R (on the application of Watson) v (1) Secretary of State for the Home Department and (2) First-tier Tribunal (Extant appeal: s94B challenge: forum) [2018] UKUT 00165 (IAC)

Upper Tribunal
Immigration and Asylum Chamber

Application for Permission to bring Judicial Review Proceedings

The Queen on the application of Wellington Paul Watson

Applicant

v

Secretary of State for the Home Department

First Respondent

and

First-tier Tribunal (Immigration and Asylum Chamber)

Second Respondent

Mr Justice Lane, President
Upper Tribunal Judge O'Connor

Application for permission to bring judicial review proceedings

Having considered all documents lodged and having heard the parties' respective representatives, Ms S Naik QC and Mr B Hoshi, of counsel, instructed by Duncan Lewis Solicitors, on behalf of the applicant and Mr S Kovats QC, of counsel, instructed by the Government Legal Department, on behalf of the first respondent, and there being no attendance on behalf of the second respondent, at a hearing at Field House, London on 8 March 2018.

(1) *Where an appellant's appeal has been certified under section 94B of the Nationality, Immigration and Asylum Act 2002 and the appellant has been removed from the United Kingdom pursuant to that certificate, the*

First-tier Tribunal is the forum for determining whether, in all the circumstances, the appeal can lawfully be decided, without the appellant being physically present in the United Kingdom. The First-tier Tribunal is under a continuing duty to monitor the position, to ensure that the right to a fair hearing is not abrogated. In doing so, the First-tier Tribunal can be expected to apply the step-by-step approach identified in AJ (s 94B: Kiarie and Byndloss questions) Nigeria [2018] UKUT 00115 (IAC).

(2) If the First-tier Tribunal stays the appeal proceedings because it concludes that they cannot progress save in a manner which breaches the procedural rights safeguarded by Article 8, then it is anticipated the Secretary of State will promptly take the necessary action to rectify this position. If this does not happen, then an application for judicial review can be made to the Upper Tribunal to challenge the Secretary of State's decision and compel him to facilitate the appellant's return.

(3) If the First-tier Tribunal decides that the appeal process is Article 8 compliant, the Tribunal's substantive decision will be susceptible to challenge, on appeal to the Upper Tribunal, on the ground that the Tribunal was wrong so to conclude.

Judge O'Connor

Introduction

1. This case raises issues as to the correct approach in an application for judicial review made to the Upper Tribunal challenging the maintenance of a certificate issued by the Secretary of State for the Home Department ("SSHD") pursuant to section 94B of the Nationality, Immigration and Asylum Act 2002 ("2002 Act"), in cases where (i) that certificate was issued prior to the Supreme Court's decision in Kiarie v SSHD; R (Byndloss) v SSHD [2017] UKSC 42; [2017] 1 WLR 2380 ("Kiarie and Byndloss"), (ii) the applicant was subsequently removed from the United Kingdom and (iii) the applicant has an extant appeal before the First-tier Tribunal against a decision, made prior to removal, refusing a human rights claim made on Article 8 European Convention on Human Rights ("ECHR") grounds.

2. The applicant applies for permission to challenge the SSHD's ongoing decisions, most recently documented in letters of the 22 December 2017 and 10 January 2018, to:

(a) maintain the section 94B certification of his Article 8 human rights claim; and

(b) refuse to facilitate his return from Jamaica to the UK in order that he may engage in his pending appeal before the First-tier Tribunal.

3. The applicant also seeks permission to challenge the First-tier Tribunal's decision of 15 January 2018 refusing to stay the hearing of his appeal

pending the final resolution of the instant application for judicial review. The appeal is listed for hearing on the 25 and 26 June 2018.

4. By way of interim relief, the applicant requests an order that his appeal proceedings before the second respondent be stayed pending resolution of this application.

5. By way of substantive relief, the applicant seeks:

(i) An order quashing the section 94B certification of his human rights claim;

(ii) A declaration that the first respondent failed to lawfully consider the exercise of her discretion in making and/or maintaining the section 94B certification;

(iii) A mandatory order requiring the first respondent to reconsider her decision on the section 94B certification in accordance with the law;

(iv) A mandatory order requiring the first respondent to facilitate and fund his return from Jamaica to the UK;

(v) A declaration that the first respondent breached/or continues to breach his rights under Article 8 ECHR;

(vi) A declaration that the first respondent breached/or continues to breach the rights of his children and/or failed to take account of the children's best interests in making and/or maintaining the section 94B certification;

(vii) An order quashing the decision of the second respondent refusing to stay the applicant's appeal pending the resolution of these judicial review proceedings;

(viii) Damages under section 8 Human Rights Act 1998.

Factual Background

Events pre-removal of the applicant from the United Kingdom

6. The applicant was born on 3 August 1978 and is a national of Jamaica.

7. His eldest son, RW, was born in the United Kingdom on 1 September 1997 to SY. On 13 May 2000 the applicant was refused leave to enter the United Kingdom as a visitor but was granted temporary admission until the following day. He failed to report as required. On 16 December 2000 the applicant and SY married. They separated in 2003.

8. In 2004 the applicant began a relationship with JH. JW was born of that relationship in May 2008. In 2006 the applicant made an application to the SSHD for indefinite leave to remain as the father of RW, but such

application was refused by the SSHD in November 2009. An appeal against this decision was dismissed by the First-tier Tribunal on 27 April 2010 and, thereafter, by the Upper Tribunal on 28 September 2010.

9. On 4 July 2013 the SSHD granted the applicant limited leave to remain in the United Kingdom for 30 months, as a consequence of his relationship with JW - it being concluded that the applicant had a parental relationship with JW and that it was not reasonable to expect JW to leave the United Kingdom. However, on 13 February 2014 the applicant was convicted of supplying Class A controlled drugs and was sentenced to fourteen months' imprisonment. This caused the SSHD to serve notice on the applicant on 24 May 2014 of his liability to deportation. This notice alerted the applicant to the fact that he was required to submit any reasons why he should not be deported, with documentary evidence in support where available.

10. In response, on 19 June 2014 the applicant raised a human rights claim relying upon his relationship with his children and JH. On 23 February 2015, the SSHD made a decision to deport the applicant and also refused the applicant's human rights claim, detailed reasons being given for the latter in a twelve-page decision letter of the same date. This decision letter concluded with a consideration of whether to certify the applicant's human rights claim under section 94B of the 2002 Act, the following being said:

> "Consideration has been given to whether your Article 8 claim should be certified under Section 94B of the 2002 Act. The Secretary of State has considered whether there would be a real risk of serious irreversible harm if you were to be removed pending the outcome of any appeal you may bring. The Secretary of State does not consider that such a risk exists in light of the above. Therefore, it has been decided to certify your Article 8 claim under Section 94B and any appeal you may bring can only be heard once you have left the United Kingdom. ...
>
> Appeal
>
> **...**
>
> You may appeal to the First-tier Tribunal (Immigration and Asylum Chamber) against the decision to refuse your human rights claim under Section 82(1) of the 2002 Act. You may only exercise your right of appeal from outside the United Kingdom."

11. The applicant brought a challenge to the section 94B certification by way of judicial review proceedings issued on 24 March 2015 (JR/3490/2015). Within the confines of the judicial review proceedings he put forward further evidence supporting his Article 8 claim. This led the SSHD to issue a supplementary decision letter on 30 April 2015, in which she refused to treat the further evidence as a fresh claim pursuant to paragraph 353 of the Immigration Rules, refused to revoke the deportation order and maintained the section 94B certification. In relation to the latter decision the following was stated:

> "Your claims and evidence have been considered, but it is not accepted that

> you have demonstrated that removing you prior to the hearing of any appeal against a decision to make you the subject to a deportation order would give rise to a risk of serious irreversible harm for you, your children, or their respective mothers."

12. Permission to bring judicial review proceedings challenging the decisions of 23 February and 30 April 2015 was refused on the papers by Upper Tribunal Judge Perkins on 18 August 2015. A decision on the oral renewed application for permission was subsequently stayed to await the Court of Appeal's decision in Kiarie and Byndloss. Thereafter, the matter came before Upper Tribunal Judge Blum on 22 June 2016 and, after having heard Counsel for both parties, Judge Blum refused permission to bring judicial review proceedings on the basis although the certification decision was unlawful as a consequence of the SSHD misdirecting herself to the appropriate legal consideration, it had not been demonstrated that such unlawfulness was arguably material to the outcome. In so concluding Judge Blum found as follows:

> "(4) The human rights application was not accompanied by evidence that the partner or the applicant's children could not continue their lives in the way they did when he was in prison. There was no evidence before the respondent to suggest that the applicant's family would be destitute, or that their health issues require his presence during the period of his appeal, or that they would be unable to cope during his temporary removal (I note that the applicant's partner was the sole carer for their daughter during his lengthy imprisonment). There was no evidence that the family would face any significant difficulties or hardship. Although the daughter has congenital abnormalities of her hands and feet, and a medical letter of August 2010 stated that extensive surgery was anticipated, there has as yet been no surgery, nor is there any more up-to-date medical report."

13. In August 2016 the applicant made further submissions to the SSHD asserting, *inter alia*, that his relationship with JH had broken down and that Social Services had initiated a child protection case in relation to both JW and the applicant's unborn child.

14. In a decision of 30 August 2016, the SSHD refused to revoke the applicant's deportation order but accepted that the further submissions amounted to a fresh human rights claim pursuant to paragraph 353 of the Immigration Rules. The SSHD also gave consideration to section 94B of the 2002 Act and, for reasons that run to 32 paragraphs, concluded that the claim should be certified thereunder. Notice was given to the applicant of the SSHD's intention to remove him to Jamaica on 7 September 2016.

15. The applicant lodged an application for judicial review challenging the decision to remove him (JR/9647/2016). By way of an order dated 5 September 2016 Upper Tribunal Judge McGeachy refused to grant the applicant interim relief in the form of a stay of his removal, identifying that he would have a right of appeal from abroad and concluding that such appeal *"is an effective remedy"*. The papers currently before the Tribunal do not identify the final resolution of these proceedings, if there has been

one. The applicant made further submissions on the 6 September, which were rejected in a decision notice of the same date. He was removed from the UK to Jamaica on 7 September 2016.

Events post-removal

16. On 4 October 2016, the applicant submitted an appeal to the First-tier Tribunal with the assistance of a pro-bono organisation.

17. Six weeks later the applicant's second son RW was born to JH, in the United Kingdom. The applicant has never physically seen RW. The next relevant event in time occurred on the 25 May 2017, the date on which the First-tier Tribunal provided notice that the applicant's appeal was to be heard before it on 17 August 2017.

18. The Supreme Court's decision in Kiarie and Byndloss was handed down on 14 June 2017. The applicant instructed his present solicitors on 25 July 2017 and on 4 August they sent a pre-action protocol letter to the SSHD challenging the lawfulness of his removal, ostensibly in reliance on the reasoning in Kiarie and Byndloss. On the same date an application was made to the First-tier Tribunal for an adjournment of the hearing listed for 17 August.

19. On 16 August 2017 the SSHD responded to the pre-action protocol letter, maintaining the certification of the applicant's human rights claim and refusing the request to facilitate his return to the United Kingdom. On the same date, the First-tier Tribunal adjourned the applicant's appeal and listed it for a Case Management Review hearing on 25 October 2017, a hearing that the First-tier Tribunal later adjourned of its own motion having identified the applicant's case as one which was to be a video-link 'test case'. The First-tier Tribunal did not inform the applicant's solicitors until 22 November 2017 that the applicant's appeal had been selected as a 'test case'. The appeal was listed for a Case Management Review hearing on 13 December 2017, with the 15 January 2018 being identified as the date of the substantive hearing. That date was subsequently converted into a Case Management Review hearing.

20. On 4 December 2017 the applicant applied for exceptional case funding from the Legal Aid Agency for his appeal. Such application was granted on 15 January 2018. Prior authority for the applicant's solicitors to instruct a forensic psychiatric expert, an independent social worker and an independent probation officer was granted by the Legal Aid Agency on 22 February 2018.

21. In the meantime, on 12 December 2017 the applicant made further submissions to the SSHD by way of a pre-action protocol letter, requesting the withdrawal of the section 94B certification and the facilitation of his return to the United Kingdom. The following core assertions are made within this letter:

(i) The applicant has had significant difficulty in communicating with his solicitors in the United Kingdom. He lacks computer literacy and access to a computer. This has required the solicitors to have to contact one of the applicant's relatives to get in touch with the applicant, which has typically led to there being a period of between two and three days between seeking and receiving instructions. It has typically taken between two and three weeks for the applicant's solicitors to receive documentation or a signature on documentation requested of the applicant. Telephone calls are also problematic because there is a five-hour time difference between the UK and Jamaica. In any event, it is difficult to take legal advice over the telephone or by email on such complex legal issues. The applicant has very basic education and is often unable to understand advice given to him. There is also a considerable cost involved in speaking with the applicant by telephone which is not reimbursed by the Legal Aid Agency. It is unreasonable to expect the applicant's solicitors to bear such costs.

(ii) The applicant is unable to obtain the necessary expert/professional evidence required to pursue his appeal whilst he is out of the country. In particular, he wishes to instruct a forensic psychiatrist, an independent social worker, and obtain a probation officer's risk assessment and a Social Services child protection assessment. The relevant experts/professionals require face-to-face contact with the applicant in order to assess him.

(iii) There are significant logistical and practical issues with the applicant giving evidence by video-link. Providing evidence by video-link will hamper the quality of the evidence, a matter that the applicant is anxious about. His demeanour and general presentation will be highly important factors for the Tribunal to consider, which cannot be properly scrutinised through the use of video-link evidence. In addition, there are concerns about the proposed video-link equipment and facilities to be used by the First-tier Tribunal, since their quality is not known.

(iv) The fact that the applicant's human rights claim was not certified as clearly unfounded means that he has an arguable case.

(v) The earlier decision of the Upper Tribunal refusing the applicant permission to challenge the section 94B certificate is irrelevant, given that it is predicated on the judgment of the Court of Appeal in Kiarie and Byndloss which was subsequently overturned by the Supreme Court.

(vi) There is a strong public interest in returning those who are unlawfully removed from the UK in breach of their protected fundamental rights, as this applicant was.

22. The application was supported by two witness statements dated 12 December 2017, the first drawn in the applicant's name and the second authored by Sulaiha Ali, a solicitor employed by Duncan Lewis with conduct of the applicant's case.

23. The SSHD responded by way of a letter dated 22 December 2017, concluding that it was not appropriate to return the applicant to the UK to pursue his appeal and that the section 94B certificate would be maintained. This prompted a further pre-action protocol letter drawn on the applicant's behalf, sent to the SSHD on 27 December 2017. The SSHD responded to this by way of a further detailed letter of 10 January 2018, once again finding *"that there are no grounds on which to conclude that your client's section 94B certificate should be withdrawn or that he should be returned to the UK in order to conduct an in-country appeal"*.

24. Both the letter of 22 December 2017 and that of the 10 January 2018 give consideration to the specific submissions put forward in the respective pre-action protocol letters. The later of these letters addresses, *inter alia*, the relevance of the lawfulness of the decision to remove the applicant, the earlier judicial review proceedings, the effect of the Supreme Court's decision in Kiarie and Byndloss, the asserted practical and logistical problems for the applicant in providing effective instructions to his solicitors and the efficaciousness of video link evidence.

25. Moving on, as previously indicated the First-tier Tribunal held a Case Management Review hearing on 15 January 2018, presided over by the President of the First-tier Tribunal and Resident Judge Campbell. A statement from Ms Ali, dated 26 January 2018, sets out the following material events from the day of the hearing:

(i) The applicant had been informed to attend the British Embassy in Kingston at 9 a.m. (Jamaican time);

(ii) Ms Ali attended before the First-tier Tribunal, along with both leading and junior Counsel. The applicant and his legal representatives were afforded the opportunity to undertake a 30-minute conference using the video-link, prior to the start of the Case Management hearing. During this time there were significant delays in the sound, which led to lengthy pauses between questions being asked of the applicant and his response. The applicant had difficulty in hearing what was being said by his representatives, and questions had to be repeated.

(iii) As to the events at the hearing itself, it is said the same problems with the quality of the video link arose. The judges were required to repeat themselves both at the outset and at the close of the hearing when addressing the applicant directly. Ms Ali describes the picture quality as *"moderate"* which, it is asserted, meant that it was very difficult to see the applicant's eyes and facial expressions and to assess his overall demeanour. The bottom half of the applicant's face was not visible when he was speaking.

(iv) During the hearing there was a period during which the video-link froze, which initially went undetected. It was eventually noticed by Judge Campbell, when he addressed the applicant but did not get a response.

(v) The applicant has since instructed Ms Ali that he experienced a loss of sound on four separate occasions during the hearing.

26. It is asserted in the grounds in support of the application for judicial review, although not mentioned in Ms Ali's witness statement or evidentially supported by any other documentation before us, that an application was made at the Case Management hearing for a stay of the appeal proceedings pending an outcome of the applicant's application for judicial review, *"on the basis it was unfair and not in accordance with the overriding objective"* of the First-tier Tribunal Procedure Rules to proceed with an appeal in circumstances where the fairness and effectiveness of such appeal were the subject of challenge. This, we are told, was opposed by the SSHD. The First-tier Tribunal refused such application and thereafter made directions for the furtherance of the appeal. The First-tier's decision has not been reduced to writing as far as we are aware.

27. The instant application for judicial review was lodged on 29 January 2018, on which date the President of the Upper Tribunal (Immigration and Asylum Chamber) directed that the application for interim relief and the application for permission to bring judicial review proceedings be considered by the Upper Tribunal at a hearing.

Legal Framework

Legislation

28. Section 32(4) of the UK Borders Act 2007 provides that deportation of a foreign criminal i.e. a person who is not a British citizen, who has been convicted of an offence in the UK and who has been sentenced to a period of imprisonment of at least 12 months for any offence, is conducive to the public good for the purposes of section 3(5)(a) of the Immigration Act 1971. The SSHD must make a deportation order in relation to such a person (s.32 (4)), subject to the exceptions identified in section 33. One such exception is where removal would breach that person's rights under the ECHR (s.33 (2) (a)).

29. A person has a right of appeal to the First-tier Tribunal (Immigration and Asylum Chamber) against a decision of the SSHD to refuse a human rights claim (s.82(1)(b) of the 2002 Act). In the ordinary course of events, that appeal must be brought from within the United Kingdom and the appellant will remain within the United Kingdom for the duration of the appeal process (s.92(3) of the 2002 Act).

30. This is not true, however, when the SSHD has certified a claim under specified provisions. One such provision is section 94B of the 2002 Act, pursuant to which the SSHD may certify a human rights claim if she considers that removing the particular individual from the United Kingdom pending the outcome of any appeal would not be unlawful under section 6

of the Human Rights Act 1998.

Kiarie and Byndloss v SSHD

31. In the Kiarie and Byndloss litigation the senior courts gave detailed consideration to the approach to be taken to an assessment of the lawfulness of a section 94B certificate.

32. Both Mr Kiarie and Mr Byndloss were foreign offenders against whom the SSHD had made deportation orders, rejected human rights claims and certified those human rights claims pursuant to section 94B of the 2002 Act. The Court of Appeal concluded that, in common with her general practice at the relevant time, the SSHD had misdirected herself when considering whether to certify the human rights claims, focus being incorrectly placed on the question of whether the applicants would, before the exhaustion of the appeals process, face a real risk of serious irreversible harm if removed. It is now settled that the SSHD ought to have asked herself whether the applicant's removal would be unlawful under section 6 of the Human Rights Act. Despite accepting that the SSHD had misdirected herself in law, the Court of Appeal dismissed the substantive appeals having found, in both cases, that the error was immaterial on the basis that had the SSHD considered the correct question she would inevitably have concluded that the applicants' removal pending the outcome of their appeals would not breach either the substantive or the procedural aspects of rights afforded by Article 8.

33. In the Supreme Court emphasis was placed on the procedural rights protected by Article 8 and, in particular, the question of whether there is an Article 8 compliant system in place for out-of-country appeals. The Court found that the considerable practical difficulties that faced an out-of-country appellant meant that the burden fell on the SSHD to establish that such an appeal would be effective and fair and, therefore, met the procedural requirements of Article 8. It held that the SSHD had not established this in either of the cases before the Court.

34. Lord Wilson, with whom Baroness Hale, Lord Hodge and Lord Toulson agreed, gave the leading judgment. In paragraph 35 thereof, Lord Wilson identified the public interest in removing a foreign criminal in advance of an appeal as being the risk that, if permitted to remain pending his appeal, the foreign criminal might take that opportunity to reoffend. It was further stated, however, that such public interest "*may be outweighed by a wider public interest which runs the other way*" e.g. "*the public interest that, when we are afforded a right of appeal, our appeal should be effective*".

Challenge to SSHD's decisions

Summary of Grounds

35. The applicant raises four grounds of challenge to the SSHD's decisions. By grounds 1 and 2 it is asserted that the applicant's appeal before the First-tier Tribunal will not be effective, and breaches the procedural rights

afforded to the applicant by Article 8 ECHR (ground 1) and the common law doctrine of procedural fairness (ground 2).

36. By ground 3 the applicant submits that the SSHD failed to lawfully exercise her discretion to withdraw the section 94B certificate, for the reasons set out in grounds 1 and 2 and, in addition, as a consequence of the failure of the SSHD to take account of the best interests of the applicant's children.

37. Ground 4 asserts that the applicant's removal, and ongoing exclusion from the United Kingdom, disproportionately breach his substantive article 8 rights.

Decision - Grounds 1 & 2 (Procedural Article 8 rights/ fairness)

38. We take grounds 1 and 2 together, as did Ms Naik during her submissions.

39. An appeal to the First-tier Tribunal against a decision to refuse a human rights claim, which has been legislated for by Parliament, must be *"effective"*. Neither Article 8 nor the common law doctrine of procedural fairness requires access to the best possible procedure on the appeal, but access to a procedure that meets the essential requirements of effectiveness and fairness. What is effective and fair must always be viewed in context, and will depend upon the facts and circumstances of a particular case.

40. In paragraphs 60 to 74 of his judgment in Kiarie and Byndloss, Lord Wilson identifies a number of fact sensitive features of an applicant's claim that require addressing when consideration is being given to the issue of whether an out-of-country appeal against the refusal of a human rights claim is compatible with the procedural requirements of Article 8. We gratefully adopt the following synthesis of that consideration, set out by the Upper Tribunal (President and Upper Tribunal Judge Hanson) in its recent decision of AJ (s94B: Kiarie and Byndloss questions) Nigeria [2018] UKUT 00115 (IAC)

> "***First question***
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> 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.
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> ***Second question***
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> The second question, addressed at paragraph 74 of the judgment, is whether the appellant's absence from the United Kingdom, as a result of deportation or other removal pursuant to the section 94B certificate, is likely to present "difficulties in obtaining the supporting professional evidence which … can prove crucial in achieving its success". One example given was the likelihood of submitting evidence from a criminal appellant's probation officer; "but, upon his deportation, his probation officer will have closed his file and will apparently regard himself as no longer obliged to

write a report about him”. Another potential problem would be where the appellant wished “to submit evidence from a consultant forensic psychiatrist about [the level of risk]” posed by the appellant. In cases concerning relationships with a child, partner or other family member in the United Kingdom, an appellant “will not uncommonly adduce … a report by an independent social worker … but a report compiled in the absence of a social worker’s direct observation of the appellant and the family together is likely to be of negligible value”.

Third question

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

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

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

Fourth question

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

41. The decision of the Court of Appeal in R (Nixon and Another) v SSHD [2018] EWCA Civ 3, also provides important guidance relevant to any consideration as to the effectiveness of an appeals process. The appellants therein, Mr Nixon and Mr Tracey, are foreign criminals each of whom was

deported from the United Kingdom after having had a human rights claim rejected and certified pursuant to section 94B of the 2002 Act. Prior to their removal each brought a challenge by way of judicial review, *inter alia*, to the SSHD's decisions certifying their human rights claims pursuant to section 94B. Permission was refused in both cases, as was an application made by Mr Nixon for a stay of his removal.

42. In his consideration of the subsequent applications for interim relief and permission to appeal to the Court of Appeal, Hickinbottom LJ said as follows, at [75]:

> "… the following propositions can be derived from the authorities.
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> 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.
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> 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.
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> 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.
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> 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.
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> 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.
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> 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.
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> 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.”

43. Ms Naik submits that it is clear, and certainly arguable, that the applicant’s appeal before the First-tier Tribunal will not be effective or fair. In support of this contention she places substantial reliance on the evidence contained within the witness statements drawn by the applicant and Ms Ali, referred to above.

44. Having considered the entirety of the assembled evidence for ourselves, we find that it cannot be said that such evidence, even arguably, leads to a conclusion that the appeal process would, in the specific circumstances of this case, be such so as to breach the rights afforded by the procedural aspects of Article 8 ECHR or the common law duty of procedural fairness.

45. The applicant has instructed legal representatives in the United Kingdom and has the benefit of public funding, both in the instant proceedings and, more importantly, in the proceedings before the First-tier Tribunal. The witness statement from Ms Ali identifies that there is a need to pre-arrange a convenient time for the taking of instructions from the applicant by telephone, as a consequence of the time difference between Jamaica and the United Kingdom. The solicitors must also remove restrictions on their telephony system in order to make such calls. It is asserted that it is unreasonable for the solicitor’s firm to bear the significant cost of these

calls to the applicant. There is also difficulty in contacting the applicant by email, although procedures have been put in place with one of the applicant's relatives that allow for a response within 2-3 days. Whilst this evidence shows a degree of inconvenience it does not in our view show any impediment or obstruction to the applicant receiving effective legal advice and assistance.

46. Ms Naik further submitted that significant weight should be attributed to the fact that the applicant and JH have now separated, asserting that in such circumstances the SSHD could not rely upon the counter argument that the applicant's interests will, to some extent, be looked after by his family members in the United Kingdom - for example, by the provision of information necessary to the assembly of the professional evidence to be produced to the Tribunal. The difficulty with this submission is the absence of evidence before us supporting the claimed lack of willingness by JH to assist in the assembling, or production, of such evidence. There is nothing to indicate that the applicant's solicitors have even written to JH inviting her, for example, to give her consent to an independent social worker engaging with her and her children, or inviting her to produce witness evidence in support of the applicant's appeal.

47. Lack of supporting evidence also pervades other aspects of Ms Naik's submissions. There is no evidence of attempts having been made to obtain relevant information from the probation officer who was supervising the applicant prior to his removal, nor is there evidence from an independent probation officer as to the consequences of the applicant currently being outside the UK. In this latter regard, we have taken account of the evidence provided in 2015 by Dr Basu. His report, which was considered by the Supreme Court in Kiarie and Byndloss, was a non-case specific description of the shortcomings in preparing psychiatric evidence without face-to-face contact with the person concerned. Dr Basu's report therefore does not relate to the instant applicant's circumstances. Assuming there is a genuine need for a psychiatric report on the applicant for Article 8 purposes, again there is no evidence before us as to the impact on the production of such evidence of the applicant being abroad, nor is there evidence relating to the possibility of such a report being prepared by a professional witness based in Jamaica.

48. The applicant wishes to provide oral evidence to the First-tier Tribunal. We have little doubt that to do so would benefit his case. It is proposed that such evidence be given via video-link. Whilst the evidence before us shows the unsatisfactory nature of the video-link at the case management hearing, that is not the last word on the subject. There is cause for cautious optimism that between now and the date of the applicant's hearing – which is currently listed in June 2018 – arrangements can be made which will provide an 'effective' means of providing oral evidence. Those arrangements can be expected to take account of the difficulties that arose during the case management hearing.

49. Despite what we say above in relation to the lack of merit in grounds 1 and 2, we do not propose to dispose of those grounds by refusing

permission to bring judicial review proceedings but, instead, we stay the application made on those grounds until after the applicant has exhausted his appeal rights to the Tribunal. As Hickinbottom LJ recognised in Nixon, staying the judicial review proceedings ensures that the position can be promptly revisited if it transpires that an-out-of-country appeal will in fact be incompatible with the procedural aspects of Article 8.

50. Although we recognise that there will be cases in which the Upper Tribunal in its judicial review capacity will be required to determine the issue of whether an appeal before the First-tier Tribunal in a section 94B case will be Article 8-compliant, without waiting to see how matters unfold in the First-tier Tribunal, the present case cannot be said at this point to be one of them.

51. The First-tier Tribunal is under a duty to ensure that the appeal process complies with the procedural rights afforded by Article 8 ECHR and the common law duty of fairness. It has specialist judges with a wealth of contextualised experience and understanding, who now also have the benefit of the judgments in Kiarie and Byndloss, the judgment of Hickinbottom LJ in Nixon and the guidance of the Upper Tribunal in AJ.

52. The First-tier Tribunal can be expected to apply the step-by-step approach identified in Kiarie and Byndloss , synthesised in AJ. If it is concluded that an appeal cannot be 'effective' unless the appellant is returned to the United Kingdom, then the proceedings should be stayed with written reasons explaining why such a decision has been reached. An appellant can waive his procedural rights; however, before the First-tier Tribunal accepts this to be the case it must be clear both as to the appellant's intentions and understanding of consequences of such a waiver. This, of course, has its own difficulties if the applicant is abroad and is not legally represented.

53. If the First-tier Tribunal stays the appeal proceedings because it concludes that they cannot progress save in a manner which breaches the procedural rights safeguarded by Article 8, then we anticipate that the SSHD will take the necessary action to rectify this position, promptly. If she does not, then an application for judicial review will be appropriate at this stage. In the instant case, if the position is reached whereby the First-tier Tribunal concludes that the appeal before it cannot be effective without the applicant being brought back to the United Kingdom, the applicant is at liberty to apply to lift the stay in place in the instant proceedings.

54. If the First-tier Tribunal concludes that the appeal process is Article 8 compliant, that renders grounds 1 and 2 in the instant proceedings academic. Should the First-tier Tribunal's conclusion in this regard be in error, it would be open to the applicant to seek rectification of this error by appealing to the Upper Tribunal against the final decision of the First-tier Tribunal disposing of the appeal, should that decision be adverse to the appellant, as occurred in AJ.

55. In our view, the First-tier Tribunal will generally be in a better position to determine any factual dispute that may arise in relation to compliance with the procedural requirements of Article 8. If necessary, it could arrange a hearing at which evidence going to this issue could be tested. It has long been acknowledged that although such a process can be accommodated in an application for judicial review, it is not the forum best suited to such an approach

56. Furthermore, the circumstances underpinning an assessment of whether the appeal process is effective will inevitably be the subject of change during the course of the proceedings. There may come a point in time when the assembled evidence is such that an analysis thereof shows that an appeal will not be effective. However, those circumstances may change. An obvious example of this is where there is a technical difficulty on a particular occasion which prevents an appellant providing evidence by video-link, in a case where such evidence is crucial, but it is immediately recognised what went wrong and that the fault can be corrected. This fluidity can be more readily accommodated by the First-tier Tribunal during the appeals process, rather than by the Upper Tribunal exercising its judicial review jurisdiction. We would emphasise that we are not sanctioning a protracted process, during which the appellant remains outside the United Kingdom. The First-tier Tribunal will be under a duty to continue to monitor the position, in order to ensure that the right to a fair hearing is not abrogated.

57. We invited the parties' submissions at the hearing on the proposed course of staying the challenge to the SSHD's decisions. Mr Kovats was content with this approach but identified the SSHD's preferred course to be a refusal of permission. Ms Naik strongly opposed such a course, drawing support from the following paragraph of Lord Wilson's judgment in Kiarie and Byndloss:

> "65. … 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."

58. With respect to Ms Naik's submissions, they fail to take cognisance of the context within which Lord Wilson's observations were made. The applicants in Kiarie and Byndloss were in the United Kingdom and seeking to challenge the section 94B certification. A case specific assessment by the First-tier Tribunal of the effectiveness of the appeal proceedings could not take place unless the applicants had been removed and had subsequently brought an appeal. It is in this context that Lord Wilson made his observations. In the instant case a challenge to such certification

has already been unsuccessful and the applicant has been removed. The appeal proceedings before the First-tier Tribunal are ongoing and, consequently, the duties and responsibilities on it to ensure the proceedings are fair and effective have already been engaged.

59. A further advantage in the approach we have taken in this case is its consistency with the approach recently taken by the Court of Appeal in Nixon. Having first refused an application for interim relief in the form of a mandatory order for the return of the appellant to the United Kingdom, Hickinbottom LJ stayed the application for permission to appeal on certain of the grounds, for the following reasons:

> "86. Mr Nixon's appeal is due to be heard by the First-tier Tribunal on 6 March 2018. Although the Secretary of State has not submitted all of the evidence that she would wish to rely upon if she were required to prove the effectiveness of an out-of-country appeal in Mr Nixon's case, Miss Giovannetti has put forward a compelling case for there being some optimism and confidence that the steps that the Secretary of State is taking (e.g. to ensure appropriate video-link facilities are available to enable Mr Nixon to give evidence from Jamaica) will be sufficient to render the appeal effective for the purposes of article 8. Indeed, Mr Bedford frankly and with good grace accepts that they may do so; but he is sceptical that, in the event, they will. In the circumstances, he urges me to grant permission to appeal against the refusal of Phillips J to refuse permission to proceed with the judicial review challenge to the section 94A certification – or, as perhaps a better alternative, to grant permission to proceed with the judicial review, and remit the matter to the Administrative Court for it to consider, on the basis of evidence from both parties (including the Secretary of State as to the facilities that are generally available in Jamaica for video-link hearings etc), whether an out-of-country appeal would be effective in Mr Nixon's case.
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> 87. However, in the circumstances, I do not consider that it would be sensible or appropriate to grant permission to appeal or permission to proceed with the judicial review of the certificate now. In my view, the clearly better course is to grant permission for Mr Nixon to re-amend his grounds to in the terms of Grounds 2 and 3, and to stay the application for permission to appeal in respect of those grounds until after the First-tier Tribunal has determined Mr Nixon's appeal and any appeal from that determination has been dealt with. 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 and 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.
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> 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."

60. In relation to the second appellant (Mr Tracey) the Court dismissed the application for permission to appeal, the difference in approach to that taken in Mr Nixon's case being explained by the fact that, unlike Mr Nixon, Mr Tracey had not lodged an appeal to the First-tier Tribunal against the refusal of his human rights claim, the possibility for which had been open to him since the date of his departure from the United Kingdom.

61. For the reasons identified above, we stay consideration of grounds 1 and 2.

Grounds 3 and 4

62. By grounds 3 and 4 the applicant brings challenge to decisions made by the SSHD regarding the substantive rights safeguarded by Article 8.

63. The reality is that the submissions set out in ground 3 add nothing to the overarching contention that the applicant's, and his family members', Article 8 substantive rights would be disproportionately infringed by his continued presence outside the United Kingdom pending the resolution of his appeal. If the Applicant makes out his case in isolation on ground 3, then the best he could hope to achieve would be the quashing of the SSHD's decisions to maintain the section 94B certification and to refuse to return him to the United Kingdom. That would still leave the section 94B certification in place and the applicant outside of the United Kingdom, albeit the SSHD would inevitably be required to reconsider such matters on a lawful basis. By ground 4, the applicant seeks resolution in his favour of the underlying human rights issue, something the Upper Tribunal is specifically tasked with adjudicating upon in these proceedings (see, for example, R (Lord Carlile of Berriew) v SSHD [2015] AC 945).

64. For this reason, we do not intend to devote any further judicial ink to the task of resolving the matters pleaded within ground 3, save to observe that both the applicant's letter of 12 December 2017 and that of 27 December 2017 focus on the procedural aspects of Article 8. If there were any submissions made therein aimed at seeking a re-evaluation of the section 94B certification by the SSHD on substantive article 8 grounds, they are difficult to identify. Whilst we accept that the attachments to those letters contain evidence capable of infringing on a consideration of the substantive Article 8 issue, this evidence was not emphasised in the application letters themselves.

65. Turning then to ground 4, as we have alluded to above the lawfulness of

the original imposition of the section 94B certificate has been the subject of a judicial decision already – permission to bring judicial review proceedings being refused on the papers by Upper Tribunal Judge Perkins and, on 22 June 2016 after an hearing, by Upper Tribunal Judge Blum in the terms set out at paragraph 12 above. We accept the relevance of Judge Blum's decision having been made prior to the Supreme Court's judgment in Kiarie and Byndloss, and thus the judge was guided by the Court of Appeal's statement of the law. In particular, we observe that the Supreme Court took issue with the Court of Appeal's analysis of the nature and strength of the public interest that is in play in a case such as the instant one. We have applied the law as the Supreme Court pronounced it to be.

66. The applicant has now been living outside of the United Kingdom for 18 months. For reasons that are obvious, he is currently in a significantly better position to demonstrate the effects of his removal from the United Kingdom on his children and JH, than he was prior to his removal at which time the effects of his absence from the United Kingdom could only be asserted on a hypothetical and speculative basis. His second child, indeed, had not even been born. That is not so anymore. The applicant now has the benefit of being able to bring forward evidence of the actual consequences of his removal as they have evolved in the past 18 months, and assert with some confidence how those consequences will further manifest themselves during his continued absence from the United Kingdom, whilst he awaits the exhaustion of the appeal process.

67. In these circumstances what is startling is the poor quality of the evidence before us going to this issue. There is no dispute that the applicant's removal and his continued exclusion from the United Kingdom are an interference with his family life, and that such interference engages Article 8. The issue of substance before us is one of proportionality. The applicant's witness statement provides some detail of the nature of his current relationship with his children and JH, which is inevitably restricted given that the applicant is living in Jamaica and his family are in the United Kingdom. We have no hesitation in accepting that the applicant is distressed by the current state of affairs. We also accept that it is likely to be in the best interests of all of the applicant's children that he lives in the United Kingdom whilst his appeal is being determined, a matter that we treat as a primary consideration. There is, though, no evidence as to how the separation is currently affecting the children and, in particular, no evidence that either of the children is suffering particular harm as a consequence of the applicant's absence, or that they would suffer such harm during the period of his continued absence whilst the appeal process is ongoing.

68. Having balanced the applicant's (and his family members') circumstances, insofar as they are disclosed by the evidence before us, against the public interest in his exclusion for the duration of the appeal process, we have no hesitation in concluding that it is not arguable that such exclusion would be a disproportionate interference with the applicant's substantive Article 8 rights or the rights of his family members.

69. Once again, however, we do not propose to dispose of this ground by refusing permission. This is not, as was the case for grounds 1 and 2, because it is more appropriate for the First-tier Tribunal to determine this issue. The First-tier Tribunal is not seized of the issue of whether the applicant's absence for the duration of the appeal proceedings infringes the substantive rights protected by article 8. Rather, we see sense in taking this practical approach in circumstances in which we have already stayed the proceedings relating the procedural aspects of Article 8.

Challenge to the Decision of the First-tier Tribunal

70. Given what we say above, the challenge to the First-tier Tribunal's decision refusing to stay the appeal proceedings pending the resolution of this application for judicial review is plainly not capable of success and we refuse permission in relation to it (ground 5).

Order

1. The applicant's application for permission to bring judicial review proceedings challenging the SSHD's decisions maintaining the section 94B certification and refusing to return the applicant to the United Kingdom prior to the disposal of his appeal, is stayed.

2. If the applicant wishes to proceed with the aforementioned application then he shall, within 21 days of the ultimate outcome of his appeal to the tribunal, file an application to remove the stay, together with any proposed amended grounds of application and any further evidence upon which he wishes to rely. The SSHD shall respond to such application within 21 days. The matter will then be referred to the President of the Upper Tribunal for consideration and any directions.

3. The applicant's application for permission to bring judicial review proceedings challenging the decision of the First-tier Tribunal refusing to stay the appeal proceedings before it, is refused.

4. Liberty to Apply

Signed: Upper Tribunal Judge O'Connor

Date: 31 March 2018