Upper Tribunal
(Immigration and Asylum Chamber)

AJ (s 94B: Kiarie and Byndloss questions) Nigeria [2018] UKUT 00115 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 January 2018	
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Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE HANSON

Between

AJ
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:	Miss M Cohen, Counsel, instructed by Wilson Solicitors
For the Respondent:	Mr C Thomann, Counsel, instructed by the Government Legal Department

(1) In the light of Kiarie and Byndloss v Secretary of State for the Home Department [2017] UKSC 42, the First-tier Tribunal should adopt a step-by-step approach, in order to determine whether an appeal certified under section 94B of the Nationality, Immigration and Asylum Act 2002 can be determined without the appellant being physically present in the United Kingdom.

(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?

(3) The First-tier Tribunal should not lightly come to the conclusion that none of the issues covered by the first and second questions prevents the fair hearing of the appeal.

(4) Even if the first and second questions are answered in the negative, the need for live evidence from the appellant is likely to be present. A possible exception might be where the respondent's case is that, even taking a foreign offender appellant's case at its highest, as regards family relationships, remorse and risk of re-offending, the public interest is still such as to make deportation a proportionate interference with the Article 8 rights of all concerned.

(5) If the First-tier Tribunal concludes that the appeal cannot be lawfully determined unless the appellant is physically present in the United Kingdom, it should give a direction to that effect and adjourn the proceedings.

DECISION AND REASONS

A. INTRODUCTION AND BACKGROUND

1. This case is concerned with the effect of the judgments of the Supreme Court in R (Kiarie and Byndloss) v Secretary of State for the Home Department [2017] UKSC 42 on a decision of the First-tier Tribunal, made before the handing down of those judgments, in which the Tribunal dismissed the human rights appeal of a criminal appellant who had been deported from the United Kingdom, prior to the hearing of his appeal, pursuant to certification by the respondent section 94B of the Nationality, Immigration and Asylum Act 2002.

2. The appellant is a citizen of Nigeria, born in December 1987. His mother brought him to this country in 1989, when he was aged 2. The appellant and his mother arrived in possession of leave to enter as visitors. The appellant's mother overstayed and so did the appellant (having, at the time, no choice in the matter). The appellant's status was eventually regularised in 2009, when he was granted indefinite leave to remain.

3. On 25 November 2014, the appellant was convicted at Croydon Crown Court of child abduction and sentenced to eighteen months' imprisonment. A Sexual Offences Prevention Order was made for a five-year term. The Sentencing Judge said:-

> "The victim in this case … was a 14 year old child. It is perfectly apparent from the exchange of messages that she was infatuated with you. She spent at least one night at your flat and was then found by police hiding on the stairs outside your flat at 3 o' clock in the morning the following day.
>
> In my judgment you made little or no effort to assist the police in recovering the child and returning her to her parents. There is no doubt in my mind that you are the one who is responsible for her SIM card being down the toilet in your flat. The only

inference that I can draw from that is that you were afraid that data on it would incriminate you and I do not doubt that that is the case.

… This is a serious offence. The maximum sentence is one of seven years' imprisonment. There is, it is fair to say, no evidence of sexual contact between yourself and [the child] but there is no doubt in my mind that your motive was to groom this child for sexual activity in due course.

You have been convicted on the clearest possible evidence by the jury in my judgment and shown no remorse for your actions."

4. On 6 January 2015, the appellant was notified that section 32 of the UK Borders Act 2007 required that a deportation order should be made against him, unless he could demonstrate that he fell within one of the exceptions set out in section 33 of that Act. A notice under section 120 of the Nationality, Immigration and Asylum Act 2002 was also served on the appellant at the same time.

5. The appellant made submissions against deportation but they failed to persuade the respondent that the appellant fell within one of the section 33 exceptions. Accordingly, on 3 March 2015, the respondent served a notice of deportation on the appellant. At the same time, she certified the appellant's human rights claim under section 94B of the 2002 Act.

6. On 3 March 2015, the Upper Tribunal refused the appellant's application for permission to bring judicial review proceedings to challenge the certification decision. An application for permission to appeal to the Court of Appeal was refused by the Upper Tribunal on 22 May 2015. The appellant's renewed application to the Court of Appeal was subsequently dismissed.

7. The appellant made further submissions to the respondent on 3 July 2015, which were rejected on 20 July 2015 as not amounting to a fresh asylum or human rights claim.

8. On 28 July 2015, the appellant was deported to Nigeria.

B. THE HEARING BEFORE THE FIRST-TIER TRIBUNAL AND THE JUDGE'S DECISION

9. On 14 August 2015, the appellant appealed, from outside the United Kingdom, against the refusal of his human rights claim. The appellant's appeal was heard at Taylor House on 19 May 2017 by First-tier Tribunal Judge Mitchell. Ms Mallick of Counsel appeared on behalf of the appellant. She was instructed by Cleveland Law Limited.

10. The judge heard oral evidence from the appellant's mother and father, and from Lotte Lewis-Smith, a representative of an organisation called "Roots to Return". This is a charity, set up to support those "who are pursuing out-of-country appeals once removed from the UK". The letter stated that the writer had "been in touch with [the appellant] and his mother … since he was removed in 2015 … We have mostly been

in contact with [mother] who has been assisting her son to gather evidence, employ a lawyer and get the appeal lodged".

11. The judge's decision recorded that the appellant was the father of a girl born in the United Kingdom in June 2009. It noted that the mother of the child did not attend the Tribunal to give evidence or provide a statement in connection with the proceedings. The judge observed that the witnesses claimed the appellant had "a very close relationship with his daughter". It was also stated that:

> "The appellant had been effectively destitute and homeless since his deportation to Nigeria in 2015. He does not have the appropriate documentation or experience of Nigeria and is unlikely to obtain a job and may suffer degrading treatment as a consequence" (paragraphs 24 to 26)

The judge further noted that the appellant was said to have "experienced theft of money and his mobile phone on more than one occasion". The appellant's circumstances in Nigeria were said to be "very compelling".

12. The judge's findings of fact began at paragraph 21 of the decision. At paragraph 32, the judge found that there was "no statement from the appellant or any evidence that he has shown any contrition or remorse for the crime". So as concerned the relationship between the appellant and the daughter, the judge found at paragraph 34 that there had been "no evidence of any ongoing contact" between the two since the appellant was deported in July 2015. Although noting the difficulties of communicating between Nigeria and the United Kingdom, the judge observed that the appellant "has a mobile telephone and is able to communicate with his mother". The judge cited evidence from the mother that she recorded messages from her son in Nigeria, which were played to his daughter, who appeared to respond well to them.

13. At paragraph 35, the judge found that there did not appear to have been ongoing contact between the appellant and his daughter whilst the appellant had been in the United Kingdom. There was no evidence that the daughter was a British citizen: "In fact, I have almost no evidence that the child exists apart from the testimony of the witnesses". The judge considered this was particularly significant, given that the appellant had been given a section 120 notice "and to date there is still no evidence that this child exists or is living in the United Kingdom and is a British citizen as claimed apart from the oral testimony of the witnesses". The judge, nevertheless, accepted for the purposes of the appeal that the child was British and had lived in the United Kingdom for a continuous period of seven years.

14. At paragraph 36, the judge recorded that the daughter was living with her mother and that the appellant had never had sole responsibility for the child. There were "no suggestions that the child is suffering in any way through the absence of the appellant from the United Kingdom".

15. At paragraph 47, the judge held that there was "no evidence that the child in the United Kingdom has suffered any adverse consequences as a result of the appellant being deported". The judge also found that:-

> "The failure of the child's mother to provide a statement or attend the hearing to give oral evidence does not assist the appellant at all to show that he has a genuine and subsisting relationship with the child. The failure of the appellant to provide a statement to the Tribunal about his relationship with the child also does not assist him."

16. At paragraph 54, the judge decided that, in the circumstances, it would be wrong to consider the appellant's immigration status in the United Kingdom had been "precarious".

17. At paragraph 55, the judge began an analysis of the appellant's position in Nigeria. The appellant appeared to have been assisted by the "Centre for Youths Integrated Development (CYID) whose letter dated 10 May 2017 appears at page 69 of the appellant's bundle". This letter indicated that the CYID had come into contact with the appellant over eighteen months after his arrival in Nigeria. The letter catalogued "some of the problems he had experienced". The judge then said:-

> "There naturally is no other supporting evidence as regards this. It is claimed that the appellant is homeless and does not have the funding or resources to provide accommodation to him."

The judge observed that the appellant's mother said the appellant did not have appropriate documentation, an assertion which the judge found "somewhat hard to understand".

18. The judge considered that the appellant had been "able to survive without the assistance of CYID for a significant period of time" and that the CYID could "clearly point the appellant towards the correct authorities to obtain ID documents if necessary".

19. At paragraph 58, the judge noted the contention that the appellant's mother would be unable to cope without the appellant being in the United Kingdom. According to the judge, there were, however, "no letters or supporting documents from social workers or other people to show that the appellant's mother is 100% reliant on the appellant or that her medical conditions require her to have any form of assistance".

20. At paragraph 67, we find the judge was "unaware as to whether the appellant had undertaken some courses whilst in prison".

21. At paragraph 69, the judge noted that there had not been produced an OASys or probation report for the appellant and that:

> "he has not provided any statement of evidence. I do not accept that it would have been impossible for him to do so. He could have dictated a statement to his mother as she has recorded conversations with him and it could have been transcribed."

The judge also did not know "the views of the appellant as regards his past offending and the deportation apart from those they have given to me through his own mother".

22. At paragraph 79, the judge concluded that the life of the appellant in Nigeria "may be undesirable to him and may be difficult and challenging but it is impossible to say that it will be worse than that on the evidence before me". The judge considered that the appellant "has not provided any information as regards the difficulties he is experiencing and is likely to experience in the future".

23. At paragraph 86, the judge held that although the appellant was "clearly experiencing some difficulty and hardship upon return … they do not make his circumstances very compelling".

24. At paragraph 87, the judge noted that "the statutory provisions and the case law [make] it quite clear that the scales are heavily weighted in favour of deportation. I have to assess if there if there are any very compelling circumstances regarding the appellant".

25. The judge concluded that there were no such circumstances and, accordingly, dismissed the appellant's appeal.

26. Following Kiarie and Byndloss, permission to appeal to the Upper Tribunal was granted by the First-tier Tribunal in July 2017.

C. THE JUDGMENTS IN *KIARIE AND BYNDLOSS*

27. As is now well-known, the Supreme Court quashed the section 94B certificates in respect of Messrs Kiarie and Byndloss. The Court did so on the basis that, in the circumstances of each case, an appeal brought from outside the United Kingdom, against the refusal of the human rights claim, would be a breach of Article 8 of the ECHR. Although the two cases involved the application of section 94B in its original form, whereby it applied only to those liable to deportation, the Supreme Court noted that, with effect from 1 December 2016, section 94B was extended, so as to enable the respondent to certify under that section any human rights claim, whether or not the person concerned is liable to deportation. In this regard, Lord Wilson said: "The extended power does not fall to be considered in these appeals but our decision today will surely impact on the extent of its lawful exercise" (paragraph 9 of the judgments). The correctness of that observation was demonstrated in Ahsan and others v Secretary of State for the Home Department [2017] EWCA Civ 2009: see paragraphs 90 to 92.

28. Under Part L of his judgment, Lord Wilson, speaking for the majority of the Court, set out "The effect of a certificate under section 94B in obstructing an appellant's ability to present his appeal" (paragraph 59):-

> "60. The first question is whether an appellant is likely to be legally represented before the tribunal at the hearing of an appeal brought from abroad. Legal aid is not generally available to an appellant who contends that his right to remain in the UK arises out of Article 8: para 30, Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012. So, in order to obtain legal aid, he must secure an "exceptional case determination" under section 10 of that Act.

Although an appeal brought from abroad is in principle as eligible for such a determination as an appeal brought from within the UK, the determination cannot be made unless either the absence of legal aid *would* breach his rights under Article 8 or it *might* breach them and provision of it is appropriate in all the circumstances: section 10(3). It suffices to say for present purposes that it is far from clear that an appellant relying on Article 8 would be granted legal aid. One can say only that, were he required to bring his appeal from abroad, he might conceivably be represented on legal aid; that alternatively he might conceivably have the funds to secure private legal representation; that alternatively he might conceivably be able to secure representation from one of the specialist bodies who are committed to providing free legal assistance to immigrants (such as Bail for Immigration Detainees: see para 70 below); but that possibly, or, as many might consider, probably, he would need to represent himself in the appeal. Even if an appellant abroad secured legal representation from one source or another, he and his lawyer would face formidable difficulties in giving and receiving instructions both prior to the hearing and in particular (as I will explain) during the hearing. The issue for this court is not whether Article 8 requires a lawyer to be made available to represent an appellant who has been removed abroad in advance of his appeal but whether, irrespective of whether a lawyer would be available to represent him, Article 8 requires that he be not removed abroad in advance of it.

61. The next question is whether, if he is to stand any worthwhile chance of winning his appeal, an appellant needs to give oral evidence to the tribunal and to respond to whatever is there said on behalf of the Home Secretary and by the tribunal itself. By definition, he has a bad criminal record. One of his contentions will surely have to be that he is a reformed character. To that contention the tribunal will bring a healthy scepticism to bear. He needs to surmount it. I have grave doubts as to whether he can ordinarily do so without giving oral evidence to the tribunal. In a witness statement he may or may not be able to express to best advantage his resolution to forsake his criminal past. In any event, however, I cannot imagine that, on its own, the statement will generally cut much ice with the tribunal. Apart from the assistance that it might gain from expert evidence on that point (see para 74 below), the tribunal will want to hear how he explains himself orally and, in particular, will want to assess whether he can survive cross-examination in relation to it. Another strand of his case is likely to be the quality of his relationship with others living in the UK, in particular with any child, partner or other family member. The Home Secretary contends that, at least in this respect, it is the evidence of the adult family members which will most assist the tribunal. But I am unpersuaded that the tribunal will usually be able properly to conduct the assessment without oral evidence from the appellant whose relationships are under scrutiny; and the evidence of the adult family members may either leave gaps which he would need to fill or betray perceived errors which he would seek to correct.

62. When the power to certify under section 94B was inserted into the 2002 Act, an analogous power was inserted into the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003) ("the 2006 Regulations"), now recently replaced. Regulation 24AA(2) enabled the Home Secretary to add to an order that an EEA national be deported from the UK a certificate that his removal pending any appeal on his part would not be unlawful under section 6 of the 1998 Act. But regulation 24AA(4) enabled him to apply "to the appropriate court or tribunal (whether by means of judicial review or otherwise) for an interim order to

suspend enforcement of the removal decision". In *Secretary of State for the Home Department v Gheorghiu* [2016] UKUT 24 (IAC), the Upper Tribunal (Blake J and UTJ Goldstein) observed at para 22 that, on an application for an order to suspend enforcement, the court or tribunal would take due account of four factors. The fourth was

> "that in cases where the central issue is whether the offender has sufficiently been rehabilitated to diminish the risk to the public from his behaviour, the experience of immigration judges has been that hearing and seeing the offender give live evidence and the enhanced ability to assess the sincerity of that evidence is an important part of the fact-finding process …"

It is also worthwhile to note that, even if an EEA national was removed from the UK in advance of his appeal, he had, save in exceptional circumstances, a right under regulation 29AA of the 2006 Regulations (reflective of Article 31(4) of Directive 2004/58/EC) to require the Home Secretary to enable him to return temporarily to the UK in order to give evidence in person to the tribunal.

63. The Home Secretary submits to this court that the fairness of the hearing of an appeal against deportation brought by a foreign criminal is highly unlikely to turn on the ability of the appellant to give oral evidence; and that therefore the determination of the issues raised in such an appeal is likely to require his live evidence only exceptionally. No doubt this submission reflects much of the thinking which led the Home Secretary to propose the insertion of section 94B into the 2002 Act. I am, however, driven to conclude that the submission is unsound and that the suggested unlikelihood runs in the opposite direction, namely that in many cases an arguable appeal against deportation is unlikely to be effective unless there is a facility for the appellant to give live evidence to the tribunal.

64. But in any event, suggests the Home Secretary, there is, in each of two respects, a facility for an appellant in an appeal brought from abroad to give live evidence.

65 The first suggested respect was the subject of a curious submission on the part of the Home Secretary to the Court of Appeal. It was that from abroad the appellant could apply for, or that the tribunal could on its own initiative issue, a summons requiring his attendance as a witness at the hearing pursuant to rule 15(1) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2014/2604) ("the 2014 Rules"). The curiosity of the submission is that such a summons is not enforceable in respect of a person outside the UK. Nevertheless the Court of Appeal held that the issue of a summons would be a legitimate way of putting pressure on the Home Secretary to allow the appellant to return to the UK to give oral evidence. Before this court the Home Secretary does not continue to contend for the suitability of a summons under rule 15(1). She nevertheless suggests that the tribunal could, by direction, stress the desirability of the appellant's attendance before it and that, were she thereupon to fail to facilitate his attendance, the appellant could seek judicial review of the certificate under section 94B and, if successful, a consequential order for his return at least pending the appeal. But whether the tribunal could, or if so would, give such a direction in the teeth of a subsisting certificate is doubtful; and in any event it seems entirely impractical for an

appellant abroad to apply first for the unenforceable direction and then for judicial review of any failure to comply with it.

66. The second suggested respect has been the subject of lengthy and lively argument. The suggestion is that the appellant can seek to persuade the tribunal to permit him to give live evidence from abroad by video link or, in particular nowadays, by Skype.

67. There is no doubt that, in the context of many appeals against immigration decisions, live evidence on screen is not as satisfactory as live evidence given in person from the witness box. The recent decision of the Upper Tribunal (McCloskey P and UTJ Rintoul) in *R (Mohibullah) v Secretary of State for the Home Department* [2016] UKUT 561 (IAC) concerned a claim for judicial review of the Home Secretary's decision to curtail a student's leave to remain in the UK on the grounds that he had obtained it by deception. The Upper Tribunal quashed the decision but, in a footnote, suggested that the facility for a statutory appeal would have been preferable to the mechanism of judicial review and that it would be preferable for any statutory appeal to be able to be brought from within the UK. It said:

> "(90) Experience has demonstrated that in such cases detailed scrutiny of the demeanour and general presentation of parties and witnesses is a highly important factor. So too is close quarters assessment of how the proceedings are being conducted - for example, unscheduled requests for the production of further documents, the response thereto, the conduct of all present in the courtroom, the taking of further instructions in the heat of battle and related matters. These examples could be multiplied. I have found the mechanism of evidence by video link to be quite unsatisfactory in other contexts, both civil and criminal. It is not clear whether the aforementioned essential judicial exercises could be conducted satisfactorily in an out of country appeal. Furthermore, there would be a loss of judicial control and supervision of events in the distant, remote location, with associated potential for misuse of the judicial process."

Although the Home Secretary stresses that the Upper Tribunal was addressing the determination of issues relating to deception, its reservations about the giving of evidence by electronic link seem equally apt to appeals under Article 8 against deportation orders. Indeed one might add that the ability of a witness on screen to navigate his way around bundles is also often problematic, as is his ability to address cross-examination delivered to him remotely, perhaps by someone whom he cannot properly see. But, although the giving of evidence on screen is not optimum, it might well be enough to render the appeal effective for the purposes of Article 8, provided only that the appellant's opportunity to give evidence in that way was realistically available to him.

68. Inquiry into the realistic availability of giving evidence on screen to the tribunal gets off to a questionable start: for in her report entitled "2016 UK Judicial Attitude Survey", Professor Thomas, UCL Judicial Institute, records that 98% of the judges of the First-tier Tribunal throughout the UK responded to her survey and that, of them, 66% rated as poor the standard of IT equipment used in the tribunal.

69. In *Secretary of State for the Home Department v Nare* [2011] UKUT 443 (IAC) the Upper Tribunal (Mr CMG Ockelton VP, UTJ Grubb and IJ Holmes), in the course of considering an allegation that a judge of the First-tier Tribunal had too readily allowed a witness to give evidence by telephone, gave guidance as to how the tribunal should approach any application for a direction that evidence be given by electronic link. At that time the rules specifically provided for such a direction to be given; now, by rules 1(4) and 14(1)(e) of the 2014 Rules, provision for it is encompassed in the definition of a "hearing", together with the power to direct "the manner in which any evidence or submissions are to be provided [including] orally at a hearing". The Upper Tribunal prefaced its guidance by observing at para 17 that departure from the usual model of oral evidence given directly in the courtroom was likely to reduce the quality of evidence and the ability both of the parties to test it and of the judge to assess it. Its guidance, given in para 21, included:

(a) that the application should be made and determined well before the substantive hearing;

(b) that the application should not only explain the reason for evidence to be given on screen and indicate the arrangements provisionally made at the distant site but also include an undertaking to be responsible for any expenses incurred;

(c) that, were the evidence to be given from abroad, the applicant should be able to inform the tribunal that the foreign state raised no objection to the giving of evidence to a UK tribunal from within its jurisdiction;

(d) that the applicant should satisfy the tribunal that events at the distant site were, so far as practicable, within its observation and control, that the evidence would be given there in formal surroundings and be subject to control by appropriate officials and that nothing could happen off camera which might cast doubt on the integrity of the evidence; and

(e) that a British Embassy or High Commission might be able to provide suitable facilities.

70. Bail for Immigration Detainees ("BID"), a charity which provides a small minority of those facing deportation with free legal advice and even representation and which intervenes in the appeals before the court, provides a helpful example of how the tribunal seeks to implement the guidance given in the *Nare* case. In 2016 BID represented a Nigerian citizen in his appeal against a deportation order by reference to his rights under Article 8. His claim had been certified under section 94B so he had been removed to Nigeria in advance of the appeal. On his application, through BID, to give evidence on the appeal from Nigeria by Skype, the tribunal sought to implement the guidance summarised at para 69(d) above by the following direction:

> "The tribunal must be advised in advance of the hearing of the arrangements made to enable the appellant to give evidence in a secure location, attended by a local agent or representative instructed by the appellant's solicitors and whose identity has at the time of such advice been provided to the tribunal."

71. In the same order the tribunal also sought to implement the guidance summarised at para 69(b) above by the following direction:

> "All necessary equipment and Skype link must be provided and paid for by the appellant but must include:
>
> (i) Projection equipment
>
> (ii) Audio equipment
>
> (iii) Wi-fi link
>
> to enable all present to see and hear the appellant give evidence."

As is apparent from this direction, the tribunal requires an applicant to pay for provision of the necessary equipment not only at the distant end but also at the hearing centre itself. When, in a letter written in response to the direction, BID requested the tribunal to buy, install and maintain its own equipment for the purpose of hearing evidence from abroad, one of its judges replied:

> "Unfortunately, the Tribunal has no funds to provide equipment or technical ability, hence the onus in that regard we have to place upon appellants and their representatives."

In the event the appellant represented by BID was furnished by a friend with the equipment necessary for his use in Nigeria in giving evidence by Skype; and, since the friend was a lawyer, he was able and willing also to exercise free of charge the degree of control required by the tribunal. But the appellant could not afford to purchase the equipment for use at the hearing centre; and so it was BID which bought a laptop computer (£240), a projector (£252) and a 3G mobile telephone contract (£33.97 per month), for use there at the hearing of his appeal.

72. The researches of the solicitors for Mr Kiarie indicate that it would cost the equivalent of £240 per hour to rent a video conference room for his use in Nairobi and that therefore a rental for say seven hours, so as to enable counsel to conduct a pre-hearing conference with him as well as to cover the probable length of the hearing, would cost £1,680. The researches of the solicitors for Mr Byndloss indicate that the hourly cost of renting a video conference room for his use in Kingston would be marginally less but they estimate that it would be necessary to rent it for 11 hours in order to cover the probably lengthier hearing of his appeal.

73. It is already clear however that the cost of hiring the necessary equipment for use at the distant end of any evidence given by video link or Skype is only part of the cost which an appellant must bear. He must also bear the cost of providing the equipment for use at the hearing centre and he may well have to pay for the attendance beside him of someone able and willing to exercise the degree of control required by the tribunal. Apart, however, from having to meet the overall costs of giving evidence in that way, an appellant has to confront formidable technical and logistical difficulties. Powerful evidence is given by the appellants' solicitors and other legal specialists in the field to the effect that:

(a) it can be a slow and tortuous process to obtain the consent of the foreign state for evidence to be given from within its jurisdiction;

(b) it can be difficult to achieve compatibility between the system adopted at the distant end and the system installed at the hearing centre, with the result that a bridging service sometimes needs to be engaged and funded;

(c) it can be difficult to alight upon a time for the link to begin and end which is both acceptable to the tribunal and practicable at the distant end in the light of the time difference; and

(d) if, as is not uncommon, the link fails during the hearing and cannot then and there be restored, the tribunal can prove reluctant to grant an adjournment to another date.

74. Apart from the difficulty surrounding his giving live evidence to the tribunal, an appellant deported in advance of the appeal will probably face insurmountable difficulties in obtaining the supporting professional evidence which, so this court is told, can prove crucial in achieving its success. In support of his claim to present no significant risk of re-offending, an appellant is likely to wish to submit evidence from his 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. An appellant may also wish to submit evidence from a consultant forensic psychiatrist about that level of risk. But the evidence in these proceedings of Dr Basu MRC Psych, Clinical Director at Broadmoor Hospital, is that he has never sought to assess the risk posed by a person visible to him only on screen and that any such assessment would have to be treated with considerable caution. In support of an appellant's likely claim to have a close and active relationship with a child, partner or other family member in the UK, an appellant will not uncommonly adduce, as in these preliminary proceedings Mr Byndloss has already sought to do, a report by an independent social worker who, so he hopes, will speak of the quality, and in particular for the family the importance, of the relationship. But a report compiled in the absence of the social worker's direct observation of the appellant and the family together is likely to be of negligible value.

75. It was more than 30 years ago that, in the appellate committee which preceded the creation of this court, concern was first expressed about the value of an appeal which was required to be brought from abroad. In *R (Khawaja) v Secretary of State for the Home Department* [1984] AC 74 Lord Fraser of Tullybelton observed at pp 97-98:

> "… in spite of [a] decision … that the illegal immigrant be removed from this country, it will still be open to him to appeal under section 16 of [the 1971 Act] to an adjudicator against the decision to remove him. The fact that he is not entitled to appeal so long as he is in this country - section 16(2) - puts him at a serious disadvantage, but I do not think it is proper to regard the right of appeal as worthless. At least the possibility remains that there may be cases, rare perhaps, where an appeal to the adjudicator might still succeed."

76. Today, however, this court is invested with responsibility for deciding whether two foreign criminals who, by reference to Article 8, each have arguable appeals against the deportation orders made against them and who have rights thereunder for their appeals to be effective, would suffer a breach of those rights if they were to be deported in advance of the hearing of the appeals. I conclude

that, for their appeals to be effective, they would need at least to be afforded the opportunity to give live evidence. They would almost certainly not be able to do so in person. The question is: as a second best, would they be able to do so on screen? The evidence of the Home Secretary is that in such appeals applications to give evidence from abroad are very rare. Why? Is it because an appellant has no interest in giving oral evidence in support of his appeal? I think not. It is because the financial and logistical barriers to his giving evidence on screen are almost insurmountable. In this case the Court of Appeal has indorsed a practice in which, so it seems, the Home Secretary has, not always but routinely, exercised her power under section 94B to certify claims of foreign criminals under Article 8. But she has done so in the absence of a Convention-compliant system for the conduct of an appeal from abroad and, in particular, in the absence of any provision by the Ministry of Justice of such facilities at the hearing centre, and of some means by which an appellant could have access to such facilities abroad, as would together enable him to give live evidence to the tribunal and otherwise to participate in the hearing.

77. Between 28 July 2014 and 31 December 2016 the Home Secretary issued 1,175 certificates pursuant to section 94B in relation to foreign criminals, all, therefore, with arguable appeals. Of those 1,175 persons, the vast majority were no doubt duly deported in advance of their appeals. But by 31 December 2016 only 72 of them had filed notice of appeal with the tribunal from abroad. It may well be that on 13 February 2017 a few of those appeals remained undetermined. The fact remains, however, that, as of that date, not one of the 72 appeals had succeeded.

78. It remains only to re-cast the reasoning expressed in this judgment within its proper context of a claim that deportation pursuant to the two certificates under section 94B would breach the procedural requirements of Article 8. The appellants undoubtedly establish that the certificates represent a potential interference with their rights under Article 8. Deportation pursuant to them would interfere with their rights to respect for their private or family lives established in the UK and, in particular, with the aspect of their rights which requires that their challenge to a threatened breach of them should be effective. The burden then falls on the Home Secretary to establish that the interference is justified and, in particular, that it is proportionate: specifically, that deportation in advance of an appeal has a sufficiently important objective; that it is rationally connected to that objective; that nothing less intrusive than deportation at that stage could accomplish it; and that such deportation strikes a fair balance between the rights of the appellants and the interests of the community: see *R (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45, [2012] 1 AC 621, para 45. The alleged objectives behind the power to certify a claim under section 94B have been set out in section F above. I will not prolong this judgment by addressing whether the power is rationally connected to them and as to whether nothing less intrusive could accomplish them. I therefore turn straight to address the fair balance required by Article 8 and I conclude for the reasons given above that, while the appellants have in fact established that the requisite balance is unfair, the proper analysis is that the Home Secretary has failed to establish that it is fair."

D. THE 'KIARIE' QUESTIONS

29. These paragraphs of Lord Wilson's judgment make it plain that, in deciding whether an out-of-country appeal against the refusal of a human rights claim is compatible with the procedural requirements of Article 8, a number of fact-sensitive questions need to be addressed.

First question

30. 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

31. 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

32. 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.

33. 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.

34. 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

35. 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.

E. THE 'NIXON' CASES

36. Our view as to the appropriateness of this step-by-step approach is reinforced by R (Nixon and Another) v Secretary of State for the Home Department [2018] EWCA Civ 3, in which Hickinbottom LJ gave a comprehensive and detailed reserved judgment refusing permission to appeal against a dismissal of judicial review applications challenging section 94B certificates where the applicants had been deported, following those refusals.

37. At paragraph 19, Hickinbottom LJ noted that:-

> "The First-tier Tribunal has set down a series of (currently) seven out-of-country appeals for hearing in the next three months, listed separately, but each case having to deal with the current position with regard to (e.g.) the availability of video facilities and the provision of facilities free of charge to enable an appellant to provide instructions to his representative and participate in their appeals (including giving evidence by video-link) if they wish to do so, in various countries including Jamaica. Although not formally test cases, it is hoped that these will test the effectiveness of appeals conducted from abroad, and heard in those circumstances."

38. At paragraph 75 of the judgment, Hickinbottom LJ set out a series of propositions, derived from a number of authorities (including, importantly, Kiarie and Byndloss):-

> "(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. "

Applying those propositions to the facts of Mr Nixon, Hickinbottom LJ found as follows:-

"80. There has been a finding of the tribunal that Mr Nixon and his wife did not have any significant relationship, nor did Mr Nixon play any significant part in J-Kwon's life, in the period 2006-10. It is true that there has also been a subsequent finding that, by 2014, they had reconciled, and Mr Nixon was playing an active part in his son's life; but there is no evidence that he has seen his wife or son since he was imprisoned for the assault on the former in August 2014. Indeed, the evidence does not suggest any contact after the assault in April 2014. Neither Mrs Nixon nor J-Kwon visited Mr Nixon in prison. Mr Nixon was apparently prohibited from contacting his wife, at least during the period he was on licence. There is no evidence of any contact between them since his removal in September 2016. The amount of contact he would have had had he been in the UK since that date is a matter for conjecture – and a matter upon which I will not speculate – but, unfortunate as that situation might be, it seems to me that any incremental harm to the welfare of J-Kwon and to the family life of Mr Nixon, Mrs Nixon and their son by Mr Nixon not being returned immediately would be negligible.

81. I am unimpressed by the submission that he is required in the UK so that an independent social worker report can be prepared on the basis of observations of the relationships working in practice. No attempts have apparently been made by Mr Nixon or his advisers to obtain reports prepared by social service in respect of their intervention in the period 2013-14. Mr Bedford submits, with some force, that the crucial issue in the appeal will be whether there was a subsisting relationship between Mr Nixon and his wife, and between Mr Nixon and his son, in the period 2014-16. However, no independent report was prepared, or apparently even considered, by Mr Nixon or his legal advisers in the 18 months between the challenged certification decision in March 2015 and his deportation in September 2016. There is no evidence that Mr Nixon even met his wife or son in that period. There are records of the relationships at that time which will no doubt be put in evidence in the appeal; but it is unlikely that any expert report would be of assistance with regard to the relationships as they were then. There is no evidence as to what contact, if any, there has been between Mr Nixon on the one hand, and his wife and son on the other, since his removal to Jamaica, 15 months ago. Even if Mr Nixon were to be returned now, and even if he were allowed contact with his son, the relationship and any family life they

would enjoy are likely to be slow to form or reform, and would be almost entirely new.

82. Furthermore, whilst I appreciate the burden of proof ultimately lies on the Secretary of State, but the evidence that an out-of-country appeal will be ineffective in protecting the Article 8 rights of Mr Nixon and his family members is currently weak. There is no evidence that he is in any way constrained from instructing his legal team. As I have indicated, the crucial issue in the appeal will be whether there was, in the period 2014-16, a subsisting relationship between Mr Nixon and his wife, and between Mr Nixon and his son. Mrs Nixon and J-Kwon will be able to give live evidence at any appeal hearing, as they did before Judge Pacey. Even if Mr Nixon is in Jamaica, the Secretary of State says that video-link facilities will be made available to him, to enable him to give evidence. Video-link facilities are improving; and they are becoming common in many courts and tribunals, even where there are contested evidential issues. Although Mr Nixon's credibility may be in issue, I am unpersuaded that a tribunal will be unable to assess his sincerity and credibility in respect of that narrow issue from taking his evidence on video-link."

39. At paragraph 87, Hickinbottom LJ decided that Mr Nixon's application for permission to appeal in respect of certain of his grounds should be stayed until "after the First-tier Tribunal has determined Mr Nixon's appeal and any appeal from that determination has been dealt with". His reason for so deciding is important for present purposes. It was as follows:-

"87. The First-tier Tribunal is, in my view, the more experienced and appropriate forum for the determination of factual issues such as those that arise in this case, notably the nature of the relationship between Mr Nixon, and his wife and son. It is inherently better for that issue to be considered on the basis of the facilities that are in fact made available for this case, as opposed to the Administrative Court conducting the exercise hypothetically, on the basis of general evidence provided by the Secretary of State. As I have indicated, there is reason for some confidence that the First-tier Tribunal will be in a position to conduct an effective appeal. Without falling into the heresy identified by the Supreme Court in Kiarie & Byndloss, it is nevertheless worthy of note that the Tribunal will of course be under an obligation to ensure the appeal is effective, and will no doubt take appropriate steps to ensure that it is so.

88. If the appeal is effective to protect the relevant Article 8 rights, then there will be no substance left in this appeal. In the event that the appeal is not conducted so as to protect the relevant Article 8 rights effectively – or if Mr Nixon considers that to be the case – then he will be able to return to this court and press for permission to appeal or permission to proceed with the judicial review. By that stage, the cases to which I have referred in paragraph 19 above, that have been set up for the First-tier Tribunal to deal with out-of-country appeals using video-link facilities etc, will also have been determined. This court can then consider permission to appeal, if indeed matters requiring further consideration by this court remain."

F. DOES 'KIARIE' IMPACT ON THE JUDGE'S DECISION?

40. It is now possible to return to the facts of the present appeal and to engage with the submissions of Counsel.

41. Mr Thomann, for the respondent, submitted that the decision in Kiarie and Byndloss cannot retrospectively affect the question whether the First-tier Tribunal Judge in the present appeal did or did not err in law. He compared the situation to that in Mulvenna v Secretary of State for Communities and Local Government [2015] EWHC 3494 (Admin), [2016] JPL 487. In that case, the claimants sought to challenge, out of time, the Secretary of State's decision to recover their planning appeals. The Secretary of State accepted that the decisions in question had been unlawful, viewed in the light of the subsequent decision of the High Court in the case of Moore and Coates v Secretary of State for Communities and Local Government [2015] EWHC 44 (Admin). The High Court, however, rejected the application of the claimants to extend time for bringing judicial review of the decisions in their cases. In essence, the rationale was that time limits for challenging decisions cannot be set aside merely because, at some point thereafter, a judicial decision casts doubt on the validity of those decisions.

42. We are unable to accept Mr Thomann's submission on this issue. The present case is not comparable with that in Mulvenna. The lawfulness of the decision of the First-tier Tribunal is directly in issue in the present appeal. The appellant did not need to seek any extension of time limits in order to challenge that decision.

G. THE 'KIARIE' QUESTIONS IN MORE DETAIL

43. We therefore need to return to the questions set out at paragraphs 30 to 35 above and address them in more detail, in a way that we believe will enable judges to apply them to the particular facts of a case.

First question

44. In the case of an appellant who is not legally represented, the First-tier Tribunal will need to consider whether that state of affairs is likely to be a direct result of the appellant's deportation pursuant to section 94B: paragraph 60 of Lord Wilson's judgment. In the light of the burden on the respondent of showing that the certification system is, in a particular case, lawful, the First-tier Tribunal can expect the respondent to provide appropriate information on this subject. As far as this Tribunal is aware, legal aid is not available as a matter of course to foreign criminal appellants who are seeking to resist deportation, regardless of circumstances. Accordingly, in such cases the First-tier Tribunal will need to be wary of arguments that depend on the alleged consequences of section 94B certification on the availability of legal aid.

45. Assuming that the appellant is legally represented, the First-tier Tribunal will need to be satisfied that the appellant has been able to provide adequate instructions to his United Kingdom lawyers and to receive advice from those lawyers. Given the state

of modern communications, there is, in general, no reason why communication by telephone and email should not be regarded as adequate, particularly where the appellant's direct instructions can be supplemented by United Kingdom relatives or friends.

Second question

46. The First-tier Tribunal will need to consider whether professional evidence, such as from psychiatrists and social workers, is genuinely needed in the particular case and, if so, whether its availability or quality is likely to be materially affected by the appellant being outside the United Kingdom. In this regard, we consider that it will not be sufficient for the appellant (or those representing him) merely to assert that such evidence is needed and that it cannot satisfactorily be produced. The Tribunal will need to form a view whether, if the appellant had not been required to leave, such evidence would have been likely to have been forthcoming. If so, the Tribunal will have to consider whether physical, face-to-face contact between the appellant and the expert is required, in order for the expert to be able to produce a satisfactory report. The professional view of any proposed expert as to his or her ability to proceed without such contact (eg by video link or Skype) will be particularly significant in this regard. As for reports from OASys, etc, the First-tier Tribunal is likely to want to see evidence that the appellant's legal advisers or relatives have tried to obtain relevant reports and been refused on the basis that the appellant is outside the United Kingdom.

47. An important issue for the First-tier Tribunal will be the stance of the respondent as regards the matters to which we have just referred. If, for example, the respondent concedes that an appellant who has been deported as a result of criminal activity is genuinely remorseful and/or presents no significant risk of re-offending, any difficulties concerning the appellant's ability to present such evidence may be rendered irrelevant. See further paragraph 51 below.

48. So far as social worker reports are concerned, the First-tier Tribunal will, again, need to be satisfied that there is, on the facts of the particular case, a genuine need for such a report and that its quality is likely to be materially affected by the social worker's inability to observe face-to-face contact between the appellant and the child or other family member concerned.

Points to bear in mind

49. It is important to stress that the First-tier Tribunal should not lightly come to the conclusion that none of these issues, whether viewed individually or collectively, prevents the fair hearing of the appeal. The thrust of Lord Wilson's judgment is plain. The difficulties facing a person in bringing an appeal in these circumstances are, in many cases, likely to be such as to make the proceedings Article 8 non-compliant. In our view, however, bearing in mind the judgment of Hickinbottom LJ in Nixon (albeit acknowledging it is a permission decision), the questions need to be raised and answered.

50. If the First-tier Tribunal comes to the conclusion that, for example, adequate instructions have not been able to be given to the appellant's legal adviser, then the

availability or otherwise of video-link facilities for hearing the appellant give evidence will be immaterial, unless the First-tier Tribunal concludes that any deficiencies regarding instructions can be addressed by a private consultation between the appellant and his legal adviser, using such facilities, before the hearing begins.

Third question

51. 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.

Fourth question

52. If this point is reached, the issue will be whether the respondent can demonstrate that a satisfactory video-link facility can be established (at the respondent's expense), between a suitable place outside the United Kingdom, which is reasonably convenient to the appellant, and the First-tier Tribunal hearing centre and that, in all the circumstances, evidence given by means of such a link is a satisfactory alternative to physical face-to-face evidence, albeit that it will not be its equivalent.

H. ADDRESSING THE QUESTIONS IN THE PRESENT CASE

53. In the present case, how does Kiarie and Byndloss impact upon the lawfulness of the decision of the First-tier Tribunal Judge? Adopting the approach we have outlined, we proceed as follows.

The first question

54. So far as funding is concerned, there is no issue. The appellant has, at all material times, had legal representation. That representation did not cease upon his deportation. He was represented by solicitors and Counsel at the hearing before the First-tier Tribunal. The criticisms advanced by the appellant of his former

representatives are entirely unsubstantiated. There is no evidence that his previous representatives have been approached in order to give their side of the story. There is, on the facts, nothing to show that the appellant's deportation materially affected his ability to have solicitors and Counsel mount a case on his behalf. The appellant's mother makes reference to the appellant having telephone conversation with his former advisers, albeit that these occurred only when she visited their offices.

55. At this point, we need to deal with an application made under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 by the appellant's present solicitors, whereby they sought to adduce a witness statement from the appellant and a further witness statement from his mother. These concerned, amongst other things, alleged difficulties in instructing the appellant's advisers, given his presence in Nigeria. Mr Thomann opposed the application. He said that the evidence contained in those statements could and should have been submitted earlier.

56. We agree. Despite Miss Cohen's submissions, we see no reason why the evidence contained in the statements should not have been put forward earlier. Insofar as the failure is sought to be laid at the door of the former legal advisers, the submission falls foul of the judgment of the Court of Appeal E & R v Secretary of State for the Home Department [2004] EWCA Civ 72.

57. In all the circumstances, the First-tier Tribunal judge did not err in law in proceeding on the basis that the appellant's absence had not materially impacted on his ability to secure legal representation and instruct his lawyers.

The second question

58. Strikingly, the appellant has at no point sought to express remorse for the crime for which for he was imprisoned for eighteen months and which led to his deportation. So far as re-offending is concerned, we agree with Mr Thomann that the appellant had the opportunity during the five months that he was in the United Kingdom after being given the notice of deportation decision to obtain OASys reports and any other report that might be relevant in this regard. In the long period since his deportation, there is no evidence that any effort has been made to obtain such information. There is, even now, no indication that such information is being sought or that there is a stated need for a psychiatrist or similar expert to give evidence for the appellant.

59. The First-tier Tribunal Judge made entirely valid findings that the appellant had had limited contact with his daughter, before his deportation. The judge took no issue with the evidence put forward by the appellant' mother regarding the indirect contact, in the form of what appear to be voicemail messages, which had occurred since.

60. The judge regarded it as a significant fact that no attempt had been made to seek evidence from the mother of the appellant's daughter. That was, we find, highly pertinent and is entirely unaffected by the fact that the appellant was outside the United Kingdom. There was also no suggestion that the report of any social worker was regarded as relevant in this regard by the appellant's representatives or his witnesses.

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.

66. In doing so, the Tribunal will need to consider all the up-to-date evidence. That may include the evidence which was the subject of the rule 15(2A) application. As in the Nixon cases, the First-tier Tribunal – if it reaches the fourth question - will need to determine whether a hearing of the appellant by video-link with Lagos would be feasible and of sufficient quality.

I. DIRECTIONS OF THE FIRST-TIER TRIBUNAL

67. The issue arises as to what should happen if the First-tier Tribunal, on remittal, comes to the conclusion that nothing short of the appellant's physical presence in the United Kingdom is needed, before an Article 8 compliant hearing of his appeal in that Tribunal can take place. We note what Lord Wilson said at paragraph 65 of Kiarie and Byndloss (see above). In considering the respondent's submission that the Tribunal could "by direction, stress the desirability of the appellant's attendance before it", Lord Wilson observed that "it seems entirely impracticable for an

appellant abroad to apply first for the unenforceable direction and then for judicial review of any failure to comply with it".

68. It must, however, be remembered that the appeals in Kiarie and Byndloss concerned judicial reviews of section 94B certificates. In the present case, as matters stand, the section 94B certificate in respect of the appellant has not been successfully challenged. Accordingly, it seems to us that it will indeed be necessary for the First-tier Tribunal to proceed as suggested by the respondent at paragraph 65 of Kiarie and Byndloss if, on remittal, the Tribunal concludes that a fair hearing, compatible with Article 8, cannot take place unless the appellant is able to return to the United Kingdom.

69. Both in the present case and in any other appeal where the section 94B certificate has not been quashed, if the First-tier Tribunal, as a result of adopting the step-by-step approach, concludes that the appeal cannot lawfully be determined unless the appellant is in the United Kingdom, the Tribunal should give a direction to that effect and adjourn the proceedings, to enable the respondent to secure the appellant's return.

J. DECISION

The decision of the First-tier Tribunal contains a material error of law. We set that decision aside and remit the matter to be re-decided by the First-tier Tribunal.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Dated: 26 February 2018

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber