Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07944/2017 **(V)**

THE IMMIGRATION ACTS

Heard remotely	**Decision & Reasons Promulgated**
On 21 July 2020	**On 31 December 2020**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MOHAMED BARRY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

The resumed hearing of this appeal was conducted on the Skype for Business platform, with the Upper Tribunal sitting at Field House. The hearing was duly recorded by the Upper Tribunal.

Representation:
For the appellant: Mr G Lee, Counsel, instructed by Lex Sterling Solicitors
For the respondent: Mr S Whitwell, Senior Home Office Presenting Officer

REMAKING DECISION AND REASONS

INTRODUCTION

1. This is the remaking component of the decision in this appeal following the conclusion of a panel (comprising The Hon. Lord Uist, sitting as a Judge of the Upper

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Tribunal, and myself) that the First-tier Tribunal had erred in law when dismissing the appellant's appeal against the respondent's refusal of his protection and human rights claims, which had in turn been made following the instigation of deportation action.

2. The panel's conclusions and reasons are set out in full in the appendix to this remaking component of the decision. Before turning to the error of law issue, it is important to summarise the relevant background to the appellant's case.

BACKGROUND

3. The appellant was born in Conakry, Guinea, on 28 December 1987. His nationality has been and remains a matter of dispute between the parties. It appears that he arrived in the United Kingdom in September 2002 at the age of 14. An asylum claim was made shortly thereafter in which it was asserted that the appellant was a citizen of Sierra Leone. Whilst that claim was refused November 2002, the appellant was granted exceptional leave to remain (what is now discretionary leave to remain) on the basis of his minority.

4. In May 2005, the appellant accrued the first of 17 convictions in this country, further details of which I will set out, below. As a result of at least three of his initial convictions, the respondent instigated deportation action in late 2008. There then followed various administrative steps which prolonged matters. In 2010 the appellant made a further asylum claim, repeating his assertion that he was a citizen of Sierra Leone. The asylum process was elongated (it is asserted by the respondent that this was in part due to the appellant's non-compliance with interview procedures). A full asylum interview was not conducted until November 2012. It was only in late January 2016 that the appellant was served with a notice of a decision to deport him. This notice included a certificate under section 72 of the Nationality, Immigration and Asylum Act 2002, as amended ("NIAA 2002"). A deportation order was signed on 24 August 2016, pursuant to section 32(5) of the UK Borders Act 2007. This was accompanied by a "stage 2" notice of decision to deport. The appellant's protection claim was certified under section 94B NIAA 2002. In light of the judgment of the Supreme Court in Kiarie and Byndloss [2017] UKSC 42; [2017] 1 WLR 2380, the certification decision was withdrawn and the respondent issued the decision to refuse the appellant's protection and human rights claims which is the subject of this appeal.

5. Following the lodgement of the appeal with the First-tier Tribunal, a protracted period unfolded during which a number of adjournments were sought and granted. The respondent liaised with the Metropolitan Police under the auspices of Operation Nexus and obtained large amounts of evidence as to the appellant's alleged criminal behaviour.

6. One element of the delay was as a result of an adjournment granted in early January 2019 in order to give the respondent the opportunity to make any further enquiries

as to the authenticity and overall reliability of letters from the Sierra Leonean and Guinean Embassies in the United Kingdom (dated 4 December 2018 and 19 February 2018, respectively). The respondent did not take advantage of this opportunity.

THE APPELLANT'S OFFENDING HISTORY

7. The appellant's criminal record is not in dispute. As mentioned above, he has accrued 17 convictions. These span the period 2005 to 2013 and account for 25 specific offences. Given the importance of the public interest it is appropriate to set out the record here:

> 11 May 2005: robbery whilst on bail; 12 months' supervision order;
>
> 17 May 2007: possession of cannabis; £50 fine;
>
> 30 July 2007: possession of an offensive weapon in public, whilst on bail; 16 weeks in a Young Offenders Institution;
>
> 8 August 2007: obstructing powers of search for drugs and using disorderly behaviour threatening words; 28 days in a Young Offenders Institution and £100 fine;
>
> 25 March 2008: possession of a knife in public; four months' imprisonment, suspended for 12 months and 12 months' supervision requirement;
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> 29 April 2008: possession of cocaine whilst on bail: £100 fine;
>
> 5 June 2008: failing to surrender to custody; £10 fine;
>
> 6 June 2008: possession of cannabis, possession of a bladed article in public, and failure to comply with community requirements of a suspended sentence order; 4 weeks' imprisonment and activation of previous suspended sentence of 16 weeks;
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> 15 July 2008: possession of bladed article in public; 8 months' imprisonment;
>
> 16 December 2008: possession of ammunition without certificate; £100 fine;
>
> 10 March 2010: possession of cannabis whilst on bail; 1 days' detention;
>
> 21 April 2010: possession of crack cocaine whilst on bail; community order requiring unpaid work;
>
> 11 May 2010: possession of cannabis whilst on bail; £50 fine;
>
> 6 July 2010: common assault, criminal damage, and using threatening words or behaviour; a total of 6 months' imprisonment;

15 October 2010: robbery and possession of a knife in public; total of 3 years' imprisonment;

1 December 2010: possession of heroin whilst on bail; 2 months' imprisonment;

22 March 2013: possession of crack cocaine; 2 months' imprisonment.

8. The Operation Nexus evidence relating to matters in respect of which charges were not brought against the appellant was not, in the event, relied on by the respondent before the First-tier Tribunal and has played no part in my considerations.

THE DECISION OF THE FIRST-TIER TRIBUNAL

9. Before the First-tier Tribunal, the appellant argued that he was neither a citizen of Sierra Leone nor Guinea: in other words, he was stateless. In respect of Article 8, the appellant did not contend that he had a family life in the United Kingdom.

10. The claim of statelessness was predicated on the two Embassy letters referred to above. That emanating from the Guinean authorities, written and signed by the Consul, Mr or Ms Iromou, stated as follows:

> "To whom it may concern
>
> This letter is to confirm that after an investigation from the Ministry of Interior in [*sic*] and per the Home Office documents submitted to the Embassy by Mr Barry, it has been established that, Mr Mohamed Barry born 28/12/1987 is not a Guinean national.
>
> Please do not hesitate to contact us if you require further information."

11. The letter from the Sierra Leonean Embassy stated that:

> "TO WHOM IT MAY CONCERN
>
> This is to confirm that Mohamed Barry, D.O.B 28th December 1987, who is currently residing at […] Has been interviewed by the High Commission and has proved beyond reasonable doubt that he is not a Sierra Leonean Citizen.
>
> All assistance rendered to him will be highly appreciated."

12. On any view, the judge's decision was conscientious and indicative of good deal of thought. Whilst one specific aspect of his findings and conclusions involved the making of an error of law, several other issues were dealt with more than adequately. The panel preserved the following conclusions (in respect of which only the fourth was the subject of any challenge in the grounds of appeal):

i. the appellant was excluded from the protection of the Refugee Convention as a result of the upholding of the certificate issued under section 72 NIAA 2002. He was a danger to the community of the United Kingdom;

ii. the appellant was excluded from Humanitarian Protection by virtue of his offending history;

iii. the rejection of the Article 3 claim (which, on the facts, had the effect of rejecting the substance of the asylum claim as well);

iv. the absence of social and cultural integration in the United Kingdom and, as a consequence, the appellant's inability to bring himself within Exception 1 under section 117C(4) NIAA 2002 and paragraph 399A the Immigration Rules.

13. In respect of the statelessness issue, the judge stated at [32] that it was "uncontroversial that the appellant is not a citizen of Sierra Leone." Thus, the core factual issue for determination was whether or not the appellant was a citizen of Guinea (see [33]), or whether he was indeed stateless. In this regard, the most important passage the judge's decision is contained at [72]:

> "Drawing the threads together, I find as a fact the appellant was born in Conakry and his family all had Guinean nationality. I also find the appellant was not in Sierra Leone. I find the appellant was educated in Guinea up to the age of 14. The circumstances would tend to show the appellant was Guinean. I accept the letter from the Embassy shows that records were searched in good faith and the appellant's registration could not be found. I accept that the Canadian authorities were entitled to conclude on that basis that the appellant was not Guinean and to refuse him a travel document. However, I infer from the appellant's readiness to mislead the respondent over many years and not just when he was a minor and his willingness to give misleading evidence to the tribunal that the appellant did not cooperate by giving truthful information to the Guinean Embassy. He must have subverted the process as he had done previously by leading the respondent to believe he was Sierra Leonean, even to the point of attending an ETD interview."

14. The judge expressly found that the appellant was a Guinean citizen. As a consequence, and in light of the appellant's overall circumstances (including his age when he left Guinea, his relatively lengthy residence in the United Kingdom, and the strong public interest engendered by the offending history), the judge went on to conclude that the protection claim failed and that there were no "very compelling circumstances" over and above those contained within the two exceptions, with reference to section 117C(6) NIAA 2002. The appeal was dismissed on all grounds.

THE PANEL'S ERROR OF LAW CONCLUSIONS

15. The central reasoning in the panel's conclusion that the First-tier Tribunal had erred in law, are contained in paragraphs 5 and 6 of its decision:

> "5 . In our judgment the judge was correct to say that this was not a case in which a shared duty to establish nationality arose and the judge was correct so to hold. A shared duty arises where an appellant has done all that he could to obtain evidence of nationality (or lack of it) but requires further evidence which can be obtained by the Secretary of State but not by the appellant himself. That was not the position in this case. The appellant did not require any further evidence to establish that he was not a Guinean national. He had obtained what was probably the best evidence available in the form of an official letter from the Guinean Embassy stating that he was not a Guinean national. It was then for the Secretary of State, if he could, to produce evidence rebutting the content of the letter. He did not do so: indeed, he did not even attempt to do so, despite the directions from the Tribunal. It was not suggested that the letter was a forgery. It bears the appellant's correct name and date of birth. In these circumstances it constituted very strong evidence that the appellant was not a Guinean national. The reason why the judge did not accept the content of the letter was because he formed a generally unfavourable view of the appellant's credibility.
>
> ([72] of the judge's decision is then quoted in full)
>
> 6. The finding by the judge that the appellant "did not co-operate by giving truthful information to the Guinean Embassy" and that "he must have subverted the process" are in effect findings by the judge that the appellant obtained the letter by fraudulent means. The problem is that there was no specific evidence on the basis of which he was entitled to make such a finding and it therefore amounts to a material error of law. In order to make such a damning finding against the appellant the judge would have to have had some evidence pointing to a specific fraud perpetrated by the appellant in order to obtain the letter, but the fact of the matter is that there was no such evidence. The respondent had made no inquiries about how the letter was obtained and there was therefore a lacuna in the evidence. It was not for the judge to fill that lacuna by making a finding adverse to the appellant and contrary to the terms of the letter without any evidence to support it. The fact that the appellant had previously acted dishonestly does not provide a proper basis for concluding that he acted dishonestly in obtaining the letter. Properly analysed this is not a case of a shared burden but of a finding of fact unsupported by the evidence.

16. The panel went on to conclude that error made in respect of the statelessness issue was relevant to the question of whether the appellant could show that there were "very compelling circumstances" in his case, with reference to section 117C(6) NIAA 2002 and the Rules.

THE ISSUES IN THIS APPEAL

17. As stated at paragraph 15 of the panel's decision and in my subsequent directions notice sent out to the parties on 22 April 2020, the scope of the remaking of the

decision in this appeal is narrow. There are, in essence, two issues arising; one factual and the other legal.

18. The factual question is:

> whether the appellant is stateless, or, as the respondent contends, he is *de jure* a national of Guinea.

19. The legal issue can be divided into three parts:

> first, if the appellant is not truly status, what are the consequences for his appeal?
>
> second, if the answer to the factual question is "yes", is statelessness capable of amounting to a "very compelling circumstance" over and above those described in Exception 1, with reference to section 117C(4) and (6) NIAA 2002?
>
> third, if it is so capable, what weight should be attributed to that circumstance generally and on the particular facts of this case?

20. None of the preserved conclusions of the First-tier Tribunal's decision have sought to be revisited at the remaking stage.

PROCEDURAL ISSUE: THE RESPONDENT'S ADJOURNMENT APPLICATION

21. At the outset of the remote hearing, Mr Whitwell made an adjournment application on the basis that he did not have the Home Office file, nor was he in possession of the appellant's bundle. As a result of the Covid-19 pandemic, he was appearing from home and had not been provided with these materials. He had sought to contact the appellant's solicitors the day before in order to obtain a copy of their bundle, but to no avail.

22. Whilst having sympathy with Mr Whitwell's position, Mr Lee opposed the application on the grounds that the issues in this appeal were very narrow, as set out above. In addition, the evidence upon which these issues rested was also extremely limited; it amounted, in effect, to the letter from the Guinean Embassy (the letter from the Sierra Leonean Embassy no longer or any relevance). The respondent had been in possession of this letter since 2018 and no action had been taken in respect of it.

23. At that stage, I declined to make a final decision on the application, pending any further steps that could be taken in order to ensure that Mr Whitwell was in a fair position to present the respondent's case. The hearing was "paused" at 12:11, the representatives released until 14:00, and I instructed my clerk to scan and email the relevant parts of the appellant's bundle, namely the three witness statements and the letters from the Guinean and Sierra Leonean Embassies (the remaining items

evidence contained within bundle were out-dated country information reports which were not being relied upon by the appellant). This was done, with confirmation by Mr Whitwell of receipt of the email and attachments occurring at 12:26.

24. Upon resumption of the hearing at 14:00, I refused the adjournment application. My reasons for so doing are as follows.

25. First, the issues in this appeal were indeed narrow. The scope of the resumed hearing was set out in clear terms in the error of law conclusions, which had been promulgated on 25 February 2020. Thus, this was not a case involving a number of complex issues or a large amount of evidence.

26. Second, Mr Whitwell had appeared before the Tribunal at the error of law stage in February 2020. Although that was some months back, he was clearly familiar with the case and the relevant issues.

27. Third, Mr Whitwell had been provided with the relevant parts of the appellant's bundle by email on the day of the remote hearing. I was satisfied that he had had sufficient time to read and digestive this evidence prior to submissions beginning at 14:00.

28. Fourth, Mr Whitwell was clearly able to make submissions on the evidence and the factual issue of whether the appellant was stateless.

29. Fifth, Mr Whitwell had been able to check the respondent's GCID database in advance of the hearing and was able to confirm that there was no record of the respondent having sought any further evidence in respect of the appellant's claimed statelessness. He was also able to confirm that the Home Office file had been placed in storage at some point. Thus, it would have been impossible for him to have been provided with that file for the hearing in any event. That is not a criticism of Mr Whitwell (who, I wish to make clear, acquitted himself in a highly professional manner in these proceedings), but it does not perhaps reflect particularly well on the respondent's organisational systems in respect of 'live' cases.

30. Sixth, and finally, I assessed all of these considerations through the all-important prism of fairness to the parties, in this case specifically the respondent. I will satisfied that, in all the very particular circumstances, Mr Whitwell was properly and fairly able to present the respondent's case without material prejudice.

THE EVIDENCE

31. In remaking the decision in this appeal, I have considered the following evidence:

    i. the three witness statements from the appellant, one dated the 15 February 2018 and the other two being undated;

ii. the letter from the Guinean Embassy dated 19 February 2018;

iii. the letter from the Sierra Leonean Embassy dated 4 December 2018.

32. In light of what has already been discussed, it is only the second item of evidence which addresses the Guinean nationality issue.

THE PARTIES' SUBMISSIONS

33. I record here my gratitude to both representatives for their concise and clear submissions in this case.

34. Mr Lee relied on his brief skeleton argument, dated 21 July 2020, the letter from the Guinean Embassy, and the panel's conclusions reached on the error of law issue, in particular the passages set out above. When the letter was combined with the panel's conclusions, and then set in the context of the guidance provided by the Court of Appeal in AS (Guinea) [2018] EWCA Civ 2234; [2019] Imm AR 341, it was submitted that there was only one proper outcome to the factual question: the appellant is stateless. Mr Lee emphasised the respondent's acceptance that the appellant was not a citizen of Sierra Leone. He submitted that the appellant had done all he could to prove this aspect of his case and the respondent's failure to have taken any steps of her own, notwithstanding specific directions from the First-tier Tribunal, was telling. Mr Lee submitted that there was no evidence to show that the appellant would be admitted to Guinea, Sierra Leone, or indeed any other state.

35. Addressing the legal question, Mr Lee accepted that in order to succeed in his appeal the Appellant needed to show that there were "very compelling circumstances" or a "very strong claim indeed", with there being no difference between the two thresholds. The requisite very powerful factor lay in the fact of statelessness. Mr Lee relied on section 5(1) of the Immigration Act 1971 and submitted that the appellant could not be deported to a country where he was not a national and there was no reason to believe that he would otherwise be admitted. In essence, the appellant's deportation would not be capable of performance and this was sufficient for him to make out his case. Reference is also made to the respondent's policy guidance entitled "Stateless Leave", version 3.0, published on new 30 October 2019, in which it is said that individuals refused leave to remain under the general grounds of refusal, but who are stateless, cannot be removed and thus may fall for a grant of leave outside of the Immigration Rules. Mr Lee helpfully confirmed that after his own researchers, he was unable to find any other decided cases from the Upper Tribunal or the Court of Appeal which had reached reasoned conclusions on the issue of statelessness in the context of deportation.

36. Mr Whitwell relied on the respondent's reasons for refusal letter. He clearly set out the respondent's position: first, it was not accepted that the appellant is stateless; second, this case is not in truth about statelessness, but rather involves the appellant

being, at most, in the situation of "limbo", and in this regard any barriers to removal are administrative in nature and do not permit the appellant to succeed in his appeal.

37. As to the factual issue, Mr Whitwell asked me to consider the appellant's overall history of adverse credibility, together with deficiencies and/or other concerns relating to the letter from the Guinean Embassy itself. the appellant had lied about his nationality in the past, having claimed for a prolonged period that he was Sierra Leonean. This was relevant to the assessment of the Embassy letter. The appellant had not been called to give evidence at this stage, without explanation. This too was relevant. The appellant had a vested interest in not assisting or indeed misleading the Guinean authorities.

38. As to the Embassy letter itself, he had not been able to see the original. There was no subsequent letter from the Embassy to verify the authenticity of the initial letter or the position of the author of that letter. Mr Whitwell noted the existence of a Gmail email account stated at the bottom of the Embassy letter. There was no schedule of the evidence that had been provided by the appellant to the Embassy, nor indeed had any of that evidence (if any existed) been submitted for this appeal. It was unclear what the parameters of the "investigation" carried out by the authorities had been. It was an accepted fact that the appellant had been born in Conakry, had attended school in Guinea until the age of 14, and had family members who were citizens of that country, including at least one sibling. The appellant never produced his birth certificate, which presumably would have been required for him to have attended school. The Embassy letter was now two years old and there was nothing to show that the authorities had not subsequently changed their views of the appellant's status. The letter was addressed "To whom it may concern", and it was unclear whether the document had been written for consideration in legal proceedings.

39. In summary, Mr Whitwell submitted that the "best evidence" provided by the appellant was simply not good enough, and it failed to discharge the burden of proof on the balance of probabilities.

40. On the legal question, Mr Whitwell submitted that the appellant should not be permitted to circumvent Exception 1 in section 117C(4) NIAA 2002. The appellant's inability to satisfy this exception was important. Once section 117C(6) came into play, the public interest had to be taken into account. It was submitted that as the appellant was not stateless, he was simply in a position of "limbo". Reliance was placed on RA (Iraq) [2019] EWCA Civ 850; [2019] Imm AR 1212, with particular reference to paragraphs 59-71. Properly analysed, submitted Mr Whitwell, this was indeed a "limbo" case and, on the facts, the appellant simply could not succeed.

41. In reply, Mr Lee objected to the scope of Mr Whitwell's attack on the Embassy letter. He submitted that no such criticisms as to the authenticity/bona fides of that letter had been raised previously. There had been no cross-appeal by the respondent, or any other notification that the previous decision adopted in respect of the letter was being withdrawn. The respondent's failure to have complied with previous

directions from the First-tier Tribunal was emphasised. As to the appellant not been called to give evidence at the resumed hearing, Mr Lee submitted that he had been given legal advice based upon the conclusions and reasons stated by the panel in the error of law decision.

42. Mr Lee reiterated his submission that this was not a "limbo" case. He referred me to paragraphs 74-75 and 97 of RA (Iraq). This case was not about a lack of documentation, but rather a lack of nationality. Finally, Mr Lee acknowledged that the public interest was in play, given that the appellant was having to rely on section 117C(6) NIAA 2002. However, he submitted that the statelessness issue was sufficient for the appellant to succeed.

43. As mentioned earlier, at the end of the hearing I deemed it appropriate to seek further written submissions from the respondent on the question of whether statelessness (if proved) was capable of constituting a "very compelling circumstances" in the context of section 117C(6) NIAA 2002 and the overall proportionality exercise. Directions to that effect were sent out to the parties on 31 July 2020.

44. In the event, I received written submissions from Mr Whitwell on 4 September 2020, but nothing from the appellant. I was satisfied that both the directions and Mr which Wells submissions had been sent to the appellant's solicitors and Mr Lee.

45. I will deal with the relevant aspects of Mr Whitwell's submissions when setting out my conclusions, below.

FINDINGS OF FACT

46. I direct myself to the authoritative guidance set out by the Court of Appeal in AS (Guinea). Having reviewed the relevant authorities, Kitchin LJ stated that paragraph 57 :

> "57. These authorities reveal a consistent line of reasoning. A person claiming to be stateless must take all reasonably practicable steps to gather together and submit all documents and other materials which evidence his or her identity and residence in the state or states in issue, and which otherwise bear upon his or her nationality. The applicant ought also to apply for nationality of the state or states with which he or she has the closest connection. Generally, these are steps that can be taken without any risk. If, in the words of Elias LJ, the applicant comes up against a brick wall, then, depending on the reasons given, the adjudicator will decide whether the applicant has established statelessness, and will do so on the balance of probabilities. Of course, from time to time, there may be cases where it would not be reasonable to expect the applicant to take this course, and in those cases the Secretary of State will assist the applicant by making enquiries on his or her behalf but again there is no reason why the issue of statelessness cannot be decided on the balance of probabilities. By contrast, in refugee cases, it is necessary to make an assessment of what may happen in the future in another country, and whether the

> applicant faces a real risk of persecution there. This is a very different kind of assessment and it is one which, by its nature, justifies the adoption of a different and lower standard of proof. I recognise that, as the appellant and UNHCR contend in their sixth submission, many of the cases to which I have referred were decided before the promulgation by UNHCR of the guidance in 2012 and the Handbook in 2014 but in my judgment the reasoning in these decisions remains robust and authoritative."

47. I begin my assessment by recognising that the appellant has clearly lied about his nationality in the past, claiming over a prolonged period that he was Sierra Leonean. Indeed, he has admitted to this. It is also abundantly clear from the decision of the First-tier Tribunal that it was less than impressed with the appellant as a witness.

48. Mr Whitwell is correct to highlight other adverse matters. The appellant did, and still does, have an interest in the Guinean authorities concluding that he was not a national of that country. This, combined with the evidence from the Sierra Leonean authorities, would appear to assist him in showing that he was stateless, which in turn would be beneficial to his desire to remain in the United Kingdom. There is also real merit in his emphasis on the now uncontroversial facts that the appellant himself asserts that he is a Guinean national; was born in Guinea to Guinean parents; grew up in that country; was educated there until the age of 14; that certain other family members hold and/or have held Guinean citizenship; and that he has failed to adduce any evidence aside from the Embassy letter. These are potent arguments against the appellant.

49. Another strand of Mr Whitwell's submissions focused on the factual question is that the appellant has failed to provide either a schedule of the evidence he presented to the Guinean authorities or any of the evidence itself. The absence of such certainly does not assist the appellant's case.

50. It is also of note that the appellant has not given oral evidence in this Tribunal, nor indeed has even provided an updated witness statement. There is no evidence that the appellant has made a statelessness application to the respondent pursuant to the relevant Immigration Rules.

51. However, what had not been argued by the respondent before the First-tier Tribunal was that the Embassy letter of 19 February 2018 was a forgery, or that the document was written and provided otherwise than in good faith (see [43]). The judge went on at [72] to specifically find that the letter had indeed been produced in good faith, following a search of the relevant records. Nothing in the respondent's skeleton argument prepared for the error of law hearing made any reference to matters going to the authenticity and/or *bona fides* of the letter.

52. Of further relevance is the fact, as I find it to be, that the respondent has at no stage endeavoured to undertake enquiries with the Guinean authorities regarding the appellant's nationality, or claimed lack thereof. This inaction makes it more difficult for the respondent now to contend that the letter is unreliable by virtue of concerns

raised about its provenance (as opposed to what evidence should the appellant may or may not have presented to the officials).

53. Bringing the above matters together, I find that Mr Whitwell's criticisms of the letter, insofar as they relate to its provenance, should be rejected. I find that the letter was in fact written by the Consul, and that this was done in good faith following an investigation based on what the appellant told the authorities or provided to them by way of Home Office documents.

54. I acknowledge the panel's view that the Embassy letter constituted "very strong" evidence that the Guinean authorities did not believe him to be a national of that country and that this evidence was "probably the best evidence" that he could have adduced. On reflection and having considered the evidence before me as a whole, the observations contained in the error of law decision could have been expressed in a more nuanced fashion, albeit that this would not have changed the effect of what was being said.

55. The precise (and very limited) wording of the Embassy letter is instructive: the investigations were carried out "per the Home Office documents" submitted to the Embassy by the appellant and led to the conclusion that the appellant was not a Guinean national. It is quite clear that a number of the Home Office documents relating to the appellant's case over time contained incorrect information; for example, the assertion that he was a Sierra Leonean national. Further, it is impossible to know precisely what the appellant told the officials at the Embassy about his connections with Guinea as we have no relevant evidence from him on this issue. That is not to say that he actively told the officials false information in order to "subvert" their investigations (as had been found by the First-tier Tribunal). However, the import of the letter is that the non-establishment of nationality was predicated on the basis of the information provided and (unspecified) checks undertaken by the Ministry of the Interior. Thus, the letter did indeed represent "very strong" evidence of that conclusion, but this was to be seen in the context of an investigation carried out on the basis of information, aspects of which are entirely unknown, others which were inaccurate (relating to historical Home Office documents), and some which I accept were true, in particular the appellant's name and date of birth.

56. The letter was and remains the "best evidence" that the appellant could have provided as to the Guinean authorities' conclusion that, *on the information provided (such as we know it to be) and following an investigation presumably based upon that information*, the appellant is not currently recognised as a national of that country.

57. It is now uncontroversial that the appellant is not a national of Sierra Leone and would not be entitled to the nationality of that country.

58. Is the appellant therefore stateless? The term "stateless person" is defined in Article 1 of the 1954 Convention relating to the Status of Stateless Persons as follows:

> "For the purpose of this Convention, the term "stateless person" means a person who is not considered as a national by any State under the operation of its law."

59. This definition has been adopted in the Immigration Rules, paragraph 401 of which provides:

> "401. For the purposes of this Part a stateless person is a person who:
>
> (a) satisfies the requirements of Article 1(1) of the 1954 United Nations Convention relating to the Status of Stateless Persons, as a person who is not considered as a national by any State under the operation of its law;
>
> (b) is in the United Kingdom; and
>
> (c) is not excluded from recognition as a Stateless person under paragraph 402."

It is common ground that none of the exclusion criteria under paragraph 402 apply in this case.

60. Bringing all of the above matters together, I find that the appellant has failed to show, on the balance of probabilities, that he is stateless within the meaning of the 1954 Convention. The Embassy letter proves that the authorities have concluded that he is not currently a national of that country. It has not however been shown that this position is as result of the *operation of Guinean law*, as is required by the definition set out in the Convention. The letter makes no reference to any operative legislative provisions which preclude the appellant from having the nationality of that country (as opposed to a lack of information provided in order to establish eligibility), nor has he provided any evidence in respect of the relevant legal framework. On the evidence before me, there are in my view clear *prima facie* indications that the appellant could or would in principle be a national (he was born in the country to Guinean parents; has siblings who are or were Guinean nationals; was educated there; and resided in the country until the age of 14).

61. The core factual question is therefore determined against the appellant.

CONCLUSIONS

62. As I have found the appellant not to be stateless, the second and third aspects of the legal question identified earlier do not arise.

63. As matters stand, although he is not stateless the appellant cannot be deported to Guinea. I conclude that this scenario engages the "limbo" situation, as explained by the Court of Appeal in RA (Iraq) [2019] EWCA Civ 850; [2019] 4 WLR 132 at paragraphs 63-71.

64. As the appellant is already subject to a deportation order, I consider that he is in a state of "actual limbo", notwithstanding the fact that the respondent has in fact yet to attempt a removal.

65. On the evidence before me, it is not apparent that the appellant cannot be deported in the foreseeable future; nor can it be said that there are no further steps that may be taken by either party to facilitate deportation for example by the respondent communicating with the Guinean authorities or the appellant seeking to adduce further evidence from family members who are (or were) nationals of that country so as to assist in establishing nationality on better evidence than was provided previously. It cannot be said at this stage that the prospects of removal in consequence of the respondent's refusal of the human rights claim are sufficiently remote.

66. I turn to analyse the appellant's overall circumstances. He has clearly spent a long time in the United Kingdom, now just over 18 years. That residence has been lawful because he was granted discretionary leave to remain as a minor and his in-time extension application was not refused until the decision now under appeal was made in 2017, following which he will have enjoyed leave under section 3C of the Immigration Act 1971. A sizeable portion of the delay in dealing with that extension application was down to the appellant's own failure to cooperate with the authorities as regards his claimed nationality. The appellant has no family in this country and does not suffer from any material health problems. There is a preserved finding that he is not socially and culturally integrated into British society. Whilst he has clearly established a private life in this country, there is no reliable evidence of any significant ties here. It is also the case that he is a danger to the community (a consequence of the upholding of the section 72 certificate). His offending history is very poor indeed (even leaving out of account what appears to be very recent matters highlighted in Mr Whitwell's written submissions). The appellant's case has not been argued on the basis that he would not be able to reintegrate into the society of that country without experiencing very significant obstacles in so doing (bearing in mind that the existent of such obstacles would not, of themselves, go to establish very compelling circumstances under section 117C(6) NIAA 2002). The extant deportation order was only made in 2016 and the decision under appeal in 2017, neither of which render them particularly "old". As indicated above, it cannot yet properly be said that the prospects of deporting the appellant are remote.

67. I now move on to the necessary balancing exercise, taking into account the mandatory considerations under sections 117B and 117C NIAA 2002 and having regard to relevant case-law.

68. On the appellant's side of the balance sheet, it is inescapably the case that there is very little to say. This fact has been realistically reflected in Mr Lee's focus on the statelessness issue as opposed to any of the appellant's other circumstances. The length of his lawful residence in this country together with the relatively young age at which he arrived (14) are the weightiest matters in his favour.

69. Against him are ranged the following. There is a very strong public interest in deporting this individual, as recognised not only in section 117C(1) NIAA 2002, but by the seriousness of his offending and the finding by the First-tier Tribunal that he constitutes a danger to the community of the United Kingdom. He has no

established family life in this country. He is unable to meet either of the Exceptions under section 117C(4) and (5) NIAA 2002.

70. Even on the actual limbo scenario, the appellant still needs to show that very compelling circumstances exist in his case. It has not been suggested that his length of residence in the age at which he arrived here themselves constitute a sufficiently strong Article 8 claim. In my judgment, that is an entirely realistic position to have adopted.

71. Overall, it cannot be said that the very strong public interest is diminished (or to put it another way, outweighed) by any factors on the appellant's side of the balance sheet, whether these are viewed in isolation or cumulatively.

72. Therefore, the appellant is unable to show that the refusal of his human rights claim is unlawful, notwithstanding the fact that he is not at present removable from the United Kingdom. In other words, at the point in time at which I am determining this appeal, the consequences of the respondent's refusal of the human rights claim are not disproportionate. As recognised in RA (Iraq), 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 United Kingdom could be considered so remote that Article 8 might provide a route for success. In my judgment, that stage has not yet been reached, and by some distance.

73. What would the consequences be if I had found that the appellant was truly stateless within the meaning of the 1954 Convention? The issue is wholly academic, but I would make the following observations. First, the fact of statelessness would not render the deportation order itself unlawful. Second, I would conclude that statelessness could in principle be capable of constituting a very compelling circumstance. Third, I would also take the view 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 (whether due to statelessness or the absence of any basis to suppose that he/she would be admitted to another country in any event), and that there was no realistic prospect of removal occurring in the foreseeable future, the very compelling circumstances threshold might be met.

74. On the material findings and conclusions set out previously, the appellant's appeal must fail.

ANONYMITY

75. No anonymity direction has been made at any stage of these proceedings thus far. There is no good reason why one should be made now. I make no such direction.

NOTICE OF DECISION

76. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law and that decision has been set aside.

77. I re-make the decision by dismissing the appeal.

Signed: *H Norton-Taylor* Date: 11 December 2020

Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed: *H Norton-Taylor* Date: 11 December 2020

Upper Tribunal Judge Norton-Taylor

APPENDIX: ERROR OF LAW COMPONENT

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07944/2017

THE IMMIGRATION ACTS

Heard at Field House
On 22 January 2020

Decision & Reasons Promulgated

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Before

THE HONOURABLE LORD UIST SITTING AS A JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MOHAMED BARRY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Gordon Lee, Counsel, instructed by Lex Sterling Solicitors
For the Respondent: Mr Stephen Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

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1. This is an appeal by Mohamed Barry, who was born on 28 December 1987 and whose nationality is a matter of dispute, against the decision of First-tier Tribunal Judge Froom ("the judge") promulgated on 7 August 2019 dismissing his appeal against the Secretary of State's decision of 24 July 2017 to refuse his protection and human rights claim, a deportation order having been made against him on 23 August 2016.

2. The first ground of appeal is that the judge erred in law in his approach to the question whether or not the appellant was stateless. He noted that the appellant had obtained a letter from the Guinean Embassy (the *bona fides* of which were accepted by the respondent) which concluded, without reservation, that the appellant was not a Guinean national and there was a letter in similar terms from the Sierra Leonian authorities confirming that he was not a national of that country. He noted that the letter had been properly served on the respondent and that the Tribunal had directed the respondent to provide her response to the letter and any enquiries made of the authorities. On the day of the substantive hearing the respondent admitted that he had made no attempt to contact the Guinean Embassy. At the hearing it was not submitted by the respondent that the appellant might be a national of Sierra Leone, but that he was a national of Guinea, notwithstanding the letter from the Guinean Embassy. It was submitted on behalf of the appellant that the decision of the Court of Appeal in *AS (Guinea) v Secretary of State for the Home Department* [2018] EWCA Civ 2234 was relevant to the appeal and the judge considered other relevant authorities which established that in certain circumstances there is a shared burden on the appellant and respondent to make enquiry to establish whether or not the appellant is stateless. It is asserted that the judge erred in concluding that the respondent was under no such obligation in this case. The judge noted at para 44 of his decision that the letter from the Guinean Embassy stated that investigations had been carried out in Guinea itself and the conclusion was, in unequivocal terms, that the appellant did not have Guinean nationality. It did not, for example, state that it could not be established whether he was a Guinean national. The letter was, on the face of it, powerful evidence in support of the appellant's case. The context of the letter was that the respondent had been given every opportunity (and directed by the First-tier Tribunal) to make any enquiry he wished about the circumstances of the letter being written and its content. Instead, he chose to do nothing. He failed to disclose any correspondence arising out of his attempts to obtain travel documentation from the Guinean Embassy since 16 September 2016. In that context the judge's conclusion that the appellant must have led the Guinean authorities in some unspecified way in order to obtain the letter was unfair, particularly as the respondent was under a duty to help establish the position and could have done so by contacting the embassy. The appellant had attended the embassy, answered questions and obtained the letter. To conclude that the respondent was under no obligation to assist in those circumstances amounted to an error in law.

3. In response it was submitted that the judge's finding (at para 72 of his decision) that the appellant did not co-operate by giving truthful information to the Guinean Embassy was more than adequately reasoned and open to him on the evidence. Accordingly, the issue of the respondent assisting the appellant with discharging the burden of proof simply did not arise. The judge noted (at para 56 of his decision) that

he was not told what questions the Guinean Embassy had asked, the extent of the appellant's response or whether he was claiming to be truthful or accurate in such response, let alone what documents were lodged with the Guinean Embassy. His conclusion had to be viewed in light of his holistic assessment of the appellant's credibility, having decided that the appellant had lied about being Sierra Leonean (para 32), that he was "a less than impressive witness" (para 57), at times "evasive" (para 61) and "aggressive in response to difficult questions" (para 89). He noted (at para 66) that the appellant's evidence would indicate that he was entitled to Guinean nationality and (at paras 68-70) that a number of his siblings had either been born in Conakry or claimed to be Guinean nationals, as had a cousin.

4. The letter from the Guinean Embassy is on the Embassy's headed notepaper, dated 19 February 2018, addressed "to whom it may concern", bears to be signed by the consul and is franked with the Embassy's stamp. It reads as follows:

> "This letter is to confirm that after an investigation from the Ministry of the Interior in and per the Home Office documents submitted to the Embassy by Mr Barry, it has been established that, Mr Mohamed Barry born 28/12/1987 is not a Guinean national.
>
> Please do not hesitate to contact us if you require further information."

5. In our judgment the judge was correct to say that this was not a case in which a shared duty to establish nationality arose and the judge was correct so to hold. A shared duty arises where an appellant has done all that he could to obtain evidence of nationality (or lack of it) but requires further evidence which can be obtained by the Secretary of State but not by the appellant himself. That was not the position in this case. The appellant did not require any further evidence to establish that he was not a Guinean national. He had obtained what was probably the best evidence available in the form of an official letter from the Guinean Embassy stating that he was not a Guinean national. It was then for the Secretary of State, if he could, to produce evidence rebutting the content of the letter. He did not do so: indeed, he did not even attempt to do so, despite the directions from the Tribunal. It was not suggested that the letter was a forgery. It bears the appellant's correct name and date of birth. In these circumstances it constituted very strong evidence that the appellant was not a Guinean national. The reason why the judge did not accept the content of the letter was because he formed a generally unfavourable view of the appellant's credibility. He dealt with the point as follows at para 72 of his decision:

> "Drawing the threads together, I find as fact that the appellant was born in Conakry and his family all had Guinean nationality. I also find the appellant was not in Sierra Leone. I find the appellant was educated in Guinea up to the age of 14. These circumstances would tend to show that the appellant was Guinean. I accept the letter from the Embassy shows that records were searched in good faith and the appellant's registration could not be found. I accept the Guinean authorities were entitled to conclude on that basis that the appellant was not Guinean and to refuse him a travel document. However, I infer from the appellant's readiness to mislead the respondent over many years and not just when he was a minor and his willingness to give misleading evidence to the tribunal that the appellant did not co-operate by giving truthful information to the Guinean Embassy. He must have subverted the process as

> he had done previously by leading the respondent to believe he was Sierra Leonean, even to the point of attending an ETD interview."

6. The finding by the judge that the appellant "did not co-operate by giving truthful information to the Guinean Embassy" and that "he must have subverted the process" are in effect findings by the judge that the appellant obtained the letter by fraudulent means. The problem is that there was no specific evidence on the basis of which he was entitled to make such a finding and it therefore amounts to a material error of law. In order to make such a damning finding against the appellant the judge would have to have had some evidence pointing to a specific fraud perpetrated by the appellant in order to obtain the letter, but the fact of the matter is that there was no such evidence. The respondent had made no inquiries about how the letter was obtained and there was therefore a *lacuna* in the evidence. It was not for the judge to fill that *lacuna* by making a finding adverse to the appellant and contrary to the terms of the letter without any evidence to support it. The fact that the appellant had previously acted dishonestly does not provide a proper basis for concluding that he acted dishonestly in obtaining the letter. Properly analysed this is not a case of a shared burden but of a finding of fact unsupported by the evidence.

7. The second ground of appeal is that the judge erred in his approach to para 399A(b) and (c) of the Immigration Rules (and, by extension, section 117C(4) of the Nationality, Immigration and Asylum Act 2002). He accepted that the appellant had been lawfully resident in the UK most of his life but did not accept that he was socially and culturally integrated in the UK, or that there were very significant obstacles to his integration in the country of his proposed return. It was submitted that, when considering social and cultural integration, he left out of account the principle enunciated by the respondent in his published guidance *Criminality: Article 8 ECHR Cases Version 8.0* which states:

> "If the person has been present in the UK from a very early age it is unlikely that offending alone would mean a person is not socially and culturally integrated."

8. The appellant had entered the UK as a child and attended school here. In relation to rule 399A(iii) the judge had made a series of findings which *prima facie* pointed inexorably towards a finding that there would be very significant obstacles to his integration in Guinea, namely, the fact that he had left there as a child, had no useful knowledge of the lifestyle, systems, customs or practices there, and had no family or friends there.

9. In reply the respondent submitted that the appellant cannot sensibly have been said to have resided in the UK from a very early age as the judge found (at para 97) that he had remained in Guinea till the age of 14. His consideration of the issue of integration did not focus solely on the appellant's offending. The grounds of appeal also ignored a fuller reading of the guidance referred to. Moreover, the principle of the strength of residence from an early age was recently commented on by the Court of Appeal in *Akinyemi v Secretary of State for the Home Department* [2019] EWCA Civ 2098 at paras 50-51. That case did not offer the appellant any support

and could be easily distinguished on the facts as the appellant had been born in the UK, had never left the country and had not applied for British nationality despite being entitled to it. In any event the judge considered that the appellant was not a "home grown criminal" (para 127). He relied (at para 126) on the decision in *Binbuga v Secretary of State for the Home Department* [2019] EWCA Civ 551 at para 126 to conclude that paragraph 399A(b) of the Immigration Rules was not met (para 130 of his decision). His decision on this point was careful and focused and did not reveal any material error of law. In relation to paragraph 399A(c) it was submitted that it was not a fact that the appellant had no family or friends in Guinea, but merely an assertion by the appellant himself. It also ignored the findings of fact, which had not been expressly challenged, at para 97 of the judge's decision, where he found that the appellant was a young, healthy male with no dependents, spoke French, was resourceful and would have some family members in Guinea and elsewhere who could assist him to resettle, even if he could not rely on his mother or his uncles and aunts, and that he would not be left destitute. The judge had also recorded the appellant's inconsistent accounts of his family history, that he had been separated from his family at the age of seven (para 3) and that he had been sent to the United Kingdom at the age of 14 by his parents (para 18).

10. In our judgment it cannot be said that the judge has materially erred in law in respect of paragraph 399A(b) of the Immigration Rules. The error committed in relation to the statelessness issue could not have had a material bearing on the question of social and cultural integration in United Kingdom. The judge directed himself to the relevant authorities including *Binbuga* and *AM (Somalia) v Secretary of State for the Home Department* [2019] EWCA Civ 774 and correctly approached paragraph 399A(b) on a fact-sensitive basis. In light of the findings made at paras 112-117 and 129-130, the judge was entitled to conclude that the appellant was not socially and culturally integrated in the United Kingdom, even if such links had been established in the past.

11. The absence of an error has the consequence that the appellant could not succeed under paragraph 399A of the Immigration Rules. This is because all three limbs of that provision must be met (see, for example, *Tirabi (Deportation: "lawfully resident": s.5(1))* [2018] UKUT 00199 (IAC)).

12. That is not, however, the end of the matter in so far as the appellant's appeal is concerned. We are satisfied that by committing the error in relation to the statelessness issue, the judge failed to take a material factor into account when assessing whether there would be "very significant obstacles" to the appellant's integration into Guinean society, with reference to paragraph 399A(c) of the Immigration Rules. For the reason set out in the preceding paragraph, this could not have assisted the appellant under paragraph 399A, but the error is relevant to the judge's assessment of whether the appellant had been able to show "very compelling circumstances over and above" those described in the exception. When considering this question, the judge specifically left the statelessness issue out of account (see paras 144 and 146). In view of our conclusion on the first ground, there was a consequential failure to consider a relevant factor. It cannot be said that the

wider proportionality assessment would on any view have been determined against the appellant and therefore the error identified in respect of ground one had a material bearing on the outcome of the appeal.

13. In light of the foregoing, we set the judge's decision aside.

14. By way of disposal, this case is to be retained in the Upper Tribunal and set down for a resumed hearing in due course. The following findings of the First-tier Tribunal are preserved:

    a) the upholding of the certificate issued under section 72 of the Nationality, Immigration and Asylum Act 2002 and the appellant's consequent exclusion from the protection of the Refugee Convention;

    b) the appellant's exclusion from Humanitarian Protection;

    c) the rejection of the appellant's Article 3 ECHR claim;

    d) the absence of social and cultural integration in the United Kingdom and the inability of the appellant to satisfy the exception under paragraph 399A of the Immigration Rules and section 117C(4) of the Nationality, Immigration and Asylum Act 2002.

15. The scope of the resumed hearing will therefore be limited. The Upper Tribunal will consider the questions of statelessness and whether there are "very compelling circumstances over and above" those set out in the exception contained in paragraph 399A and section 117C(4) of the 2002 Act.

16. Directions to the parties are set out, below.

Notice of Decision

The decision of the First-tier Tribunal contains a material error of law and is set aside.

The appeal is adjourned for a resumed hearing.

No anonymity direction is made.

Signed Lord Uist Date: 21 February 2020

Lord Uist sitting as an Upper Tribunal Judge.

Directions to the parties

1) **Any further evidence from the appellant shall be accompanied by an application under rule 15(2A) of the Tribunal Procedure (Upper Tribunal)**

Rules 2008 and filed and served no later than 21 days before the resumed hearing;

2) **Any further evidence from the respondent shall be accompanied by an application under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 and filed and served no later than 14 days before the resumed hearing;**

3) **Both parties are to file and serve skeleton arguments, the appellant doing so no later than 7 days before the resumed hearing and the respondent no later than 4 days beforehand.**