Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/22866/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 March 2018	**On 27th March 2018**

Before

UPPER TRIBUNAL JUDGE JORDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR CHRISTOPHER GEORGE GRUBER
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Secretary of State: Ms A. Fijiwala, Home Office Presenting Officer
For the Respondent: In person

DECISION AND REASONS

1. The Secretary of State appeals in the case of Mr Christopher Gruber (HU/22866/2016) against a determination that was made by First-tier Tribunal Judge Cockrill whose determination was promulgated on 18 July 2017. However, for the sake of continuity, I shall refer to Mr Gruber as the 'appellant' as he was before the First-tier Tribunal.

2. First-tier Tribunal Judge Cockrill determined that the certificate that the Secretary of State had issued under Section 94B of the Nationality, Immigration and Asylum Act 2002 was unlawful and that was the sole

conclusion that he reached. He did so because he considered that by his reading of the Supreme Court decision in *Kiarie and Byndloss v Secretary of State for the Home Department* [2017] UKSC 42 the imposition of the Section 94B certificate was unlawful. He did not provide any other reasons apart from saying in paragraphs 15 and 16:

> "15. My own reading of the Supreme Court decision led me to the conclusion that the interests of fairness and justice were served by declaring that as matters stood the decision was an unlawful one. I explained the impact of **Kiarie and Byndloss** to the appellant's family. They were entirely happy with my decision emphasising that the appellant had wished to be in a position to attend his appeal hearing to give oral evidence. …
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> 16. I have recognised that the appellant has committed a number of offences over a period of years but confining myself to this certificate I am bound by the Supreme Court decision in **Kiarie and Byndloss** concerning Section 94B. As I see it the certificate is in the circumstances unlawful."

3. In my judgement that was not a lawful approach by the First-tier Tribunal Judge. First, the Supreme Court did not decide that the entire system concerning s.94B was inevitably unlawful so that any s.94B certificate would inevitably be part of an unfair process.

4. Secondly, it was not the judge's function to deal with s.94B as if he were dealing with an application for judicial review. It was for him to deal with the Article 8 case which was the only matter before him as a ground of appeal to the First-tier Tribunal. It was therefore a requirement for him to proceed with the hearing of the Article 8 claim but, of course, he had to do so in light of the decision that was made by the Supreme Court in *Kiarie and Byndloss*.

5. Since that time we have also had the assistance that has been provided by the Court of Appeal in the case of *Nixon and Another v Secretary of State for the Home Department* [2018] EWCA Civ 3 in which Hickinbottom LJ gave a comprehensive and detailed reserved judgment in relation to the grant of permission to appeal in judicial review proceedings. His ultimate conclusion, as I understand it, was that he would adjourn the question of the lawfulness of the judicial proceedings in order to await the decision by the First-tier Tribunal.

6. It followed therefore that if the First-tier Tribunal by adopting the step-by-step approach which is advocated in both of those cases comes to the conclusion that the appeal cannot lawfully be determined unless the appellant is in the United Kingdom, the Tribunal should give a direction to that effect and adjourn the proceedings to enable the respondent to secure the appellant's return. The step-by-step approach involved consideration of a number of issues/questions. The first issue is that identified by the Supreme Court in paragraph 60 of its judgment and that is whether the appellant would be able to secure legal representation which might have been available to the appellant had he remained in the

United Kingdom. I am uncertain about the circumstances in which an individual can obtain legal advice in the United Kingdom in such cases. I do not know the conditions which have to be met until it is granted. Nor do I know whether the provision of legal aid is available in an out-of-country case. Hickinbottom LJ noted in the case before him that advice had been provided. It therefore requires one to consider whether or not the appellant is adversely affected by his inability to secure legal representation.

7. The second question was addressed in paragraph 74 of the Supreme Court judgment namely, whether the appellant's absence from the United Kingdom might present difficulties in his obtaining supporting professional evidence. That type of professional evidence might cover a number of matters. It might be material from the appellant's probation officer or the OASys report or it may be that it would cover, in an appropriate case, evidence from a consultant forensic psychiatrist or from an independent social worker and that would be a matter which would have to be determined on a case by case basis. It has to be noted that in the case of *Nixon* there had been no efforts to obtain any such professional evidence and consequently the question mark that was placed over this difficulty was one which was not found to exist in the case of *Nixon*.

8. The third question concerned the need for oral evidence from the appellant and in certain cases the evidence of the appellant would be of little or limited effect. In many cases he will not rely upon his own good standing to avoid deportation as a violation of his human rights but instead he will rely upon the evidence of those who are in the United Kingdom. In the context of this case, the First-tier Tribunal Judge had the benefit of the presence of the appellant's wife, the appellant's sister and two of his children. I too have their presence in the hearing before me although one child is a different one. In those circumstances the matter might well be resolved by what they are saying rather than what the appellant has to say.

9. The third question deals with whether or not the appellant needs to give oral evidence. That leads onto the fourth question and that is whether that oral evidence can be heard by a suitable means which is satisfactory and fair. Lord Wilson was sceptical about such a link as to whether it would be functionally adequate and also as to its costs and who will bear the costs. But these are matters which the Secretary of State may well have in hand and it will be a matter for the First-tier Tribunal Judge to determine whether live evidence can be given by video-link.

10. Those therefore are the stages which current case law sets out and it will be a matter for the First-tier Tribunal Judge to go through those stages and consider whether the process and the hearing will be a fair hearing. Inevitably that will require a decision to be made not at the outset of the hearing but in the course of the hearing if the judge comes to the view that it is simply impossible to reach a just result without having the appellant's presence in the United Kingdom. Then consideration will have

to be given to whether he should be the subject of a mandatory order for his return but that is a considerable way off, until we know what the issues are and until we have examined the advantages and disadvantages of the procedure which the First-tier Tribunal Judge will adopt.

11. In the circumstances of this appeal, the decision I reach is that the judge made an error of law. He was obliged to consider Article 8 and was not in a position simply to find that the certificate was an unlawful one. I therefore set aside the decision of the First-tier Tribunal and remit the appeal for hearing before a differently constituted division of the First-tier Tribunal.

DECISION

(i) The determination of the First-tier Tribunal discloses an error of law and is set aside.

(ii) The decision is to be re-made in the First-tier Tribunal.

ANDREW JORDAN
UPPER TRIBUNAL JUDGE

Dated 23 March 2018