Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07254/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22nd January 2018	**On 7th March 2018**

Before

UPPER TRIBUNAL JUDGE FRANCES
DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

Y A B
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Subramanian, Lambeth Solicitors
For the Respondent: Ms A Brockelsby-Weller, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Trinidad and Tobago, born on 13 August 1973. He appeals against the decision of First-tier Tribunal Judge Herlihy, promulgated on 26 April 2017, dismissing his appeal against deportation and the refusal of his asylum and human rights claims.

2. The Appellant's human rights claim was certified under Section 94B of the Nationality, Immigration and Asylum Act 2002 and therefore his appeal was exercisable only after he had left the United Kingdom. Accordingly,

the Appellant was not present at his appeal before the First-tier Tribunal. He was represented by counsel and his partner gave oral evidence in English.

3. Permission to appeal was sought on the ground that, although the decision of the First-tier Tribunal predated the decision of the Supreme Court in R (on the application of Kiarie and Byndloss) v Secretary of State for the Home Department [2017] UKSC 42, there was procedural unfairness in proceeding with the appeal in the absence of the Appellant. It was submitted that certificates under Section 94B could be unlawful because the Appellant was unable to give live evidence at his own appeal which could lead to unfairness.

4. The grounds also submit, in addition to the Appellant being denied an effective appeal, that the Respondent failed to apply relevant guidance following SF and Others (Guidance, post-2014 Act) Albania [2017] UKUT 00120 (IAC) and the judge failed to consider the provisions of paragraph 398 of the Immigration Rules.

5. Permission was granted by First-tier Tribunal Judge Chohan on the following grounds: "The grounds seeking permission argue that following the Supreme Court decision in the case of Kiarie and Byndloss the judge (sic) decision erred in law because the hearing took place in the absence of the Appellant. It does seem that the appellant had been deported and the hearing took place in his absence. However, at the time the judge made the decision the above Supreme Court decision had not been reported. Therefore, no criticism can be made of the judge. Having, said that, following the Supreme Court decision, there is an arguable point of law."

The judge's findings

6. The judge found that the Appellant had not established a well-founded fear of persecution and had not shown that there were substantial grounds for believing that he would face a real risk of suffering serious harm on return to Trinidad and Tobago. She considered paragraph 339C and Article 15(c) of the Qualification Directive. The judge then directed herself in relation to MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192 and Hesham Ali (Iraq) v Secretary of State for the Home Department [2016] UKSC 60. She found at paragraph 47 that the Appellant had a genuine and subsisting parental relationship with his stepson and two daughters and a subsisting and genuine relationship with his partner who are all British citizens. However, she concluded, applying the Immigration Rules, that following paragraph 398(b) the Appellant's deportation was conducive to the public good as he had been sentenced to a period of imprisonment of at least twelve months. The judge considered whether the Appellant's deportation was unduly harsh under paragraph 399(a) of the Immigration Rules and concluded:

> "50. It is clearly in the best interests of the Appellant's children to remain in the care of their parents and the deportation of the Appellant has clearly affected the lives of the Appellant and their children that they previously enjoyed. The Appellant's partner is the children's main carer and it appears that the Appellant himself has never worked in the United Kingdom."

7. The judge found that the Appellant had lived in Trinidad and Tobago up to the age of 30 and that his mother still lived there. The Appellant's partner also had strong ties with Trinidad and Tobago. Her mother was from Trinidad and Tobago and the Appellant was currently living with her mother's siblings. The Appellant's partner and children had lived in Trinidad and Tobago for nine months with the Appellant after his deportation. The Appellant's partner decided to return to the UK because it was causing undue stress for the children. Her eldest child, aged eight, did not attend school. She said that it was her decision not to send him to school because she had concerns about the environment: it was hot, there was a lack of provisions and equipment, and she was worried about the levels of violence. However, the judge concluded that there would not be any difficulty in terms of language.

8. The judge also took into account the following matters. The Appellant's stepson, the eldest child, was having difficulties coping with separation from the Appellant, but he was receiving support and counselling. The problems arose while the Appellant was in prison. There was no evidence of any difficulties whilst the family were reunited in Trinidad and Tobago other than the Appellant's partner deciding not to send her son to school and that he was missing his friends. The other two daughters had not yet begun school and the judge found there would not be any significant difficulties in them adjusting to life in Trinidad and Tobago where the Appellant and his partner had considerable family support. The judge concluded that it would not be unduly harsh for the Appellant's partner and his children to relocate to Trinidad and Tobago or indeed for them to remain in the UK without the Appellant. In coming to this conclusion, the judge took into account that they had been cared for by their mother for some considerable time and she was able to adequately care for them in the UK.

9. The judge applied Section 117C and concluded that in the case of foreign criminals there was a statutory presumption that deportation was in the public interest. In relation to the Appellant's future risk of re-offending, she found that it was some time since his conviction and his previous conviction was for possession of cannabis. However, the lack of reoffending was in adherence to the law and societal norms and a reasonable expectation of both United Kingdom citizens and foreign nationals. It was not an exceptional factor, but evidence of ongoing rehabilitation, although this had to be weighed against the Appellant's knowledge that his immigration status was precarious and that the Respondent had made a deportation order against him.

10. The judge considered his level of integration and that he was not financially independent. He was previously supported by his wife and subsequently his partner. The judge attached little weight to his private life in accordance with Section 117B(4). The Appellant's immigration status had always been precarious and it was known, since the expiration of his initial six months' leave in 2004, that he remained in the UK illegally. Nevertheless, he began a relationship with his first wife and he met his current partner and began a relationship in 2013. He has known throughout that he had no lawful right to remain in the UK and to develop his family life and relationship with his partner's stepson. The judge considered AJ (Zimbabwe) and concluded that there was nothing special about the nature of the family relationship. Separation of parents from children where deportation is sought is the norm and such separation cannot reach the threshold of exceptional circumstances. The judge concluded at paragraph 60:

> "In considering all the evidence in the round, I do not find that the Appellant has established that there are truly exceptional circumstances which would outweigh the public interest in deporting him. To rebalance the scales in favour of the Appellant against deportation there must be very compelling reasons which must be exceptional and I do not find that in weighing up all the relevant factors that the Appellant has established that very compelling reasons exist to outweigh the public interest given the seriousness of the Appellant's crime, the need to protect society against crime and the need for a deterrent policy."

Submissions

11. Mr Subramanian relied on his skeleton argument and submitted that the Appellant was not present at his appeal hearing and there was no video-link. He had been told, by the Appellant's previous solicitors, that the Section 94B certificate had been challenged on judicial review, but he had no information as to when the application was made or whether it was successful.

12. Mr Subramanian relied on paragraph 55 of Kiarie and Byndloss and submitted that Lord Wilson made unambiguous comments that the task facing any person against whom deportation action is pursued is a "formidable" one and that such a person must "be in a position to assemble and present powerful evidence." He relied on Lord Wilson's list of factors that should be considered in an appeal against deportation.

(a) The depth of the Appellant's integration in UK society in terms of family, employment and otherwise.

(b) The quality of his relationship with any child, partner or other family member in the UK.

(c) The extent to which any relationship with family members might reasonably be sustained even after deportation, whether by their joining him abroad or otherwise.

(d) The impact of his deportation and the need to safeguard and promote the welfare of any child in the UK.

(e) The likely strength of the obstacles to his integration in the society of the country of his nationality, and, surely in every case,

(f) Any significant risk of his re-offending in the UK, judged, no doubt with difficulty, in the light of his criminal record set against the credibility of his probable assertions of remorse and reform.

13. Mr Subramanian submitted that the Appellant was in a genuine relationship with his partner and their three British citizen children. The judge erred in law in finding that the children could follow the Appellant to Trinidad and Tobago. This was contrary to the Respondent's policy and the case of SF and Others (Guidance post-2014 Act) Albania [2017] UKUT 00120 (IAC). It was not the Respondent's policy for British citizen children to follow an appellant and therefore the decision to deport this Appellant was not in accordance with policy.

14. Further, the original refusal did not mention the best interests of the child or Section 55 and neither did the judge. The Respondent had not considered the impact on the children and the judge had failed to consider the impact on the children in isolation. Following Kaur (children best interests/public interfaces) [2017] UKUT 00014, in the proportionality and balancing exercise, the best interests of a child must be assessed in isolation from other factors such as parental misconduct. The assessment of best interests should only be carried out at the beginning of the balancing exercise. The judge had failed to do this.

15. Mr Subramanian referred me to the report of the school counsellor and the impact that separation from the Appellant had on his stepson. He also referred to the doctor's report dated 15 March 2017. He then referred me to paragraph 75 of The Queen on the application of Paul Nixon and another v Secretary of State for the Home Department [2018] EWCA Civ 3 and submitted that paragraph 75(ii) and (v) were relevant. Paragraph 75(ii) and (v) state:-

> "(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.

(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."

16. Mr Subramanian submitted that the Appellant's deportation had interfered with his Article 8 rights and affected the best interests of his children. There was also unfairness because the Appellant was outside the UK and this was affecting his children. Mr Subramanian relied on JO and Others (Section 55 duty) Nigeria [2014] UKUT 00517 (IAC) and submitted that the judge had erred in law in failing to consider the best interests of the children and the effect on the Appellant's partner.

17. Ms Brockelsby-Weller submitted that the issue in this appeal was whether an out-of-country appeal materially affected the human rights involved in the disposal of the appeal. The Supreme Court had not ruled that Section 94B certificates were unlawful in all cases. They had ruled that they were unlawful in the case of the two Appellants before them. She relied on paragraph 65 of Nixon which states:-

"In response to the procedural matters relied upon, Miss Giovannetti submitted that the evidence before the court below and this court simply did not show that an out-of-country right of appeal was ever, and is now, an inadequate protection of the Article 8 rights of Mr

> Nixon and his family. There was no evidence that Mr Nixon had had any difficulties in instructing his legal team. He had apparently made no attempt to obtain an independent social worker report whilst he was still in the UK, and he had 18 months to do so between the challenged decision in March 2015 and his deportation in September 2016. In that time, there had been some social services intervention in respect of the family as I have described (see paragraph 29 above), but no attempt appears to have been made to obtain any reports made by them, although Judge Pacey considered such reports must exist. Of course, for part of that 18 months, it seems that Mr Nixon was prohibited by court order from contacting his wife; and there is no evidence that there was any active relationship between Mr Nixon on the one hand, and his wife and son on the other, after he was sent to prison for assaulting her in August 2014, the most recent available evidence being that of Mr Nixon dated 24 June 2015. That confirms that they had not seen each other – and Mr Nixon had not seen his son – since he was imprisoned nearly a year before. Even if he were to be returned to the UK now, it is uncertain what, if any, access he would have to J-Kwon. Mr Nixon has not indicated that he wishes to give oral evidence in support of his appeal; but, if he does wish to do so, there are facilities in place for him to give video-link evidence from Jamaica – and the Secretary of State has made an application for video-link evidence to be received at the 6 March 2018 hearing."

18. Ms Brockelsby-Weller relied on the judge's conclusions at paragraph 124:

> "However, as I have explained, Kiarie & Byndloss does conclude that an out-of-country appeal against a human rights claim in the deportation context cannot be effective. It confirmed that whether such an appeal will be effective, or a breach of the procedural requirements of Article 8, will depend upon the circumstances of each particular case. The Secretary of State's difficulty in Kiarie & Byndloss was that there was no evidence that she had considered the practical difficulties in, and potential undermining effect of, an out-of-country appeal in those two cases. But here, she clearly did. As I have described, at the time of the relevant decision, her decision-maker said that there were facilities available in Jamaica that would enable Mr Tracey to have sufficient access to instruct his representatives, and take advice from them; and for him to play an appropriate part in any appeal, including, if necessary, by giving evidence by video-link. At any hearing, the Tribunal would, of course, have an obligation to ensure that his rights were properly protected, and take appropriate action to ensure that they were. I am not saying that the Tribunal's duty under the Human Rights Act 1999 can be relied upon in every case to ensure compliance with Articles 6 and 8 of the ECHR. But, in this case, there is simply no evidence that Mr Tracey's Article 8 rights would be adversely affected by his appeal being dealt with out-of-country."

19. Ms Brockelsby-Weller submitted that whether the appeal could be effective was dependent on the circumstances of the case. In this case the evidence was not in dispute. It was accepted that the Appellant was in a genuine and subsisting relationship and the judge proceeded on that basis. The judge then applied the Immigration Rules. She had direct evidence from the Appellant's partner as to what occurred when the family relocated to Trinidad and Tobago and she had a witness statement from the Appellant which is referred to in the decision. The Appellant had given evidence consistent with that of his partner.

20. Ms Brockelsby-Weller submitted that the guidance relied on in the Appellant's submissions did not relate to deportation cases and there was precedent in the Court of Appeal that the Tribunal should not consider the separation of a parent and child to be a trump card. The judge was well aware of the support and counselling that the family members had received. She had not closed her mind to the repercussions of separation and the need for counselling and support. There was no evidence adduced as to any difficulties on reunification. The Appellant's partner was in an excellent position to talk about it and she had stated that her son was fearful of going to school. The Appellant could only have provided corroborative evidence of that.

21. At paragraph 56, the judge stated that there was no evidence of the risk of re-offending. Ms Brocklesby-Weller submitted that the decision did not turn on this point. The lack of re-offending was not a trump card and the Appellant had been an immigration offender for a number of years prior to his criminal conviction so even if he was remorseful and had no propensity to re-offend the judge was able to rely on his poor immigration history in relation to the public interest. The judge looked at exceptional circumstances and properly applied AJ (Zimbabwe). SF (Albania) was not relevant. There was no error of law and no challenge in the grounds of appeal or in submissions to the judge's finding that it would not be unduly harsh for the Appellant's children and his partner to relocate to Trinidad and Tobago or indeed for them to remain in the UK without him. Any evidence the Appellant could have given would not have changed the result. The Appellant had relied on Article 8 and the evidence from his partner was sufficient to ensure fairness.

22. In response, Mr Subramanian submitted that the best interests of the children had been overlooked. He referred me to the sentencing remarks of the judge and submitted that the Appellant could have given further evidence on that. The children's best interests must be assessed in isolation and the judge had failed to give adequate weight to the fact that the separation was affecting the children adversely. The judge gave the impression that counselling was sufficient to deal with separation anxieties. However, the Appellant's presence in the UK was required. The children were affected and an in-country right of appeal would have made a material difference. There was no evidence except a statement and the judge was assessing credibility without hearing the Appellant or without a video-link. This was material because of the effect of personal evidence.

The Appellant could have been more forceful in explaining to the judge how the children had been affected by his deportation. In his statement the Appellant stated that he took care of the children so that his wife could get a job and he explained how his absence was affecting his wife. The court did not have the benefit of hearing him on the real impact of that statement.

23. Mr Subramanian submitted that, if we found that there was an error of law, according to paragraph 75(vii) of Nixon we should give a direction that the Appellant be brought back to the UK. Paragraph 75(vii) of Nixon states:

> "(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."

Discussion and Conclusion

24. We are not persuaded by Mr Subramanian's submission that the Respondent had failed to follow her own policy guidance and take into account SF (Albania). The guidance states that *save in cases of criminality*, the decision maker must not take a decision in relation to the parent or carer of a British citizen where the effect of that decision would be to force that British Citizen child to leave the EU, regardless of the age of that child. The guidance was not relevant to deportation appeals and the Appellant's children would not be required to leave the UK because their primary carer was able to remain in the UK with them.

25. We are not persuaded by Mr Subramanian's submission that the judge failed to consider the best interests of the children. The judge specifically found that the best interests of the children were to remain in the care of both parents and that the Appellant's deportation had clearly affected their lives such that the Appellant's stepson had had problems at school which required counselling. The judge had taken into account the effect of deportation on the Appellant's children and dealt with their best interests. There was no error of law in relation to the application of Kaur.

26. The remaining issue is whether the Appellant's appeal hearing was ineffective or unfair because he was deported and therefore unable to give oral evidence at his appeal.

27. The judge dealt with the factors in Lord Wilson's list at paragraph 55 of Kiarie and Byndloss, even though the decision post-dated her dismissal of the Appellant's appeal. The Appellant had no basis of stay in the UK having overstayed his six months' visit visa in 2004. He had formed his

family and private life whilst his leave was precarious and had then committed a criminal offence. He did not work in the UK. He had a genuine and subsisting parental relationship with his stepson and two children who were all British citizens. The Appellant's partner and his children had lived with him in Trinidad and Tobago for nine months. They had the support of family members and his children were not prevented from going to school. They had not done so because of his partner's fear that her son would miss his friends and that the school provisions were not adequate. The Appellant's partner had strong family and cultural links to Trinidad and Tobago. His stepson was having difficulties coping with separation from the Appellant and was receiving counselling at school. There was no evidence before the judge of the Appellant's future risk of re-offending, but she acknowledged that it was some time since his conviction and his partner gave evidence of his remorse and the valuable lesson he had learned.

28. In addition, the Appellant has been able to instruct solicitors and his partner gave detailed and cogent evidence at the hearing, which was accepted and taken at its highest. The evidence he gave in his statement was consistent with that of his partner and it was not clear what further evidence he could have given that would have made a difference to the outcome of the appeal.

29. On the facts of this case the Appellant, his partner and children have been able to continue their family life in Trinidad and Tobago, but his partner has chosen not to. The judge's conclusion that it would not be unduly harsh for the children and his partner to live in Trinidad and Tobago was open to her on the evidence before her. It was not suggested that there was further evidence which the Appellant could have given which was not before the judge. It was argued that he could have been more persuasive if he could have given live evidence about the impact on his partner and children, and the sentencing remarks of the judge. However, the Appellant's partner gave that evidence and it was accepted by the judge. We find that the Appellant has not been denied the opportunity of an effective appeal.

30. Accordingly, we find that there is no material error of law in the judge's decision and we dismiss the appeal.

Notice of Decision

The appeal is dismissed.

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 her or any member of her 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.

J Frances

Signed Date: 5 March 2018

Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

J Frances

Signed Date: 5 March 2018

Upper Tribunal Judge Frances