Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06509/2018

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision & Reasons Promulgated**
On 5 November 2018	**On 30 November 2018**

Before

UPPER TRIBUNAL JUDGE LANE

Between

GIDAA [M]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Logan, instructed by Deane & Bolton, Solicitors
For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Gidaa [M], born on 26 October 1989 is a female citizen of Sudan. She had applied under Appendix FM of HC 395 (as amended) for settlement in the United Kingdom as a partner; the appellant's husband ([MT] – hereafter the sponsor) is a British citizen. The appellant appealed to the First-tier Tribunal (Judge A J Parker) which, in a decision promulgated on 13 July 2018, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. Although it is not entirely clear from the grant of permission, it seems that Judge Keane granted permission only in respect of ground [3]. His grant of permission [4] reads as follows:

> "However, it was also contended at paragraph 3 [of the grounds of appeal] that the judge failed to address the matter of the certification of the appeal and did not engage with the inherent unfairness in the certification which prevented the appellant from being able to give evidence or to engage with the appeal at all. The judge is deserving of sympathy. The judge was apparently not referred to the decisions of the Upper Tribunal in *AJ (Section 94B – Kiarie and Byndloss questions) Nigeria* [2018] UKUT 115 (IAC) and *R (Watson v Secretary of State for the Home Department) (Extant appeal Section 94B challenge: forum)* [2018] UKUT 165 (IAC) as to the Tribunal's continuing duty to determine whether an appeal can lawfully be decided without the appellant being physically present in the United Kingdom. The judge merely remarked at paragraph 43 "I imagine the case was certified because the Home Office regarded it as an open and shut case in that the income has not been met and that their claim could not succeed". Arguably, the judge did not embark upon that consideration which the Upper Tribunal had in mind as the Tribunal's continuing duty in respect of appellants such as the appellant in the instant appeal. The judge arguably perpetrated an irregularity capable of making a material difference to the outcome of the fairness of the proceedings. The application for permission is granted."

3. *AJ* (see above) has given guidance to the First-tier Tribunal in respect of the issues arising out of the Supreme Court decision in *Kiarie and Byndloss*:

> *(1) In the light of Kiarie and Byndloss v Secretary of State for the Home Department [2017] UKSC 42, the First-tier Tribunal should adopt a step-by-step approach, in order to determine whether an appeal certified under section 94B of the Nationality, Immigration and Asylum Act 2002 can be determined without the appellant being physically present in the United Kingdom.*
>
> *(2) The First-tier Tribunal should address the following questions:*
>
> *1. Has the appellant's removal pursuant to a section 94B certificate deprived the appellant of the ability to secure legal representation and/or to give instructions and receive advice from United Kingdom lawyers?*
>
> *2. If not, is the appellant's absence from the United Kingdom likely materially to impair the production of expert and other professional evidence in respect of the appellant, upon which the appellant would otherwise have relied?*
>
> *3. If not, is it necessary to hear live evidence from the appellant?*
>
> *4. If so, can such evidence, in all the circumstances, be given in a satisfactory manner by means of video-link?*
>
> *(3) The First-tier Tribunal should not lightly come to the conclusion that none of the issues covered by the first and second questions prevents the fair hearing of the appeal.*
>
> *(4) Even if the first and second questions are answered in the negative, the need for live evidence from the appellant is likely to be present. A possible exception might be where the respondent's case is that, even taking a foreign offender appellant's case at its highest, as regards family relationships, remorse and risk of re-offending, the public interest is still such as to make deportation a proportionate interference with the Article 8 rights of all concerned.*

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

4. Ms Logan, for the appellant, submitted that the appellant had acted properly by returning to Sudan following the certification of her appeal. She told me that the sponsor had suffered injuries to his leg which had affected his mobility and, in turn, his ability to earn sufficient money to enable the appellant to enter the United Kingdom. The appellant herself has a degree in dentistry and embarked upon a conversion course so that she might practise dentistry in the United Kingdom prior to return to Sudan. There was a likelihood that she would make a positive contribution to life in the United Kingdom. The impact of the appellant's separation from the sponsor had been serious. After she had left the United Kingdom, the appellant had suffered a miscarriage and had by reason of the separation, been denied the support of her husband following this event.

5. I agree with Judge Keane that it was unfortunate that Judge Parker was not referred to *AJ* at the First-tier Tribunal hearing. I note from *AJ* that "the need for live evidence from the appellant is likely to be present". This was a relatively straightforward case which did not involve deportation. Judge Parker was aware of the sponsor's medical condition and of the fact of the miscarriage. The question is whether the presence of the appellant in the United Kingdom to give oral evidence before the First-tier Tribunal may have made a material difference to the outcome of the appeal. I find that some of the matters referred to by Ms Logan add little to the appellant's case and would not have been improved upon had the appellant been present to give oral evidence. I refer, in particular, to the submission that the appellant would, as a qualified dentist, make a material contribution to life in the United Kingdom. Whether or not the appellant had been present, the First-tier Tribunal would apply little, if any, weight to such a consideration. The other matters referred to by Ms Logan, on the other hand, may have been attracted increased weight had the appellant been able to give oral evidence and be cross-examined. Into this category falls the reliance which the appellant and sponsor may have upon each other in the light of the sponsor's injury and also the appellant's pregnancy and subsequent miscarriage. Whilst the appellant could not meet the requirements of the Rules because the sponsor's income was insufficient, the true nature and depth of the relationship between the sponsor and the appellant would arguably have only become apparent to the First-tier Tribunal had the appellant been able to give oral evidence.

6. I find this was a delicately balanced case but, ultimately, I find that Judge Parker should, at the very least, have examined in greater detail whether a fair hearing could be delivered in the First-tier Tribunal if the appellant was denied the opportunity to give evidence in person. For that reason I set aside the decision.

7. Now that the appeal has reached the Upper Tribunal, I do not consider it would assist either party if I were to remit the appeal to the First-tier Tribunal to decide whether or not the proceedings should be further adjourned pending the return of

the appellant to give evidence. Such a course of action will only cause further delay. I shall direct, therefore, that the appellant should be readmitted to the United Kingdom in order to give evidence before the First-tier Tribunal. Subject to that direction, I remit the appeal to the First-tier Tribunal (not Judge A J Parker) for that Tribunal to remake the decision. Clearly, the listing will have to take account of any delay which may occur in returning the appellant to this jurisdiction.

Notice of Decision

8. The decision of the First-tier Tribunal which was promulgated on 13 July 2018 is set aside. None of the findings of fact shall stand.

DIRECTIONS

(A) I direct that the appellant shall be given entry clearance to the United Kingdom for the purpose of giving oral evidence before a First-tier Tribunal which will consider *de novo* her appeal against the decision of the Secretary of State dated 25 April 2018.

(B) The appeal is returned to the First-tier Tribunal to be heard on a date to be fixed having regard to (A) above. The hearing should not be before Judge A J Parker. The appellant's solicitors shall notify the First-tier Tribunal at least 21 days prior to the next hearing if any interpreter is required.

(C) The parties shall send to each other and to the First-tier Tribunal copies of any documentary evidence upon which they may respectively intend to rely no later than 10 days prior to the next First-tier Tribunal hearing.

No anonymity direction is made.

Signed Date 26 November 2018

Upper Tribunal Judge Lane