



United Kingdom - Mohamed Barry v Secretary of State for the Home Department

The appellant's nationality, or lack thereof, was the central issue of the remaking decision of this appeal. The appellant alleged that he was stateless and that this constituted "very compelling circumstances" outweighing the public interest requiring his deportation; he could not therefore be deported from the UK. The respondent alleged that the appellant was a *de jure* Guinean national and that the barriers to removal in his case were purely administrative in nature and did not therefore permit the appellant to succeed in his appeal. The Court found that the appellant failed to show, on the balance of probabilities, that he was stateless within the meaning of the 1954 Convention; rather, the appellant was found to be in "actual limbo". The Court also held that it could not be said that the very strong public interest was outweighed by any factors supporting the appellant's position, whether viewed in isolation or cumulatively. The Court further found that there may come a stage when all possible avenues to establish the appellant's Guinean nationality and/or other means of facilitating a removal have been exhausted and that the prospect of deporting him from the UK could be considered so remote that Article 8 ECHR might provide a route for success; but, in the Court's judgment, that stage had not been reached by some distance.

Case name (in original language) : Mohamed Barry v Secretary of State for the Home Department

Case status: Decided

Case number: PA/07944/2017

Citation: Mohamed Barry v Secretary of State for the Home Department [2020] UKAITUR PA079442017

Date of decision: 31/12/2020

State: United Kingdom

Court / UN Treaty Body: Upper Tribunal (Immigration and Asylum Chamber)

Language(s) the decision is available in: English

Applicant's country of birth: Guinea

Applicant's country of residence: United Kingdom

Legal instruments: 1954 Statelessness Convention, European Convention on Human Rights (ECHR)

Key aspects: Deportation and removal, Determination/confirmation of nationality, Statelessness determination

Relevant Legislative Provisions:

Article 1 of the 1954 Convention relating to the Status of Stateless Persons

Article 8 European Convention on Human Rights

ss 3(c), 5(1) Immigration Act 1971

ss 32(5), 35(5) UK Borders Act 2007

ss 72, 94B, 117B, 117C Nationality, Immigration and Asylum Act 2002

Paras 401 and 402 Immigration Rules

Facts

The appellant was born in Guinea but his nationality remained a matter of dispute between the parties. He arrived in the UK at the age of 14 and was granted discretionary leave to remain on the basis of his minority following an unsuccessful asylum claim which stated he was a national of Sierra Leone. The appellant accrued 17 convictions in the UK between 2005 and 2013. As a result of his early criminal convictions, the respondent instigated deportation action in 2008, following which the appellant made a further asylum claim repeating his assertion that he was a national of Sierra Leone. The asylum process took some time, with a full asylum interview not conducted until 2012 and a notice of a decision to deport the appellant subsequently served on him in 2016. The appellant's protection claim was certified but, due to a change in the law, the respondent later withdrew the certification decision and issued a decision to refuse the appellant's protection and human rights claims. The appellant lodged an appeal with the First-tier Tribunal subsequent to which a number of adjournments were sought and granted. One element of the delay was as a result of an adjournment granted to give the respondent the opportunity to conduct further enquiries as to the authenticity and overall reliability

of the letters from the Sierra Leonean and Guinean Embassies in the UK.

Central to this appeal was the letter from the Guinean Embassy which confirmed that the appellant was not a Guinean national. Indeed, the present appeal was the remaking of a previous decision by the First-tier Tribunal who was found to have erred in law when, in dismissing the appellant's appeal, it found that the appellant obtained the letter from the Guinean Embassy by fraudulent means.

Legal arguments by the applicant

The appellant argued that, when the letter from the Guinean Embassy was combined with the panel's conclusions and set in the context of the guidance provided by the Court of Appeal in [*AS \(Guinea\)*](#), then the only proper outcome was that he was stateless. Further, the respondent had accepted that the appellant was not a national of Sierra Leone and the appellant had done all he could to prove this aspect of his case. Fault lay on the respondent for not having taken any steps of her own, despite specific direction from the First-tier Tribunal to do so. There was no evidence to show that the appellant would be admitted to any State if deported. The appellant also objected to the scope of the respondent's attack on the Embassy letter as no such criticisms regarding its authenticity had been raised previously and the respondent had failed to comply with previous directions from the First-tier Tribunal in this respect.

The factor showing "very compelling circumstances" lay in the fact of the appellant's statelessness. Relying on s. 5(1) Immigration Act 1971, the appellant submitted that his deportation would not be possible due to his status, and this was sufficient for him to make his case. Reference was made in support to the respondent's policy guidance stating that stateless individuals who were refused leave to remain under the general grounds of refusal cannot be removed and may thus fall for a grant of leave outside of the Immigration Rules.

The appellant further argued this was not a "limbo" case as, per *RA(Iraq)*, the case did not concern lack of documentation, but lack of nationality. He acknowledged the public interest was in play but submitted that the statelessness issue was sufficient for the Appellant to succeed.

Legal arguments by the opposing party

The respondent did not accept that the appellant was a stateless person. The respondent asked the Tribunal to consider the appellant's history of adverse credibility; deficiencies and other concerns relating to the letter from the Guinean Embassy; as well as other factors which were relevant to the assessment of the letter. The factors included that the appellant had a vested interest in not assisting or otherwise misleading the Guinean authorities and that the appellant had, without explanation, not been called to give evidence before the Tribunal.

In respect of the Embassy letter, the respondent argued that the "best evidence" submitted by the appellant was not good enough and had failed to discharge the burden of proof on the balance of probabilities. This was due to, *inter alia*, the letter's questionable authenticity, the lack of clarity as to what evidence had been provided to the Embassy, and what the parameters of the investigation carried out by the authorities had been.

The respondent submitted that the appellant could not satisfy Exception 1 set out in s. 117C (4) Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") and so should not be permitted to circumvent it. It was argued that, once s. 117C (6) NIAA 2002 was engaged, the public interest had to be taken into account. Further, the appellant was not stateless but, at most, in a situation of "limbo" as set out in *RA(Iraq)* [2019] EWCA Civ 850. The barriers to removal were thus administrative in nature and consequently did not permit the appellant to succeed in his appeal.

Decision & Reasoning

1. *Factual question: is the appellant stateless, or is he de jure a national of Guinea?*

Referring first to the Court of Appeal in [AS\(Guinea\) \[2018\] EWCA Civ 2234](#), the Upper Tribunal (Immigration and Asylum Chamber) recognised the appellant's past dishonesty and recalled the First-tier Tribunal's statements to this effect. It identified additional adverse matters raised by the respondent as potent arguments against the appellant. These included the appellant's interest in the Guinean authorities concluding he was not a national of that country; the added element of the evidence from the Sierra Leonean authorities, which assisted him in proving he was stateless and was beneficial to his desire to remain in the UK; the fact that the appellant presented himself to be a Guinean national; the appellant's real links to Guinea; his failure to adduce any evidence aside from the Embassy letter; his further failure to

provide either a schedule of the evidence presented to the Guinean authorities or any of the evidence itself; the lack of oral evidence given before the Tribunal; and the absence of proof that he had made a statelessness application to the respondent.

However, the Tribunal recognised that the respondent had not argued, at either appeal, that the Embassy letter was unreliable. It noted that the respondent's inaction in failing to undertake enquiries with the Guinean authorities regarding the appellant's nationality was relevant. The judge therefore rejected the respondent's criticisms of the letter in so far as they related to its provenance, and upheld the letter's authenticity.

The Tribunal noted that, although it was impossible to know what the appellant had told the Guinean Embassy, this did not mean he had actively provided false information in order to subvert the authorities' investigations, as erroneously concluded by the First-tier Tribunal. The importance of the letter was that it stated that the conclusion was made on the basis of information provided by the appellant alone and following unspecified checks undertaken by the Guinean authorities. Thus, although the letter represented "very strong" evidence that they did not believe him to be a national of their country, this was to be seen in the context of an investigation carried out on the basis of information, aspects of which were entirely unknown, others which were inaccurate and some which the Tribunal accepted were true. It thus concluded that the letter was the "best evidence" that the appellant could have provided as to the Guinean authorities' conclusion that, on the information they were provided and following an investigation presumably based upon that information, the appellant was not recognised as a national of Guinea. The judge also recalled that it was uncontroversial that the appellant was not a national of Sierra Leone and would not be entitled to the nationality of that country.

The Tribunal, referencing Article 1 of the 1954 Convention relating to the Status of Stateless Persons as adopted in the para 401 of the Immigration Rules, and acknowledging that none of the exclusion criteria under para 402 of the Immigration Rules applied in this case, found that the appellant had failed to show, on the balance of probabilities, that he was stateless within the meaning of the 1954 Convention. Although the letter proved that the authorities had concluded that he was not a national of Guinea at the time, it was not shown that this position was a result of the operation of Guinean law, as required by the definition of the Convention. This convinced the Tribunal that, on the evidence before it, there was

clear *prima facie* indications that the appellant could or would in principle be a national of Guinea.

2. *Legal issue: If the appellant is not truly stateless, what are the consequences for his appeal?*

The Tribunal found that, as matters stood, the appellant could not be deported to Guinea and that, by reference to the Court of Appeal in *RA (Iraq)*, he was in a state of “actual limbo” due to him already being subject to a deportation order. “Limbo” describes the position of a person whom the Secretary of State for the Home Department wishes to deport or remove, but there is a limited prospect of ever effecting his deportation or removal. “Actual limbo” covers individuals in respect of whom a deportation order has already been made but who have not yet been deported. In such a situation, there will normally be no leave to remain under s. 3C of the Immigration Act 1971 (*RA (Iraq)*, para. 63).

The Tribunal, in addressing the second stage laid out in *RA (Iraq)*, found that it was not apparent that the appellant could not be deported in the foreseeable future, nor that there were no further steps that may be taken by either party to facilitate deportation. It could not be said at the time that the prospects of removal in consequence of the respondent’s refusal of the human rights claim were sufficiently remote.

Having conducted a fact specific analysis of the appellant’s circumstances, the Tribunal conducted the requisite balancing exercise between i) the public interest in maintaining an effective system of immigration control and in deporting those who ought not to be in the UK, and ii) an individual’s Article 8 and other Convention rights. The Tribunal found there was very little supporting the appellant’s position, whereas there existed strong arguments against him. Indeed, whilst the appellant had clearly established a private life in the UK, there was no reliable evidence of any significant ties there and he had no established family life. Additionally, the Tribunal concluded that the deportation was in the public interest. It had also not been argued by the appellant that he would not be able to reintegrate into the Guinean society without experiencing very significant obstacles in doing so. The appellant was thus unable to meet either exception under ss 117C (4) and (5) NIAA 2002. Further, it could not yet properly be said that the prospects of deporting the appellant were remote. The Tribunal continued that, even in the “actual limbo” scenario, the appellant still had to show that very compelling circumstances existed.

In this respect, it stated that it had not been suggested that the appellant's length of residence and the age at which he had arrived in the UK constituted a sufficiently strong Article 8 ECHR claim; which the Tribunal thought was an entirely realistic position to have adopted. The Tribunal concluded that it could not be said that the very strong public interest was outweighed by any factors supporting the appellant's position, whether viewed in isolation or cumulatively.

While a purely academic question, the Tribunal considered what the consequences would have been if it had found the appellant to be stateless within the meaning of the 1954 Convention. It considered that the fact of statelessness would not have rendered the deportation itself unlawful; that it would have concluded that statelessness could in principle be capable of constituting a "very compelling circumstance"; and that, if it were firmly established that the individual concerned simply could not be removed to any country in consequence of the refusal of a human rights claim and that there was no realistic prospect of removal occurring in the foreseeable future, the "very compelling circumstances" threshold might be met.

Decision documents

[Upper Tribunal \(Immigration and Asylum Chamber\) decision Mohamed Barry v Secretary of State for the Home Department](#)

Outcome

In respect of the factual question, the appellant failed to show, on the balance of probabilities, that he was stateless within the meaning of the 1954 Convention. Rather, the appellant was found to be in "actual limbo".

In respect of the legal issue, it could not be said that the very strong public interest was outweighed by any factors supporting the appellant's position, whether viewed in isolation or cumulatively. Thus, the appellant was unable to show that the refusal of his human rights claim was unlawful, notwithstanding the fact that he was not, at the time of the decision, removable from the UK. In other words, the consequences of the respondent's refusal of the human rights claim were not disproportionate. However, the Tribunal found that there may come a stage when all possible avenues to establish the appellant's Guinean nationality and/or other means of facilitating a removal have been exhausted and that the prospect of deporting him from the UK could be considered so remote that Article 8 ECHR might provide a route for success; but, in the Tribunal's judgment, that stage had not been reached by some

distance.

The appellant's appeal therefore failed.

Caselaw cited

[AS \(Guinea\) \[2018\] EWCA Civ 2234; \[2019\] Imm AR 341](#)

Kiarie and Byndloss [2017] UKSC 42; [2017] 1 WLR 2380

RA (Iraq) [2019] EWCA Civ 850; [2019] Imm AR 1212