Upper Tribunal
(Immigration and Asylum Chamber)

R (on the application of L) v Secretary of State for the Home Department (return of person removed: discretion) [2020] UKUT 00267 (IAC)

THE IMMIGRATION ACTS

Heard at Field House (Court 5) via Skype for Business	**Judgment Promulgated**
On 15 June 2020	………………………………

Before

THE HON. MR JUSTICE LANE, PRESIDENT

UPPER TRIBUNAL JUDGE O'CONNOR

Between

THE QUEEN

ON THE APPLICATION OF L

(ANONYMITY ORDER MADE)

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Applicant: Mr A Briddock, Counsel, and Mr D Grütters, Counsel, instructed by the Camden Community Law Centre

For the Respondent: Mr C Thomann, Counsel, instructed by the Government Legal Department

(1) A decision to remove a person (P) from the United Kingdom under immigration powers will not be unlawful by reason of the fact that it is predicated upon an earlier decision which has not, at the time of removal, been found to be unlawful, but which later is so found: AB v Secretary of State for the Home Department [2017] EWCA Civ 59; Niaz (NIAA 2002 s.104: pending appeal) [2019] UKUT 399 (IAC).

(2) The fact that P's removal was not unlawful will not necessarily preclude a court or tribunal on judicial review from ordering P's return. The fact it was lawful will, however, be a "highly material

factor against the exercise of such discretion": Lewis v Secretary of State for the Home Department [2010] EWHC 1749 (Admin).

(3) Where P's removal was unlawful, by reference to the position at the time of removal, that fact should not only constitute the starting point for the Tribunal's consideration of the exercise of its discretion to order return, but is also likely to be a weighty factor in favour of making such an order. The same is true where the effect of P's removal has been to deprive P of an in-country right of appeal.

JUDGMENT

A. BACKGROUND

1.
The applicant is a citizen of Nigeria. He entered the United Kingdom in 2005 as a student. He subsequently obtained further leave to remain in that capacity to April 2010. He said that he met his wife, an Italian citizen, in 2006.

2.
In January 2012, the applicant came to the attention of the United Kingdom authorities, when he was arrested on suspicion of fraud. He claimed to have lived in Italy with his wife and daughters from 2009 until his arrest in 2012. The couple had a son and daughter born in Italy in, respectively, 2009 and 2012.

3.
On 6 December 2013, the applicant was convicted at Chelmsford Crown Court on two counts of cheating the Public Revenue. On 5 September 2013, the applicant was sentenced to four years and six months' imprisonment on each count, to run concurrently. In his sentencing remarks, the judge described the applicant as the "prime mover" in a criminal enterprise of almost three years' duration, whereby the applicant and others under his control deployed stolen identities in order to submit 154 successful, but fraudulent VAT returns and repayment claims. The sums secured were laundered through a series of different accounts at substantial, and irrecoverable, cost to the United Kingdom taxpayer.

4.
On 23 September 2014, the applicant made a claim for asylum. In November 2015, however, he notified the respondent's Criminal Casework Directorate that he wished to withdraw the claim; and that he had applied for a residence card as a member of the family of an EEA national, namely his wife. That application was refused on 25 November 2015. The applicant lodged an appeal against the refusal. Directions for the applicant's removal from the United Kingdom were cancelled, in order for the respondent to ascertain the status of the appeal. A renewed date for removal was then set for 26 January 2016 and the applicant served with new removal directions on 14 January 2016.

5.
Those directions were cancelled when, on 26 January 2016, the applicant made a fresh claim for asylum. A substantive asylum interview took place with the applicant in June 2016 and on 29 July 2016 the applicant's representatives served further materials on the respondent in connection with that claim.

6.

On 25 April 2017, the respondent refused the asylum claim. The respondent's decision runs to 155 paragraphs. It began by accepting that the further submissions amounted to a fresh asylum claim within paragraph 353 of the Immigration Rules. Given the terms of paragraph 353, this meant that the respondent was satisfied that the submissions had not already been considered and that "taken together with the previously considered material, [they] created a realistic prospect of success, notwithstanding its rejection". As we shall see, this factor is important.

7.
The refusal decision explained why the respondent decided to certify the applicant's asylum claim under section 72 of the Nationality, Immigration and Asylum Act 2002. The respondent was satisfied that the applicant's convictions comprised the final judgment by a court of the United Kingdom of conviction of a particularly serious crime, such that the applicant constitutes a danger to the community of the United Kingdom.

8.
The decision letter then proceeded to consider the applicant's claim to be at risk of serious harm, if returned to Nigeria. The two bases of the applicant's claim were that he is bi-sexual and had converted to Christianity from Islam. The applicant said that in May 2013 he had returned to Nigeria for a holiday and that his friends there had arranged a sex party involving male prostitutes. The applicant agreed to pay a substantial sum of money towards the costs of hiring the prostitutes. The applicant left Nigeria, returning to Italy in June 2013, where he remained until August 2013 when he travelled to the United Kingdom, being arrested upon arrival and subsequently imprisoned.

9.
As this meant the applicant had been unable to pay the balance of the money owed to the male prostitutes, they began to hassle his friends in Nigeria; and those friends gave the male prostitutes the contact details of the applicant's family. The applicant also believes that the male prostitutes reported him to the Nigerian police. He said that the police had been to his family home in Nigeria in January 2016, looking to arrest the applicant for taking part in a gay sex party and having sex with another man.

10.
The applicant also said he had received threats from his family and from friends of his father because they had discovered his bi-sexuality and his conversion to Christianity. His wife had also been made aware of the family's attitude. All this had caused the applicant to become anxious and depressed.

11.
The decision letter considered the background information on the attitude of the Nigerian authorities towards gay men. It was accepted that societal hostility and discrimination against LGBT persons exists in Nigeria and that same sex relationships there are illegal. Prosecutions are, however, rare.

12.
The respondent did not accept that the applicant had returned to Nigeria in May 2013. Nothing in his passport indicated such travel, there being no Nigerian entry or exit stamps.

13.
The respondent's overall conclusion was that the timing of the applicant's claim for asylum meant it had been fabricated in an attempt to frustrate his removal from the United Kingdom. The decision did, however, consider the general evidence regarding religious conversion from Islam to Christianity in Nigeria. It was concluded that there were avenues of redress available to the applicant, if he were to

encounter difficulties on return in this regard. It was, therefore, not accepted that the applicant had a well-founded fear of return to Nigeria on the basis of the risk posed to him by non-state agents on the grounds of religious intolerance.

14.
The decision then addressed the ability of the applicant to relocate within Nigeria, concluding that there were parts of Nigeria, in which he would not have a well-founded fear of persecution, to which it would be reasonable to expect the applicant to go.

15.
Having considered the position regarding treatment for mental illness in Nigeria, the decision then explained why the respondent concluded under paragraph 339D of the Immigration Rules that the applicant had committed a serious crime, such as to deprive him of the benefits of humanitarian protection.

16.
After considering, and rejecting, the applicant's claim by reference to Article 8 of the ECHR, the applicant was given a section 120 notice, requiring him to tell the respondent if the applicant's circumstances changed, such that he had new reasons for wishing to remain in the United Kingdom.

17.
The decision ended by informing the applicant that he had a right of appeal against the decision, exercisable under section 82(1) of the 2002 Act. The decision stated that the respondent had decided not to certify the applicant's human rights claim under section 94B of the 2002 Act; but this was not to be treated as a "concession that the Secretary of State is satisfied that there will be a real risk of serious irreversible harm, before the appeal process is concluded, if you are removed to the country to which it is proposed to remove you". If it were to be decided, during the course of the appeal, to certify under section 94B, the applicant would be informed.

18.
Paragraph 151 is headed "Removal":-

" 151. If you do not appeal, or you appeal and the appeal is unsuccessful, or your human rights claim is later certified under section 94B … and if you do not leave the UK voluntarily you will be removed from the UK to Nigeria."

B. APPEAL TO THE FIRST-TIER TRIBUNAL

19.
The applicant appealed to the First-tier Tribunal.

20.
On 6 November 2017, the applicant attended a case management hearing before that Tribunal. It is common ground that, by this stage, the applicant was no longer receiving the services of Duncan Lewis Solicitors, who had previously assisted him and to whom the respondent's refusal decision had been sent. It is also common ground that, at the CMR hearing, the applicant informed the Tribunal of his change of address from address A to address B. Address A had been the applicant's bail address.

21.
The respondent's representative at the CMR hearing updated her records with address B. According to the grant of permission of appeal on 4 April 2018, which related to the subsequent substantive

hearing of the applicant's appeal, the First-tier Tribunal recorded address B on the file flap of the applicant's file "although the old address has not been crossed through".

22.
Very regrettably, the First-tier Tribunal sent the notice of substantive hearing to the applicant at address A.

23.
At the substantive hearing, on 19 December 2017 there was no appearance by the applicant. The judge conducting that hearing dealt with the consequences of the applicant's non-attendance as a preliminary issue:-

" **Preliminary Issue**

22. Neither the Appellant nor his solicitors, Duncan Lewis appeared at the hearing; there was no evidence that they had notified the Tribunal that they had withdrawn from the appeal. At 10.00 a.m. the Appellant had not appeared and I adjourned the hearing until 11.10 a.m. when again the Appellant had still not appeared and there was explanation offered for his failure to attend. I satisfied myself that notice of the hearing had been sent to the Appellant and to his representatives; it was served on the Appellant on 15 November 2017. The matter was the subject of a case management review on 6 November 2017 at which the Appellant's representative had not attended but the Appellant had attended in person and the Respondent's representative stated that notes on her file indicated that … Duncan Lewis were no longer representing the Appellant and that the Appellant confirmed that he and his wife would be giving evidence and the matter was listed for hearing and Directions made.

23. The notice of hearing was sent to the Appellant at the address provided to the Tribunal [address A] which the Respondent confirmed was the address to which he had been bailed. The Respondent's representative stated that the Respondent's bundle had been sent to the Appellant on 14/11/2017 and that the Appellant had also been advised in the covering letter from the Respondent that it was being sent to him for the hearing on 19/12/2017 and that the bundles had been sent to the Appellant at the two addresses which the Respondent had for him, his bail address at [Address A] and an alternative address at [Address B]. The Respondent's representative advised that Home Office records confirmed that the Appellant had absconded and failed to report in accordance with his bail conditions.

24. I determined to hear the appeal in the absence of the Appellant."

24.
Through Mr Thomann, the respondent accepts that she has been unable to confirm the correctness of what the Presenting Officer told the First-tier Tribunal Judge, as recorded in paragraph 23 of the latter's decision, regarding service of the bundle on the applicant at address B. That is of considerable significance, since the First-tier Tribunal judge was given to understand that the applicant had been put on notice of the date of the hearing by the respondent's covering letter, which had been sent to address B.

25.
The First-tier Tribunal Judge upheld the section 72 certificate, meaning that the applicant was not entitled to recognition as a refugee, even if he were at risk of persecutory harm in Nigeria. So far as serious harm was concerned, the judge found that the applicant had not submitted any evidence, such as a passport, landing stamp or airline tickets, to establish he was in Nigeria in 2013, when the sex

party was said by him to have taken place. In any event, she did not find the applicant's account of the aftermath of the sex party to be credible.

26.
So far as conversion to Christianity was concerned, the judge found that the applicant had not filed any evidence in support of this aspect but that, in any event, he could relocate to an area where he would not be at real risk of persecution by reason of religion.

27.
As a result of her findings, the First-tier Tribunal Judge agreed with the respondent that the applicant was not at real risk of suffering serious harm, such as to entitle him to humanitarian protection.

28.
The judge dismissed the applicant's appeal. Her decision was sent to the applicant at address A.

C. APPLICATION FOR PERMISSION TO APPEAL

29.
As we have already seen, in April 2018, the First-tier Tribunal granted permission to appeal. It is important for our purposes to examine how this came about.

30.
On 9 February 2018, the respondent wrote to the applicant at address B, inviting him to attend a telephone interview with the authorities of the Nigerian High Commission, to be held on 13 February 2018. The letter said the interview was to take place at Becket House Enforcement Office.

31.
On 13 February 2018, the applicant enquired of the First-tier Tribunal about the status of his appeal. He was informed (apparently by telephone) that his appeal had been dismissed. On 14 February, new solicitors acting for the applicant notified the First-tier Tribunal of the reason for his non-attendance at the hearing in December 2017. The solicitors requested a copy of the First-tier Tribunal Judge's decision.

32.
It is common ground that the applicant did not attend Becket House for the telephone interview with the Nigerian High Commission on 13 February 2018. It is also the case that he failed to report to the respondent on 15 February 2018, as required by the conditions of his immigration bail. The applicant provided a medical note as an explanation for his inability to report on that day.

33.
On 20 February, the applicant's present solicitors contacted the respondent to advise her that they now represented the applicant and that they had sent a letter to the First-tier Tribunal, challenging the decision to dismiss his appeal without the applicant being present at the hearing.

34.
On 22 February, the applicant again failed to attend his reporting appointment. On 15 March, the applicant was encountered at the Quayside in Merseyside, attempting to board a ferry bound for Belfast. The applicant was detained.

35.

On 20 March, the applicant received from the First-tier Tribunal the decision of the First-tier Tribunal Judge, dismissing his appeal. On the following day, 21 March, the applicant applied to the First-tier Tribunal for permission to appeal.

36.
In the light of what happened next, it is important to establish the status of that application for permission. Rule 33 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 provides that a party seeking permission to appeal to the Upper Tribunal must make a written application to the First-tier Tribunal for permission to appeal. Except where the party in question is outside the United Kingdom, the application for permission must be provided, so that it is received by the First-tier Tribunal no later than fourteen days "after the date on which the party making the application was provided with written reasons for the decision" (rule 33(2)).

37.
It is, accordingly, now common ground that the application for permission which the applicant made on 21 March 2018 was not out of time, being received by the First-tier Tribunal within the period specified in rule 33(2). The grant of permission of 4 April 2018 appears to proceed on that basis. Although the granting judge described the application as "late being due on 24 Jan 2018", having noted the factual position, as just described, she did not extend time but merely granted permission.

38.
The granting judge stated in her reasons for decision that this was a case where, had she the power, she would have used rule 32 of the First-tier Tribunal Rules to set aside the decision to dismiss the appeal. We observe that, were she to have been deciding the matter at the present time, the granting judge could have exercised that power and would, in our view, have been entirely right to do so. The applicant had been denied a fair hearing, through no fault of his own. The First-tier Tribunal Judge's decision, dismissing his appeal, could not possibly stand.

39.
Unsurprisingly, therefore, on 22 May 2018 the Upper Tribunal allowed the applicant's appeal and remitted the matter for a fresh hearing before the First-tier Tribunal.

D. THE REMOVAL OF THE APPLICANT

40.
By the time the First-tier Tribunal granted permission to appeal, however, the applicant was no longer in the United Kingdom. The respondent had removed him to Nigeria on 28 March 2018. The events immediately leading up to removal are as follows.

41.
Removal directions were set for 28 March 2018. An internal email of the respondent dated 27 March 2018 from OSCU, replying to a request from a senior caseworker, stated as follows:-

"I have discussed this case with the OSCU Duty SCO.

The out of time PTA application would not normally operate as a bar to removal and we would usually argue that the subject would have to apply for an injunction for removal to be stayed.

However, we consider that the subject does have a point about his change of address and that the Tribunal has made a mistake in not updating their records and so denying him the opportunity of attending his appeal etc. It is possible that the Tribunal will accept the out of time permission

application due to the reasons given. I note that our CID records show that we updated the subject's address around the time he says he notified the HO and the Tribunal of the change. And I also see that the Tribunal sent the appeal determination to the subject's previous address.

So in summary we consider that RDs should be deferred in this case pending the Tribunal's decision on the PTA application and the outcome of any possible further hearing.

Please defer RDs and I will inform RL Charters and DEPMU separately."

42.
Notwithstanding that advice, an official of the respondent's Criminal Casework Team 2 in Liverpool decided to make enquiries with the First-tier Tribunal. The enquiry of 28 March was as follows:-

"Hello

I have been advised by your call centre the Permission to Appeal application is with yourselves pending a hearing.

Can we request the application is placed before a Judge at the earliest as [applicant] has removal directions set for this evening.

It is noted he had become appeal rights exhausted on 25 January 2018 and only lodged an out of time application once he had been detained under Immigration Powers and served with removal directions.

As such, the current application prevents his removal.

I would be grateful if you could ask a Judge to look at the application today and inform me of any outcome by email-

Many thanks".

43.
It can be appreciated that this communication, although couched in terms of an out of time application, made plain the sequence of events described above. It also stated in terms that the application for permission prevented the applicant's removal.

44.
Later on 28 March, a clerk in the First-tier Tribunal in Newport emailed the following response:-

"I have received the following direct from the Duty Judge;

'An out of time application for leave to appeal is not a bar to removal. The appeal will be considered in due course.'"

45.
In purported reliance on that communication from the clerk, the applicant's removal directions were maintained and he was removed from the United Kingdom.

E. POST-REMOVAL EVENTS

46.
Following the decision of the Upper Tribunal to remit the applicant's appeal to the First-tier Tribunal, that Tribunal held a case management hearing on 21 May 2019. At that CMR, the respondent

indicated that she would facilitate the provision of evidence by the applicant via a video-link facility from the British Deputy High Commission in Lagos.

47.
At a further hearing, on 29 September 2019, the First-tier Tribunal decided that it was inapt to rule on whether the First-tier Tribunal could hear any the appeal by video-link, compatibly with the findings of the Supreme Court in Kiarie & Byndloss v Secretary of State for the Home Department [2017] UKSC 42, as explained by the Upper Tribunal in AJ (s.49B: Kiarie & Byndloss questions) Nigeria [2018] UKUT 115. The matter was adjourned in order to give the respondent an opportunity to consider her position.

48.
Following submissions from the respondent, the First-tier Tribunal decided on 20 January 2020 that it did not have power to direct the respondent to return the applicant. By this stage, the present judicial review proceedings were in prospect.

F. THE JUDICIAL REVIEW

49.
In the present proceedings, the applicant seeks an order requiring the respondent to arrange and facilitate the return of the applicant to the United Kingdom within fourteen days. Permission to bring judicial review proceedings was granted by Upper Tribunal Judge McWilliam on 1 May 2020. She made directions with regard to the hearing being by Skype for Business , to which neither party objected.

50.
In a statement dated 11 March 2020, the applicant describes how he was able in December 2018 to attend the High Court in Ibadan in order to produce an affidavit, which records that the applicant was arrested by the Nigerian police “over an allegation of same sex activities” and that “I have to go through series of molestation [sic] in the form of series of beating and intimidation by residents of different places where I have sought accommodation”. The applicant also said that he was at risk of being arrested and prosecuted, which may lead to a fourteen year jail term.

51.
In his witness statement, the applicant said that there are “very few people who are willing to interact with me here in Nigeria”. Some feel sorry for him and secretly give him handouts. He is in touch with four friends who are part of the LGBT underground community in Lagos and attends some social gatherings with them, although this is not easy. The abandoned building where he had been living had been raided by police, who beat him.

52.
In her statement of 2 June 2020, Joanna Sherman of Camden Community Law Centre describes conversations with the applicant in May 2020, in which he told her that he would be able to travel to Lagos Airport by bus. The fare, approximately £1, could be obtained by asking people for it. The applicant said that “people are able to move around Nigeria again”, following the onset of the Covid-19 pandemic.

53.
The hearing took place on 15 June 2020. It was conducted in open court at Field House, with counsel appearing by video-link (Skype for Business). No material technical difficulties were encountered

during the hearing. We are satisfied that both Mr Briddock and Mr Thomann were able to make their cases effectively, by these means.

(a) Unlawful removal

54.
It is important to establish whether the applicant's removal was unlawful at the time it took place.

55.
It is now established that a decision to remove a person from the United Kingdom under immigration powers will not be unlawful if and to the extent that it is predicated upon an earlier decision which has not, at the time of removal, been found to be unlawful, but which later is so found. The Upper Tribunal summarised the position in Niaz (NIAA 2002 s.104: pending appeal) [2019] UKUT 399:-

"31. In this regard, Mr Kotas rightly relied upon the judgment in AB v Secretary of State for the Home Department [2017] EWCA Civ 59 . In that case, the appellant had been removed following an unsuccessful appeal that had been heard pursuant to the so-called detained fast track process, which was subsequently held to be unlawful. An application for judicial review compelling the respondent to use her best endeavours to facilitate and fund the appellant's return to the United Kingdom, in order to take a direct and active part in the appeal process (which was again ongoing, following the withdrawal of the detained fast track regime), was unsuccessful. The Court of Appeal regarded itself as bound by its earlier judgments in Draga v Secretary of State for the Home Department [2012] EWCA Civ 842 and Fardous v Secretary of State for the Home Department [2015] EWCA Civ 931 . In those cases, the court had refused to hold that a decision of the respondent taken in pursuance of her immigration powers must be treated as unlawful, merely because the respondent's decision was taken by reference to the decision of another body which was later found to have been unlawful. McFarlane LJ, giving judgment in AB , held as follows:-

'69. This court is bound by the decisions in Draga and Fardous . The starting point for our consideration must be that, in absence of any additional basis for holding that decision 'B' was made unlawfully, a later finding that, in the event, an earlier decision 'A' that was relied upon was unlawful does not, of itself, affect the validity of decision 'B'. Absent any separate basis for holding that the SSHD acted unlawfully in making and implementing the decision to remove AB to the Cameroon in December 2014, the fact that, subsequently, the DFT regime and his FTT appeal have been held to have been unlawful does not render the separate removal decision unlawful or establish that the SSHD was not entitled, at the time, to rely upon the legal validity of the DFT scheme and the tribunal decisions relating to the appeal and the refusal of a stay.'"

56.
In PN v Secretary of State for the Home Department [2019] EWHC 1616 (Admin), Lewis J rejected the submission that AB was not binding. His reasoning was that (a) counsel for the claimant in AB had not, in fact, formally conceded that the removal direction would not be unlawful simply because of the subsequent finding that an appeal determination was unlawful; and (b) notwithstanding counsel's stance, the Court of Appeal in AB had gone on to consider the issue of law. As a result, Lewis J held that AB was binding on the High Court: paragraph 138.

57.
On the other hand, even where removal was not unlawful, this will not necessarily preclude a court or tribunal on judicial review from ordering the person's return. So much is plain from paragraph 34 of the judgment of Blake J in Lewis v Secretary of State for the Home Department [2010] EWCH 1749

(Admin). The fact that removal was lawful will, however, be “a highly material factor against the exercise of such discretion”: paragraph 38(iii).

58.
Mr Briddock submitted that where removal was unlawful at the time, this should be the starting point for the court or tribunal, in deciding whether to exercise its discretion to order return. In this regard, Mr Briddock relied upon paragraph 49 of the judgment of the Court of Appeal in YZ (China) v Secretary of State for the Home Department [2012] EWCA Civ 1022. It must, however, be observed that YZ (China) was a case where the respondent had acted lawfully in deporting the claimant. The certificate, pursuant to which deportation took place, had not been declared invalid at that time.

59.
Despite this observation, we agree that where the respondent has no legal basis for removing an individual, by reference to the position as at the time of removal, this should not only constitute the starting point for the Tribunal’s consideration of the exercise of its discretion to order return, but is also likely to be a weighty factor in favour of making such an order.

60.
In any event, the judgments of Richards LJ in YZ (China) and Lewis J in PN both emphasise that where the effect of removal has been to deprive an individual of an in-country right of appeal to which he or she is entitled by statute, that in itself should be the starting point. It is, in our view, also likely to be a weighty factor in favour of ordering return.

61.
We have no hesitation in concluding that, on its own terms, the removal of the present applicant to Nigeria on 28 March 2018 was unlawful. Section 78 of the 2002 Act prohibits a person from being removed from the United Kingdom whilst their appeal is “pending” within the meaning given by section 104. Section 104 provides that an appeal is pending during the period when it is instituted and ending when it is finally determined, withdrawn or abandoned (or when it lapses under section 99). Section 104(2) provides that an appeal is not finally determined while an application for permission to appeal under section 11 or 13 of the Tribunals, Courts and Enforcement Act 2007 could be made or is awaiting determination.

62.
The applicant was not served with the First-tier Tribunal Judge’s decision, dismissing his appeal until 20 March 2018. The period within which he could apply to the First-tier Tribunal for permission to appeal to the Upper Tribunal accordingly did not expire until 3 April 2018. The applicant in fact sent his application for permission to the First-tier Tribunal on 21 March 2018. The applicant’s removal was, accordingly, a breach of section 78.

63.
Whether or not the respondent knew or should have known that she had no power to remove the applicant is plainly a matter of considerable significance, in deciding whether to exercise discretion to order the respondent to take best endeavours to effect the applicant’s return. Indeed, there would be serious implications for the rule of law if courts and tribunals did not treat deliberate or reckless law-breaking as an extremely weighty consideration, when exercising discretion in judicial reviews.

64.
In the present case, the respondent was plainly in possession of the facts, which should have led her to conclude that the applicant had applied to the First-tier Tribunal in time for permission to appeal.

The email from OSCU (paragraph 41 above) makes this apparent. The fact that the official nevertheless considered the application to be out of time is immaterial. The respondent knew the relevant dates and that there was a likelihood the First-tier Tribunal would accept the application for permission. OSCU's view, that the removal direction should be deferred pending the Tribunal's decision on the permission application and the outcome of any possible further hearing was entirely right.

65.
The email of 28 March to the First-tier Tribunal from the Criminal Casework Team 2 (paragraph 42 above) likewise shows beyond doubt that at the time of sending that email the respondent did not consider she had power to remove the applicant. Had the duty judge seen that communication (which it seems he or she did not), it is impossible to envisage that the Duty Judge would have responded in the terms communicated to the respondent by the clerk.

66.
The respondent's state of knowledge was such that the message conveyed to her by the Tribunal's clerk plainly ought to have been recognised as giving no support at all for a decision to go ahead with the applicant's removal. The respondent, at best, ought to have recognised that the communication in no way undermined the stance taken by OSCU. At worst, it suggests that someone decided to take unwarranted and opportunistic advantage of what the message contained.

67.
We therefore find that the applicant's removal was unlawful, viewed as at the date of removal, and that the respondent knew this or ought to have known it. This is our starting point in deciding whether an order with respect to return should be made. It is also, in the circumstances, a very weighty matter in favour of making such an order.

(b) Other relevant factors

68.
We have said at paragraph 60 above that significant weight is also likely to be placed on the fact that removal has deprived a person of their statutory right to an in-country appeal. Like Lewis J, we regard this factor as particularly significant, where the appeal concerns a claim of real risk of persecution or other very serious harm.

69.
The applicant's claim, based on his sexuality and religious conversion, was treated by the respondent as a fresh claim. As one can see from paragraph 353 of the Immigration Rules, that necessarily means that the respondent accepted that – although she had rejected the claim – there was nevertheless "a realistic prospect of success" on appeal to the First-tier Tribunal (paragraph 6 above).

70.
The First-tier Tribunal Judge, who dismissed the appellant's appeal, proceeded with the hearing because of the Tribunal's error in sending the notice of hearing to an address at which the application no longer resided. This was despite the fact that the applicant had told the Tribunal at the CMR of his change of address.

71.
The First-tier Tribunal Judge also appears to have been influenced by the assertion of the Presenting Officer that information regarding the hearing had, nevertheless, been communicated by the

respondent to the appellant at address B. The respondent is, however, entirely unable to confirm that what the Presenting Officer said was correct. Although we have no reason at all to ascribe any improper motive to the Presenting Officer, the respondent has nevertheless thereby influenced the First-tier Tribunal Judge’s decision to go ahead with the hearing in December 2017.

72.

Cumulatively, these are, we find, extremely powerful factors weighing on the applicant’s side, in deciding whether to exercise discretion to order the respondent to take steps to effect the applicant’s return to the United Kingdom, for the purposes of having his appeal heard here, as required by law.

73.

Mr Thomann realistically recognised the difficulties in resisting any finding that removal was not lawful. As a result, his submissions focussed upon other factors.

74.

Mr Thomann asked us to regard the applicant as someone who was adept at “playing the system”, as can be seen from his immigration history. He was also a person who had committed very serious offences of dishonesty. He is a foreign criminal, whom the public interest requires to be removed from the United Kingdom.

75.

More recently, the applicant had behaved badly by failing to report in February 2018, being encountered trying to board a ferry to Belfast.

76.

We entirely accept that the appellant’s history is very problematic, both as regards his criminality and his immigration history. The fact of the matter is, however, that the applicant was afforded an in-country right of appeal in respect of his asylum and general protection claims.

77.

We place little weight on Mr Thomann’s attempt to make something material of the failures to report in February 2018 and the encounter at the docks in Merseyside with immigration officials. The applicant had been reporting regularly for a significant period beforehand. Although in no way exculpating the applicant, the unsatisfactory way in which he came to know of the First-tier Tribunal’s decision has, to some extent, to be borne in mind. Whilst attempting to board a ferry to Belfast might indicate that the applicant had it in mind to reach the Republic of Ireland, this is essentially speculative.

78.

So far as the applicant’s conviction is concerned, we note that at paragraph 56 of YZ (China) , Richards LJ found he would not place much weight on the seriousness of the appellant’s conviction in that case “in circumstances where but for the unlawful certificate (as it is assumed to be) the appellant would have had the right to remain in the United Kingdom to pursue an in-country appeal notwithstanding the seriousness of his conviction”. In the circumstances of the present case, we likewise do not consider it appropriate to give the fact of the applicant’s criminal offending much weight.

79.

Mr Thomann submitted that it was relevant to consider whether the appellant might suffer irreparable harm, whilst remaining in Nigeria to await an out-of-country appeal by video-link from Lagos to the

United Kingdom. He pointed to the findings of the First-tier Tribunal Judge; in particular, the fact that the LGBT element of the applicant's claim was grounded in an alleged party in Nigeria in 2013. The applicant's passport had nothing to show that the applicant might even have been in Nigeria in that year. The evidence of alleged threats was, in any event, weak.

80.
So far as concerned the applicant's present position in Nigeria, Mr Thomann said there was little if any evidence to support the assertion he was destitute. That assertion was, in any event, difficult to reconcile with the volume of the applicant's communications with persons in the United Kingdom. The applicant was a sophisticated individual. He had two sets of relatives in Nigeria. It could not be said that he was at risk of irreparable harm, if required to remain in that country pending the hearing of his appeal.

81.
Although we do not discount these matters, for the purposes of determining how to exercise our discretion we do not consider that they can be given anything other than limited weight. The fact is that the First-tier Tribunal Judge's decision has been set aside in its entirety. Furthermore, the respondent's attempt to rely on these matters once again faces the difficulty that the respondent decided to treat the applicant's submissions on risk going to sexuality and religious conversion as a fresh claim.

82.
Mr Thomann suggested that there was no risk of irreparable harm if the applicant, were, for the time being, to decline openly to express his sexuality. Mr Thomann accepted that there was some evidence of the authorities in Nigeria persecuting people who did not remain discrete.

83.
Mr Thomann's use of "irreparable harm" recalls the reference to "serious irreversible harm" in section 94B(3) of the 2002 Act. That section, however, concerns a power of certification, which has not been employed by the respondent in the present case. Indeed, Mr Briddock submitted that in practice section 94B certificates were issued in respect of cases concerning Article 8 ECHR claims rather than claims involving Article 3.

84.
In any event, it is an unattractive argument of the respondent to submit that, having been unlawfully removed from the United Kingdom and so deprived of his statutory in-country right of appeal, the applicant should be expected to moderate his sexual behaviour, whilst he awaits the outcome of an appeal that the respondent says the applicant should conduct from Nigeria.

85.
Having weighed all various matters, in the light of counsels' submissions, we conclude that (subject to what follows regarding Covid-19) the factors weighing in favour of the making of an order to secure the applicant's return significantly outweigh the factors lying on the respondent's side of the balance.

(c) Covid-19

86.
The Covid-19 pandemic has complicated matters. As at the date of the hearing, the position was that the effects of the pandemic in Nigeria were such that relevant personnel were not available at the Deputy High Commission in Lagos, in order to facilitate a video-link hearing with the First-tier

Tribunal in the United Kingdom. Mr Thomann's instructions were that, as at 15 June, the respondent was not in a position to say when this state of affairs might be likely to change for the better.

87.
The position regarding air travel was that flights both within Nigeria and internationally were suspended. Domestic flights were due to resume on 21 June 2020. International flights would, it appeared, resume at some unspecified time thereafter.

88.
The effects of the pandemic had been, Mr Thomann said, to create a backlog of hearings in the First-tier Tribunal. Appeals were, however, beginning to be heard once more, although these were in the main remote hearings conducted by video-link.

89.
Drawing these threads together, Mr Thomann submitted that the point had not yet been reached when it would be appropriate for the Upper Tribunal to make an order regarding the applicant's return, in the light of the Covid-19 pandemic. The matter could and should be re-visited in two months.

90.
Mr Briddock submitted that, notwithstanding the pandemic, the Tribunal should order the respondent to use best endeavours to effect the applicant's return.

91.
Following the hearing, on 25 June 2020 the respondent wrote to the Tribunal to say that the Embassy (sic) in Lagos had agreed to facilitate the applicant's appeal from outside the United Kingdom. Should statutory appeals resume in the United Kingdom, a team could be put in place to oversee the use of video conferencing facilities required for the applicant's effective appeal.

92.
The applicant's solicitors objected to the production of this letter, on the basis that it post-dated the hearing. In any event, it was submitted that the letter did not address the issues raised by the applicant, including the evidence of Ms Sherman, who spoke of her difficulties taking instructions from the applicant, whilst he remains in Nigeria.

93.
On 3 July 2020, the respondent wrote a further letter to the Tribunal. As well as pointing out that the information in the letter of 25 June necessarily post-dated the hearing, the 3 July letter said that the Deputy High Commission facility was taking steps to recommence video hearings, although a specific date for hearings to recommence remains unknown. The respondent had, nevertheless, received confirmation that special arrangements can be made for a video hearing for the applicant should there be a need prior to the main operations restarting. A number of measures were said to be in place to make this possible. Further information on these could be supplied if necessary.

94.
We note that neither party has sought to adduce evidence regarding the present position of air travel within and to and from Nigeria.

95.
We have found the Covid-19 issue the most difficult aspect of the case. As is well-known, at the present time there is much uncertainty about the future course of the pandemic, both in the United Kingdom and worldwide.

96.
Despite the applicant's challenge, we have had regard to the letters of 25 June and 3 July. In the unusual circumstances of this case, it would be wrong to decide relief on anything less than the most up-to-date position following the outbreak of Covid-19 in Nigeria.

97.
We have come to the conclusion that, despite the difficulties presented by Covid-19, it is appropriate now to make an order, requiring the respondent to use her best endeavours to secure the applicant's return to the United Kingdom for the purposes of his appeal. Our reasons are as follows.

98.
The applicant's case for return is a very strong one. Particularly in the light of our findings regarding the state of knowledge of the respondent on the date the applicant was removed, the respondent needs to show quite clearly that an out of country appeal is, in the circumstances, the best option for the appellant, having regard to timescale, the applicant's position in Nigeria and his ability to communicate with his solicitor.

99.
This is not a case where the respondent is entitled to succeed on this issue if the questions articulated in AJ (see paragraph 47 above) fall to be answered in the respondent's favour. As the First-tier Tribunal rightly held, we are not here concerned with certification under section 94B. The issue is not one of Article 8 in its procedural aspect, as it was before the Supreme Court in Kiarie and Byndloss . We are here concerned with the grant of relief in a case where the respondent acted unlawfully in removing an individual, in circumstances where the respondent knew of, or was wilfully blind to or, at best, ought to have recognised, that unlawfulness; and where the individual was thereby deprived of an in-country right of appeal against the refusal of a protection claim.

100.
In view of this, we do not consider it is appropriate to examine the evidence of Ms Sherman (paragraph 92 above) through the prism of the AJ questions, which include asking whether removal has deprived the individual of the ability to give instructions/receive advice from United Kingdom lawyers (our emphasis). Rather, we take Ms Sherman's unchallenged evidence as it stands and accept she has difficulties in communicating with the applicant, which she would not have if the applicant were enjoying his legal right to conduct his appeal whilst in the United Kingdom. In deciding upon remedy, we take these difficulties into account.

101.
It is, of course, relevant that, according to the applicant, he is at risk whilst he remains in Nigeria. The evidence from him does not, however, suggest that he regards himself as in immediate peril. This may, of course, be because the applicant is moderating his behaviour and movements, which is not something one should expect him to have to do. Nevertheless, it is apparent that, despite all this, and despite knowing of at least the possibility of conducting his appeal from Nigeria, the applicant's position continues to be that he would prefer to return to the United Kingdom, as soon as circumstances allow. This is a matter to which we must have regard in deciding upon remedy.

102.
So far as the position of the First-tier Tribunal is concerned, we are aware that both remote and (at least some) face-to-face hearings are now in prospect and that the listing of such cases is beginning. If the applicant were returned to the United Kingdom, we would expect the First-tier Tribunal to be sympathetic to an application (by either party) for expedition, given the history of this case.

103.
The greatest problem is the suspension of commercial air travel to and from Nigeria, which appears to extend to chartered aircraft. As matters stand, there is no indication of when such air travel might recommence.

104.
We take judicial notice of the economic (and social) importance of air travel, for both business and leisure purposes. A number of countries, including the United Kingdom, are attempting to resume such travel, albeit on a limited basis at present. We are unaware of any reason to assume the Nigerian authorities are not anxious to resume international flights (including to Europe), as soon as practicable; or why the United Kingdom government would not take the same view of such a resumption.

105.
Having regard to all these matters, we find that, despite the position regarding Covid-19, the applicant should not be required to conduct his appeal from Nigeria but should be returned for that purpose by the respondent to the United Kingdom.

G. DECISION

106.
We declare the removal of the applicant on 28 March 2018 to be unlawful. We conclude we should order the respondent to use her best endeavours to arrange and facilitate the return of the applicant to the United Kingdom.

107.
We shall hear counsel on the form of the order, if the same cannot be agreed. As we indicated at the hearing, in the light of the Covid-19 situation, it may be necessary for the order to be more specific as to what best endeavours does or does not comprise, in terms of making air travel arrangements. There will, in any event, be a need for the order to include liberty to apply.

Direction Regarding Anonymity – rule 14 of the Tribunal Procedure (Upper Tribunal) rules 2008

Unless and until a tribunal or court directs otherwise, the applicant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the applicant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Mr Justice Lane Date: 10 July 2020

The Hon. Mr Justice Lane

President of the Upper Tribunal

Immigration and Asylum Chamber