



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: DA/00513/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 8 December 2017

Decision sent to parties on:

On 11 December 2017

Before

**UPPER TRIBUNAL JUDGE GLEESON**

Between

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

and

**M M**

**[ANONYMITY ORDER MADE]**

Respondent

Representation:

For the appellant: Mr Ian Jarvis, a Senior Home Office Presenting Officer

For the respondent: No appearance or representation

**DECISION AND REASONS**

**Anonymity**

*The First-tier Tribunal made an order pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. I continue that order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008: unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall identify the original appellant, whether directly or indirectly. This order applies to, amongst others, all parties. Any failure to comply with this order could give rise to contempt of court proceedings.*

## **Decision and reasons**

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal, allowing the claimant's appeal in part against her decision to deport him to Lithuania, his country of origin, pursuant to Regulation 19(3)(b) of the Immigration (European Economic Area) Regulations 2006 (as amended), and to certify her decision under Regulation 24AA of the 2006 Regulations and also that she was satisfied that removing him and requiring him to make his claim from abroad would not present a real risk of serious irreversible harm, pursuant to section 94B of the Nationality, Immigration and Asylum Act 2002 (as amended).
2. The First-tier Tribunal Judge confined her decision to the lawfulness of the section 94b certificate, applying *R on the application of Kiarie and Byndloss v Secretary of State for the Home Department* [2017] UKSC 42. The First-tier Tribunal Judge had no jurisdiction to decide the lawfulness of a section 94B certificate, which may be challenged only in judicial review, before the Upper Tribunal.

## **Background**

3. The claimant was born in [ ] 1998. The claimant is an EEA citizen who claimed to have arrived in the United Kingdom in 2010, when he would have been 12 years old.
4. In 2012, when he was 14, the claimant was arrested and reprimanded for aiding and abetting the theft of a bicycle. On 22 May 2014, at South-East Suffolk Juvenile Court, the 15-year-old claimant was convicted of theft of a bicycle, and sentence to a 4-month referral order and a victim surcharge of £15.
5. On 6 November 2014, now age 16, he was convicted at the same Juvenile Court of destroying or damaging property, and theft of a bicycle, and sentenced to a 6-month referral order, and a total of £850 compensation.
6. On 4 June 2015, not long before his 17<sup>th</sup> birthday, the claimant was convicted at Ipswich Crown Court of attempted robbery and burglary with intent to steal. He was sentenced to a 12-month youth rehabilitation order, 7 days' activity requirement, 3 months curfew with electronic tagging, and 12 months' supervision requirement.
7. On 4 February 2017, age 17, at Suffolk Juvenile Court, the claimant was convicted of battery, sentenced to 12 months conditional discharge, and ordered to pay compensation (£50).
8. On 6 May 2016, still age 17, the claimant was convicted at Ipswich Crown Court of being in possession of drugs (Class A crack cocaine) with intent to supply, and sentenced to 2 years' detention and training order. This is the index offence which caused the Secretary of State to consider removing the claimant from the United Kingdom pursuant to Regulation 19(3)(b) of the Immigration (European Economic Area) Regulations 2006 (as amended).

9. On 19 July 2016, Secretary of State gave the claimant notice of intention to make a removal decision under Regulation 24AA, and an opportunity to make representations, which he did. The deportation decision was made on 24 September 2016. In October 2016, the claimant was removed to Lithuania.
10. The claimant appealed to the First-tier Tribunal. On 12 June 2017, the claimant wrote to the First-tier Tribunal pleading for the deportation order to be revoked, and saying that his parents, 9 brothers and sisters, 3 aunts and their families, and all of his friends, were in the United Kingdom. He said he had been deported as soon as he was an adult, despite having committed no crimes after he turned 18.
11. The claimant returned to the United Kingdom to seek to attend his appeal hearing, but was refused entry, and on 6 July 2017, he emailed the First-tier Tribunal, saying he had been removed from the plane on Home Office instructions, and asking how he could enter the United Kingdom to attend the hearing. The First-tier Tribunal's email customer enquiry unit replied, erroneously, informing the claimant that unless he had a valid visa, he was not entitled to attend the hearing, and advising him to appoint a representative to attend on his behalf.
12. In relation to the EEA Regulations element of the certification, the claimant had not made an application before his removal, for suspension of the Regulation 24AA(2) certificate pursuant to Regulation 24AA(4), nor, since his removal, has he applied for readmission pursuant to Regulation 29AA in order to attend the hearing.

### **First-tier Tribunal decision**

13. The claimant did not attend the hearing, although he had tried to do so. He had been removed to Lithuania and when he travelled back to the United Kingdom, he was not permitted to enter, by reason of the section 94B certificate. In addition to seeking to re-enter the United Kingdom without making a Regulation 29AA application, the claimant had emailed the Tribunal saying that he was aware of the hearing and that his father would attend. His father did not attend.
14. The First-tier Tribunal Judge noted that the claimant did want to take part in the hearing; that he was not represented and had not yet taken legal advice; and that his father's accession country certificate and certain tax documents suggested that his father might have been exercising Treaty rights in the United Kingdom since about 2013, and arguably, since 2010.
15. The First-tier Tribunal Judge was satisfied that the claimant had been properly served with notice of hearing. She considered it in the interests of justice for the hearing proceeded in the claimant's absence.
16. The Home Office Presenting Officer, Ms Davies, invited the Judge not to decide the substantive issues in the appeal and to limit her finding to the lawfulness or otherwise of the section 94B certificate. The Judge considered adjourning the hearing with a preliminary finding to that effect, but decided that such would not be an appropriate way to proceed. She made an *obiter dicta* finding that, applying *R on the application of*

*Kiarie and Byndloss v Secretary of State for the Home Department* [2017] UKSC 42, the section 94B certificate was unlawful.

17. There continues to be no Regulation 29AA application by the claimant to come to the United Kingdom and attend the hearing.

### **Permission to appeal**

18. The Secretary of State sought permission to appeal the First-tier Tribunal decision on the basis that the First-tier Tribunal erred in law by not disposing of the appeal of which she was seised (see *Greenwood (no.2)* (Paragraph 398 considered) [2015] UKUT 629 (IAC)).
19. Permission to appeal was given on the basis that it was arguable that the First-tier Tribunal Judge had no jurisdiction to consider the validity or otherwise of the section 94B certificate, which is justiciable only in judicial review, and that the Judge should either have adjourned the proceedings or determined the appeal against deportation which was before her.

### **Rule 24 Reply**

20. There has been no Rule 24 Reply from the claimant.
21. That is the basis on which this appeal came before the Upper Tribunal.

### **Upper Tribunal hearing**

22. Mr Jarvis for the Secretary of State had prepared a skeleton argument. I have had regard to the contents of that skeleton argument, which clarify the issues. There being no appearance by or on behalf of the claimant, I reserved my decision and I decide this appeal on the basis of the papers in the file and Mr Jarvis' skeleton argument.

### **Discussion**

23. I have considered whether the Secretary of State can be heard to say that the Judge should not have limited herself to deciding the lawfulness of the section 94B certificate. I remind myself that it was the Home Office Presenting Officer who asked the Judge not to determine the appeal. Nevertheless, there is a patent error in the First-tier Tribunal decision which requires correction: in ruling on the lawfulness of the section 94B certificate, the First-tier Tribunal Judge exceeded her jurisdiction. At best, her decision is declaratory of settled law, but it remains *ultra vires* the First-tier Tribunal to make that decision. The effect of that error is that the decision of the First-tier Tribunal is no decision at all, in that the matters which were *intra vires* have not been decided.
24. I therefore set aside the decision of the First-tier Tribunal. The decision in this appeal will be remade in the First-tier Tribunal with no findings of fact or credibility preserved. The section 94B certificate is of no effect, following *Kiarie and Byndloss*, but if the claimant wishes to re-enter the United Kingdom to appear and be heard in the First-tier Tribunal, he will need to make an application under Regulation 29AA of the

EEA Regulations. As set out at [90] in the refusal letter, '[the Secretary of State] will grant [him] such permission unless [his] appearance may cause serious troubles to public policy or public security'.

25. If the claimant makes no such application, the appeal will be decided in his absence.

## DECISION

26. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law. I set aside the previous decision. The decision in this appeal will be remade in the First-tier Tribunal on a date to be fixed.

Date: 8 December 2017

Signed *Judith AJC Gleeson*  
Upper Tribunal Judge Gleeson

## Approval for Promulgation

Name of Upper Tribunal Judge issuing approval:	Mrs J A J C Gleeson
Appellant's Name:	M M
Case Number:	DA/00513/2016

Oral decision (please indicate)

I approve the attached Decision and Reasons for promulgation

Name: *Judith Gleeson*

Date: 8 December 2017

Amendments that require further action by Promulgation section: **None**