Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00149/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 March 2018	**On 21 March 2018**

Before

UPPER TRIBUNAL JUDGE JORDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

DIMITAR STEFANOV

Respondent

Representation:
For the Appellant: Ms J. Isherwood, Home Office Presenting Officer
For the Respondent: No appearance

DECISION AND REASONS

1. The Secretary of State appeals against the determination of First-tier Tribunal Judge S.J. Clarke promulgated on 11 December 2017 allowing the appeal of Mr Stefanov "to a limited extent" against the decision of the Secretary of State made on 27 February 2017 to make a deportation order in accordance with reg. 27 of the EEA Regulations 2016. I shall refer to Mr Stefanov as 'the appellant' as he was before the First-tier Tribunal Judge.

2. The appellant's appeal was heard by Judge Clarke on 20 November 2017. A signed deportation order had been made against the appellant on 27

February 2017. The appellant appealed on 7 March 2017 against the Secretary of State's decision to make a deportation order. That was a non-suspensive appeal in that it was a decision made under the EEA Regulations. The appellant was deported on 5 April 2017.

3. The Supreme Court gave its decision in *Kiarie and Byndloss (on the application of) the Secretary of State for the Home Department* [2017] UKSC 42 on 14 June 2017. Inevitably, the facts in the case of Mr Kiarie and Mr Byndloss were substantially different. More important still was the fact that the relevant decisions made by the Secretary of State were to certify the claims pursuant to a power conferred upon her by s.94B of the Nationality, Immigration and Asylum Act 2002 which had been inserted into it by s.17 (3) of the Immigration Act 2014 coming into force on 30 November 2016. This provision provided the power, despite the appeals process not having been begun or not having been exhausted, to remove an appellant pending the outcome of his appeal provided it would not be unlawful under s.6 of the Human Rights Act 1998 on the grounds that the appellant would not during the period of his appeal face a real risk of serious irreversible harm if removed.

4. The Supreme Court was largely silent upon other methods of removing an appellant during the pendency of his appeal in circumstances other than pursuant to s.94B. In particular, given the discrete regime affecting EU citizens, particularly those who are to be returned within the Union, statute has not provided an in-country right of appeal. Lord Wilson in his judgement made it plain that in deciding whether an out-of-country appeal against the refusal of a human rights claim is incompatible with the procedural requirements of Article 8 was a fact sensitive question requiring four specific questions to be addressed:

    (i) The first question was whether the appellant would be able to secure legal representation which might have been available had the appellant remained in the United Kingdom and whether the appellant is able to give instructions to his lawyer and receive advice.

    (ii) The second question was whether on removal the appellant was likely to experience difficulties in obtaining the supporting professional evidence crucial in achieving success on appeal. Such professional evidence might include probation or similar reports, forensic reports as to the level of risk on return and psychiatric evidence.

    (iii) The third question concerned whether oral evidence would provide the appellant with a greater prospect of success and, if so, the fourth question, whether the use of modern video facilities would provide an effective means of providing oral evidence and participating from abroad.

5. These questions were considered by Higginbotham LJ in a comprehensive and detailed judgement refusing permission to appeal against the dismissal of judicial review applications challenging s.94B certificates in *R (Nixon and Anor.) v Secretary of State for the Home Department* [2018] EWCA Civ 3.

6. All of these questions operate in the context of s.94B to the issue of whether there was a real risk of serious irreversible harm if removed during the appeal process. That is not a consideration that arises under reg. 37(1)(d) of the 2016 Regulations which only permit out-of-country appeals where the decision is to remove the person from the United Kingdom is, in effect, a refusal to revoke a deportation or exclusion order made against the individual. Although subsection (2) provides exceptions, they do not apply in the case of regulation 37(1)(d).

7. These considerations are essentially concerned with fairness. However, as the Supreme Court made clear in paragraphs 65 and 66, the place where the issue of fairness was to be addressed was in the appeal hearing before the First-tier Tribunal. It is there that the appellant is able to raise the difficulties that he has encountered with legal representation and with the provision of documents including expert evidence. It is also in the First-tier Tribunal that he can raise the issues upon which his own evidence is required and which cannot be properly provided by video link. It should, perhaps be pointed out that in many deportation appeals, it is not the impact that removal has upon the appellant which is key; he is, after all, the offender who may well be unable to complain that it is disproportionate to remove him given his offending. Instead, it is usually the family members, often children, who will render separation disproportionate but who are, of course, in the United Kingdom.

8. The problems faced by giving evidence from a fellow member of the EU are likely to be significantly less than from some other countries.

9. The First-tier Tribunal Judge failed to provide an adequate analysis of these considerations. Instead, the First-tier Tribunal Judge concluded that it was a requirement that the respondent should provide a written supplementary letter dealing with the certification point and its absence amounted to an error of law. There is no basis for imposing that burden upon the Secretary of State.

10. Furthermore having found that the decision was unlawful, the judge went on to say that the absence of an invitation given to the appellant to return to the United Kingdom to participate in his appeal hearing was also unlawful. He concluded that there could be no remedy by adjourning the hearing because the appellant had not notified the Tribunal of his new address and his mother and partner did not attend the hearing. He therefore concluded that this was an error of law '*which is such that I allow the appeal to a limited extent.*'

11. It is difficult to understand what is meant by the judge's decision to allow the appeal to this '*limited extent*'. If a decision is unlawful, it is for the First-tier Tribunal to substitute a lawful decision. It is only in the limited circumstances where there is a discretion vested in the Secretary of State that can only be exercised by the Secretary of State (and which the Tribunal does not itself possess) that a decision is 'remitted' to the Secretary of State to enable her to make a fresh and lawful decision pursuant to her own, sole, discretionary powers. See generally *Abdi v SSHD* [1996] Imm AR 148 (CA).

12. However, in the present case, it is clear that the system was not unlawful.

13. I have read and considered the decision letter made by an official on behalf of the Secretary of State dated 27 February 2017. The appellant claims to have entered the United Kingdom on 5 August 2014. He provided no evidence to substantiate his claim but, of course, Union citizens are not required to seek entry clearance or to obtain evidence of entry. The decision-maker then deals with the appellant's criminal history in 2015 culminating in his being sentenced on two counts of burglary for which he was sentenced to a total period of imprisonment of 45 months (3¾ years), being 30 months and 15 months consecutively.

14. The decision-maker, surprisingly, having concluded that there was no evidence before him that the appellant had exercised Treaty rights, did not simply conclude that the appellant was liable for removal simply because he was not a qualified person exercising Treaty rights in the United Kingdom. He could not, of course, establish that he had acquired a permanent right of residence because the length of his time in the United Kingdom was too short. The decision-maker then went on to deal with the sentencing remarks in which he commented on the fact that he had stolen property to a value of £5,000 including a wedding ring and an engagement ring (a factor to which the judge attached '*great importance*'). None of the property had been recovered and the appellant himself had not assisted in the process.

15. The decision maker went on to say that the appellant was 34 years of old age and there were no medical issues raised by him. He provided no evidence of any rehabilitative work conducted by him whilst in prison. He provided no evidence of being engaged in regular or lawful employment. He had no family members living in the United Kingdom. The decision-maker noted in paragraph 47 that the appellant claimed to have a partner residing in the United Kingdom but the material about his partner was limited to a comment that his partner was unlikely to provide him with any support to reduce the risk of re-offending since he had not done so in the past.

16. This summary of the material that was before the First-tier Tribunal Judge raised no arguable case that the decision-making was flawed. The

appellant enjoyed no protection under the Regulations but, if he did, it was the lowest level of protection confined, in essence, to whether it was proportionate to remove him which, of course, it was.

17. The appellant was removed on 5 April 2017.

18. On 27 February 2017, however, the Secretary of State wrote to the appellant in prison setting out her reasons for making a deportation order and inviting the appellant to signify whether if he did not wish to raise any objections to his deportation, he was free to sign the attached disclaimer. More importantly, on 14 March 2017 the Tribunal wrote to the appellant, once again in prison, in these terms:

> '… You can be removed from the United Kingdom before your appeal has been finally determined.
>
> If this is the case you will have to continue with your appeal after you have left the United Kingdom and as a result of the address the Tribunal currently uses to correspond with you will need to be updated.
>
> If you wish to continue with your appeal you should provide the Tribunal with your new address within 28 days of removal from the UK. If you do not do so your appeal may be decided without a hearing on the basis of the papers currently before the Tribunal.'

19. This letter was sent some three weeks before his removal and provided the appellant with a sufficient opportunity to put him on notice that, if he wished to pursue his appeal, he had to provide an address by which he might be contacted. He failed to do so. Accordingly he precluded himself from participating in his out-of-country appeal.

20. In paragraph 10 of the determination, the First-tier Tribunal Judge noted that his mother and partner did not attend the hearing.

21. By a direction made by a judge of the Upper Tribunal, an attempt was made to serve the appellant at his former address with a notice of hearing, this being the only means by which, if he had been living with a partner or his mother, he might be contacted. No one has attended in response, assuming that address would operate as a means of re-opening contact.

22. This was the situation as it was before the First-tier Tribunal Judge.

23. The decision made by the First-tier Tribunal Judge served no useful purpose. Allowing the appeal to '*a limited extent*', created a state of legal limbo which was not justified. It was for the appellant to satisfy the Tribunal that his removal would be a violation of his human rights, assuming there was a human rights appeal. He did not do so. Accordingly, there could have been only one lawful result to the appeal. It was open to the Secretary of State to reach a decision to deport the

appellant because of his criminal misconduct. There was little or no evidence of a private or family life, far less of a private and family life that engaged the Convention given his history of criminal wrongdoing and the limited time in which he had remained in the United Kingdom without establishing that he was exercising Treaty rights or otherwise had a right to remain. All this was known to the First-tier Tribunal Judge.

24. Even if the appellant's position should be equated with one who was the subject of a certification under s.94B, the four-stage process outlined in *Kiarie and Byndloss* does not reveal that the system had operated unfairly in the specific circumstances of the appellant's case, given the fact that such cases are fact-sensitive. The appellant had not sought legal aid in the United Kingdom and did not complain of the lack of it. Since he failed to participate in the appeal process by leaving an address in the United Kingdom or elsewhere at which he might be contacted and that his relatives in the United Kingdom have not sought to raise his case, his ability to provide adequate instructions to lawyers in the United Kingdom is academic. Nothing was raised by the appellant in the material, he supplied to the Secretary of State to suggest that he wished to obtain, or was in a position to obtain, documentary or expert evidence as to the issues before the Tribunal. Whilst we have no evidence that it would have been impossible to provide evidence by video link from Bulgaria, this is also academic since the appellant rendered effective participation in the appeal process impossible.

25. For these reasons, I set aside the decision of the First-tier Tribunal Judge as containing an error of law. I allow the appeal of the Secretary of State. I re-make the decision dismissing the appeal of Mr Stefanov on all the grounds advanced.

DECISION

(i) I allow the appeal of the Secretary of State as the determination of the First-tier Tribunal Judge discloses an error of law.

(ii) I set aside the decision of the First-tier Tribunal Judge.

(iii) I re-make the decision dismissing the appellant's appeal against the Secretary of State's decision to make a deportation order as the decision does not violate Mr Stefanov's human rights.

(iv) I dismiss the appeal of Mr Stefanov on human rights grounds and on the grounds advanced.

ANDREW JORDAN
UPPER TRIBUNAL JUDGE
19 March 2018