



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2021-001602

First-tier Tribunal No: PA/03424/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 26 March 2023

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SK

(Anonymity Order made)

Respondent

Representation:

For the Appellant: Mr A McVeety, Senior Home Office Presenting Officer
For the Respondent: Mr A Shattock, instructed by Duncan Lewis & Co Solicitors

Heard at Manchester Civil Justice Centre on 27 January 2023

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing SK's appeal, on human rights grounds, against the respondent's decision to refuse his protection and human rights claims and to refuse to revoke a deportation order previously made against him.
2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and SK as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

Background

3. The appellant claims to be a national of Guinea born on 19 April 1960 but is most recently believed by the Secretary of State to be a national of Ghana. He claims to have entered the UK by air from Guinea on 17 December 2006 with the assistance of an agent. He claimed asylum on 19 December 2006 as a national of Guinea and was served with illegal entry papers. His claim was refused on 16 January 2007 and his appeal against that decision was dismissed on 2 March 2007.

4. On 9 June 2009, the appellant was convicted of 'possess or control with intention identity document known or believed to be false'. He was sentenced to 14 months' imprisonment.

5. As a result of his conviction, the appellant was issued, on 2 July 2009, with a liability to deportation letter and questionnaire to which he responded on 14 July 2009 giving reasons why he should not be deported. On 5 November 2009 he was issued with a deportation decision and on 25 November 2009 a deportation order was signed. Both were served on him on 7 December 2009 and he appealed against the deportation decision. His appeal was dismissed on 4 February 2010 and on 8 March 2010 he became appeal rights exhausted.

6. On 12 January 2012 the appellant made further submissions on asylum and Article 8 grounds. Those were treated as an application to revoke the deportation order. On 24 July 2013 the respondent made a decision to refuse to revoke the deportation order and certified the appellant's claim under section 94 of the Nationality, Immigration and Asylum Act 2002, so that he had no in-country right of appeal. The appellant then made various further submissions in 2013 to 2015, under the legacy scheme, on protection and medical grounds, and on grounds of statelessness, all of which were rejected under paragraph 353 of the immigration rules. He made two unsuccessful applications for leave to remain as a stateless person in 2015 and 2016. On 15 February 2017 he made further submissions to revoke the deportation order on the basis of statelessness and Article 8 followed by a response to a section 120 One Stop Notice raising Article 8 private life and Article 3 grounds and further submissions on 23 June 2017 on medical grounds. On 6 December 2018 the appellant made an application for settlement protection and finally on 4 May 2020 he made further submissions. All of these were considered by the respondent and were accepted as raising a fresh protection and human rights claim but were refused in a decision of 27 May 2020, giving rise to this appeal.

The Appellant's Claim

7. The appellant's asylum claim, as initially stated, can be summarised as follows. The appellant claimed to have been a pastor with the Baptist Church of Guinea. He claimed that, when posted to the church in Meka Feredou, he experienced problems with members of the community, in December 2006, following a visit from five daughters of a Muslim family who came to seek advice about their concerns relating to female circumcision. He took the girls to the Chief of Meka Feredou and explained their concerns to him and the Chief then advised him that he would deal with the matter. The appellant claimed that later the same day, whilst he was teaching, a friend came to tell him that his house had been burned down and that he ought to leave immediately because some villagers wanted to kill him. He went to stay with a friend and then left Guinea after five days. His friend, who worked for the Peace Corps, made arrangements for him to get some travel documents and paid for his flight to the UK.

8. The respondent, in refusing the appellant's claim, did not consider that it was credible and considered that the appellant was at no risk in Guinea and that he could be returned there.

9. The Judge hearing his appeal against that decision accepted, in a decision dated 2 March 2007, that the appellant was a Baptist pastor and that he had undertaken such a function in Guinea, that he had been involved with education about the dangers of FGM in his role as pastor, and that he had fled his village on account of threats to him and the burning of his house. The judge had regard to the appellant's claim, resulting from an email from a Reverend with whom his wife had apparently made contact, that his wife and children had escaped to Conakry and were in danger. However the judge considered that there had been a one-off incident and that, whilst the appellant was at risk in his home area where the incident occurred, he was not at risk outside his home area and could relocate to another part of the country such as Conakry where he would not be harmed. Further, the judge did not accept the appellant's account of being helped by a member of the Peace Corps to flee the country with false documents. The judge accordingly dismissed the appeal.

10. In a decision promulgated on 4 February 2010, another judge, hearing the appellant's appeal against the decision to deport him to Guinea, considered further evidence upon which he relied whereby he claimed that his family had been attacked and his wife sexually assaulted and raped by the people looking for him in Conakry and that he would therefore be at risk in Guinea. The judge concluded that the evidence in support of that claim was unreliable and rejected the claim as not genuine or credible.

11. In the decision of 27 May 2020, the respondent rejected the appellant's subsequent claim to be stateless. The respondent did not accept that he had left Guinea using a genuine Guinea passport and noted that, despite having had ample opportunity, he had failed to provide any evidence confirming his identity and nationality. The respondent noted that the appellant had provided inconsistent information about his wife and children and his family circumstances. It was noted that he had claimed to have attended at the Guinea Embassy three times, in 2010, 2012 and 2016 and to have been told that he could not be admitted into Guinea without documentation confirming his nationality. The respondent noted that, after an interview with the Guinea Embassy on 29 June 2016, it was verbally reported back to the Home Office on 19 August 2016 that the appellant was not a Guinean national and that the Embassy believed his name and school name to be in fact Ghanaian. The respondent considered that the appellant was not a witness of truth, noting his conviction for the use of false documents and the findings of the judge about his reliance on documents which were not genuine, and also noting that there was evidence to show that he had social media accounts linked to people in Ghana bearing the same names he had provided for his family members. The respondent concluded that the appellant was a Ghanaian national and rejected his claim to be stateless.

12. With regard to the appellant's protection claim, the respondent noted that it was intended that he be removed to Ghana and considered that he was at no risk in that country, or in Guinea. The respondent considered that the appellant was excluded from humanitarian protection because of his criminal conviction. It was considered further that the appellant's deportation would not breach his human rights. He did not have a partner or children in the UK and, as for his private life, the respondent did not accept that he had been lawfully resident in the UK for most of his life, that he was socially and culturally integrated in the UK or that there were very significant obstacles to his re-integration in Guinea or Ghana. The respondent considered the appellant's diagnosis of diabetes but was satisfied that he could access relevant

medication and treatment in Guinea or Ghana. The respondent concluded that there were no very compelling circumstances outweighing the public interest in the appellant's deportation and that the deportation order should be maintained.

Decision of the First-tier Tribunal

13. The appellant's appeal against that decision was heard on 11 June 2021 in the First-tier Tribunal by Judge Forster. The appellant gave oral evidence before the judge. The judge noted that the appellant had given an account to the Guinea Embassy that was inconsistent with what he had stated elsewhere and found it not surprising that the Guinean authorities told him he would not be recognised as a citizen of Guinea as he had told them he did not know where he was from. The judge considered that the appellant had given inconsistent accounts about his passport and that he had tailored what he said to what he wanted to achieve and lacked credibility. However the judge considered that it did not necessarily follow from that that the appellant was from Ghana and he noted that the evidence to support the respondent's contention that he was Ghanaian was very thin. The judge did not accept the respondent's submission in that regard since it amounted to an assertion unsupported by evidence of substance. He concluded that the appellant was born in Guinea, that he held Guinean identity documents including a Guinean passport which he had used to travel outside Guinea before coming to the UK in December 2006 and he found it perverse to find that he was anything but a citizen of Guinea. He considered that the appellant had not taken all steps reasonably open to him to secure admission to Guinea and he rejected his claim to be stateless. The judge considered further that the appellant was at no risk of persecution in Guinea, following the findings of the previous tribunals.

14. The judge noted that the respondent had given up on attempts to deport the appellant to Guinea and was now stating that she intended to deport him to Ghana despite the deportation order having been made on the basis of his deportation to Guinea. He considered that to be a contradictory and unacceptable position and that, on her own case, the respondent could not deport the appellant to Guinea. The judge then went on to consider Article 8, noting the appellant's circumstances and having regard to the case of RA (Iraq) v The Secretary of State for the Home Department [2019] EWCA Civ 850 and the approach to cases of immigration "limbo". He found that the appellant was in "actual limbo" and that there was no prospect of him being removed to Ghana or to Guinea. He found that the appellant did not meet the exceptions to deportation but concluded, in light of the psychiatric evidence before him and the appellant's state of limbo, that the proportionality balance came down in his favour and he allowed the appeal on Article 8 human rights grounds.

15. The respondent sought permission to appeal against that decision to the Upper Tribunal on the grounds that the judge had misdirected himself by failing to have regard to s117C of the Nationality, Immigration and Asylum Act 2002 or to paragraphs 399 or 399A of the immigration rules and that he had erred by effectively making a human rights consideration outside the immigration rules.

16. Permission was granted in the First-tier Tribunal on the basis that the judge had arguably failed to have regard to the relevant test requiring the appellant's circumstances to be very compelling over and above the exceptions to deportation.

Hearing and Submissions in the Upper Tribunal

17. The matter then came before me. Both parties made submissions.

18. Mr McVeety accepted that neither the Secretary of State's grounds nor the grant of permission was entirely correct since, contrary to the assertion in the grounds, the judge had had regard to s117C and the exceptions to deportation, and further since

this was not a case of identifying very compelling circumstances over and above the exceptions to deportation, as the grant of permission suggested, given that the appellant's prison sentence had been below four years. However what was properly identified as a challenge to the decision was that the judge had simply undertaken an ordinary Article 8 balancing exercise without considering whether there was something else pushing the case beyond that in terms of very compelling circumstances. The only basis upon which the judge had allowed the appellant's appeal was the 'limbo' situation, yet he had found at [42] that the appellant had not tried everything to prove his citizenship to the Guinean Embassy and to secure his admission to Guinea and that he was to blame for not being able to obtain documentation from the Embassy.

19. Mr Shattock, in response, submitted that the judge did consider the question of very compelling circumstances, even though he did not specifically cite that wording. He applied his mind to the correct considerations. It was clear that he was aware that he had to go above and beyond a normal Article 8 balancing exercise. He considered the public interest and it was not surprising that he found that the factors in the appellant's favour outweighed the public interest. His approach was consistent with that in RA (Iraq). The Secretary of State's appeal was simply a disagreement. The judge did not make any errors of law.

Discussion

20. The challenge made to Judge Forster's decision is that he conducted an ordinary Article 8 balancing exercise rather than assessing whether there were very compelling circumstances outweighing the public interest in the appellant's deportation. Mr Shattock accepted that the judge did not expressly refer, in terms, to that test, but it was his case that he nevertheless conducted the relevant assessment in accordance with that test. I have to agree.

21. As Mr McVeety conceded, the Secretary of State's grounds were wrong in asserting that the judge did not consider s117C of the NIAA 2002. On the contrary, the judge specifically referred to that provision at [56] to [61] of his decision, concluding at [60] and [61] that the appellant could not meet the private and family life exceptions to deportation in s117C(4) and (5). Plainly, therefore, the judge was considering Article 8 in the context of the relevant statutory provisions in deportation cases. His findings at [62] onwards were accordingly essentially a consideration of whether the public interest was outweighed by other factors in terms of the additional requirements applying to foreign criminals in s117C. That is also evident from his earlier reference to the relevant test at [17] of his decision, when setting out the respondent's submissions before him and is evident from his reference to those other factors at [50] of his decision which formed part of the respondent's assessment in the refusal decision under the heading of "very compelling circumstances".

22. The judge assessed such circumstances by way of the guidance in RA (Iraq), also a deportation case, and followed the approach in that case, applying the relevant test in the context of that framework. It is clear from his assessment of the appellant's case in the context of the four-stage approach in RA (Iraq) that the judge was persuaded that the appellant's situation of 'limbo', when taken together with the compelling psychiatric evidence, his age and length of residence in the UK, and the positive contribution made to UK society, amounted to very compelling circumstances such as to outweigh the public interest in his deportation.

23. It was Mr McVeety's submission that the weight that the judge accorded to the appellant's 'limbo' status was inconsistent with his conclusion that the appellant was largely to blame for that situation. He referred in that respect to the judge's finding at [42] that the appellant had failed to take all steps reasonably open to him to secure

admission to Guinea and the finding that the appellant had been dishonest, as set out at [38]. However he accepted that the judge was correct when stating at [47] that the respondent had given up on attempts to deport the appellant to Guinea, and he agreed that the appellant's case was similar to that of AM, R (on the application of) v Secretary of State for the Home Department (legal "limbo") [2021] UKUT 62, as relied upon by Mr Shattock and that, in that respect, there was some difficulty with the Secretary of State's challenge.

24. Clearly the judge was fully aware of the fact that the appellant, by being obstructive, was largely to blame for the 'limbo' situation. However, when considering the public interest in his deportation the judge was entitled to take account of the fact that the respondent had given up on attempting to deport the appellant to Guinea and had asserted instead an intention to deport him to Ghana despite the deportation order having been made on the basis of deportation to Guinea and despite the evidence of Ghanaian nationality being "very thin" ([37]). At [47] the judge found the respondent's position to be contradictory and unacceptable and at [54] found that there was no prospect of the appellant being removed to Ghana or Guinea. In the case of AM, the Tribunal was faced with a similar situation where the appellant was obstructive in relation to attempts to document him in order to effect his removal such that the prospect of removal was remote, and where the remoteness of the prospect of removal played a significant part of the compelling circumstances when taken together with other factors. Those other factors were not dissimilar to the appellant's, namely significant mental health concerns, vulnerability and fragility. Although the Tribunal, in that case, made it clear that the case was an exceptional one and should not be regarded as a "green light" for others attempting to withhold material relevant to establishing their identity, the decision itself lends support to Judge Forster's conclusions and undermines the objections made by Mr McVeety, as he acknowledged.

25. Accordingly, and contrary to the assertions made by the Secretary of State, Judge Forster undertook the relevant assessment and had regard to all relevant matters when determining whether the public interest required the appellant's deportation. Although not specifically citing the "very compelling circumstances" test it is clear that that is in substance the test he applied. It was his conclusion that the appellant's 'limbo' status, when taken together with other relevant factors, was sufficient to outweigh the public interest in his deportation. That was a conclusion which was open to him on the evidence before him. Whether or not the Secretary of State agrees with that conclusion and with the outcome of the appellant's appeal, and whether or not another judge may have decided the appeal differently, Judge Forster was perfectly entitled to determine the case as he did and he did not make any material errors of law in so doing. Accordingly I uphold his decision.

Notice of Decision

26. The making of the decision of the First-tier Tribunal did not involve an error on a point of law requiring it to be set aside. The Secretary of State's appeal is dismissed and the decision to allow SK's appeal stands.

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.

Appeal Number: UI-2021-001602 (PA/03424/2020)

Signed: S Kebede
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

1 February 2023