Neutral Citation Number: [2018] EWCA Civ 2234

Case No: C5/2016/3473/A

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IAC)
DA/01045/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/10/2018

Before:

LORD KITCHIN
LORD JUSTICE McCOMBE
and
LORD JUSTICE LINDBLOM

- -

Between:

AS (Guinea)	**Appellant**
- and –	
Secretary of State for the Home Department	**Respondent**
- and –	
United Nations High Commissioner for Refugees	**Intervener**

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Adrian Berry (instructed by **Birnberg Peirce & Partners**) for the **Appellant**
Julie Anderson (instructed by **Government Legal Department**) for the **Respondent**
Chris Buttler and **Ayesha Christie** (Instructed by the **United Nations High Commissioner for Refugees**) for the **Intervener**

Hearing date: 10th July 2018

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Approved Judgment

Lord Kitchin :

1. This is an appeal by the appellant against the decision of the Upper Tribunal (Mr Ockelton, Vice President of the Upper Tribunal, and Upper Tribunal Judge Blum) promulgated on 23 June 2016 which dismissed the appeal of the appellant against the decision of the First-tier Tribunal (First-tier Tribunal Judge Talbot) promulgated on 3 February 2015 which itself dismissed the appeal of the appellant against the respondent's decision of 23 May 2014 refusing to revoke a deportation order issued on 12 February 2009.

2. The appeal raises two points of principle: first, the standard of proof applicable to the determination of whether a person qualifies for the status of a stateless person as defined in the 1954 Convention relating to the Status of Stateless Persons ("the 1954 Convention"); and secondly, the relevance of a finding that a person is stateless to an assessment carried out pursuant to paragraph 390A of the Immigration Rules.

3. We have had the benefit on this appeal of written submissions from the United Nations High Commissioner for Refugees ("UNHCR") who was given permission to intervene in these proceedings for the purpose of making such submissions by Singh LJ by order dated 29 January 2018. Counsel for UNHCR attended the hearing of the appeal in case we might call upon them for further assistance and, at our request, made brief further oral submissions. We are grateful to them for so doing.

The legal framework

The 1954 Convention

4. The 1954 Convention, to which the United Kingdom is one of 89 parties, entered into force in June 1960. It establishes a framework for the international protection of stateless people and provides important minimum standards for their treatment. It also seeks to address the vulnerability that affects stateless people and the practical problems they face in their everyday lives, for as the respondent has recognised, the possession of nationality is essential for full participation in society and a prerequisite for the enjoyment of the full range of human rights. These aims and objectives of the 1954 Convention are reflected in the following paragraphs of the preamble:

> "CONSIDERING that the United Nations has, on various occasions, manifested its profound concern for stateless persons and endeavoured to assure stateless persons the widest possible exercise of these fundamental rights and freedoms,
>
> CONSIDERING that only those stateless persons who are also refugees are covered by the Convention relating to the Status of Refugees of 28 July 1951, and that there are many stateless persons who are not covered by that Convention,
>
> CONSIDERING that it is desirable to regulate and improve the status of stateless persons by an international agreement …."

5. The term "stateless person" is defined in Article 1:

> "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."

6. There follows a series of provisions addressing the rights to be granted to or conferred upon stateless persons. Article 31 deals with expulsion and reads, so far as material:

> "1. The Contracting States shall not expel a stateless person lawfully in their territory save on grounds of national security or public order.
>
> 2. The expulsion of such a stateless person shall be only in pursuance of a decision reached in accordance with due process of law…."

7. In 2012 UNHCR issued guidelines with the aim of assisting government officials, judges, practitioners and others involved in addressing statelessness. In 2014 these guidelines were incorporated into a handbook ("the Handbook"). Part two of the Handbook gives guidance about procedures for the determination of statelessness. One aspect of this guidance concerns the burden of proof. Here the Handbook advises (at D(3)):

> "89 … In the case of statelessness determination, the burden of proof is in principle shared, in that both the applicant and examiner must cooperate to obtain evidence and to establish the facts. The procedure is a collaborative one aimed at clarifying whether an individual comes within the scope of the 1954 Convention. Thus, the applicant has a duty to be truthful, provide as full an account of his or her position as possible and to submit all evidence reasonably available. Similarly, the determination authority is required to obtain and present all relevant evidence reasonably available to it, enabling an objective determination of the applicant's status. This non-adversarial approach can be found in the practice of a number of states that already operate statelessness determination procedures.
>
> 90. Given the nature of statelessness, applicants for statelessness status are often unable to substantiate the claim with much, if any, documentary evidence. Statelessness determination authorities need to take this into account, where appropriate giving sympathetic consideration to testimonial explanations regarding the absence of certain kinds of evidence."

8. Another concerns the standard of proof. The appellant and UNHCR attach great importance to this and so I will set it out in full:

> "**D ASSESSMENT OF EVIDENCE**
>
> ...
>
> **(4) Standard of proof**

> 91. As with the burden of proof, the standard of proof or threshold of evidence necessary to determine statelessness must take into consideration the difficulties inherent in proving statelessness, particularly in light of the consequences of incorrectly rejecting an application. Requiring a high standard of proof of statelessness would undermine the object and purpose of the 1954 Convention. States are therefore advised to adopt the same standard of proof as that required in refugee status determination, namely, a finding of statelessness would be warranted where it is established to a "reasonable degree" that an individual is not considered as a national by any State under the operation of its law.
>
> 92. The lack of nationality does not need to be established in relation to every State in the world. Consideration is only necessary of those States with which an individual has a relevant link, generally on the basis of birth on the territory, descent, marriage, adoption or habitual residence. However, statelessness will not be established to a reasonable degree where the determination authority is able to point to clear evidence that the individual is a national of an identified State. Such evidence of nationality may take the form, for example, of written confirmation from the competent authority responsible for naturalization decisions in another country that the applicant is a national of that State through naturalization or information establishing that under the nationality law and practice of another State the applicant has automatically acquired nationality there.
>
> 93. Where an applicant does not cooperate in establishing the facts, for example by deliberately withholding information that could determine his or her identity, then he or she may fail to establish to a reasonable degree that he or she is stateless even if the determination authority is unable to demonstrate clear evidence of a particular nationality. The application can thus be rejected unless the evidence available nevertheless establishes statelessness to a reasonable degree. Such cases need, however, to be distinguished from instances where an applicant is unable, as opposed to unwilling, to produce supporting evidence and/or testimony about his or her personal history."
>
> (Footnotes omitted)

9. A little later, at paragraphs 97 and 98, the Handbook gives this guidance about enquiries directed to and responses from foreign authorities:

> "97. Flexibility may be necessary in relation to the procedures for making contact with foreign authorities to confirm whether or not an individual is its national. Some foreign authorities may accept enquiries that come directly from another State while

> others may indicate that they will only respond to requests from individuals.
>
> 98. Where statelessness determination authorities make enquiries with foreign authorities regarding the nationality or statelessness status of an individual, they must consider the weight to be attached to the response or lack of response from the State in question."
>
> (Footnotes omitted)

10. I should also mention at this point that although 89 countries are party to the 1954 Convention, fewer than 25 countries have established dedicated statelessness determination procedures. The United Kingdom adopted such procedures in 2013 by amendment to the Immigration Rules, as I will explain in a moment.

The Immigration Rules

11. Turning now to the Immigration Rules, Part 13 addresses deportation, revocation of a deportation order and rights of appeal. The rules read, so far as relevant:

> "**Revocation of a deportation order**
>
> 390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:
>
> (i) the grounds on which the order was made;
>
> (ii) any representations made in support of revocation;
>
> (iii) the interests of the community, including the maintenance of an effective immigration control;
>
> (iv) the interests of the applicant, including any compassionate circumstances.
>
> 390A. Where paragraph 398 applies the Secretary of State will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors.
>
> 391. In the case of a person who has been deported following conviction for a criminal offence, the continuation of a deportation order against that person will be the proper course:
>
> (a) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of less than 4 years, unless 10 years have elapsed since the making of the deportation order when, if an application for revocation is

> received, consideration will be given on a case by case basis to whether the deportation order should be maintained, or
>
> (b) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of at least 4 years, at any time,
>
> Unless, in either case, the continuation would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees, or there are other exceptional circumstances that mean the continuation is outweighed by compelling factors.
>
> 391A. In other cases, revocation of the order will not normally be authorised unless the situation has been materially altered, either by a change of circumstances since the order was made, or by fresh information coming to light which was not before the appellate authorities or the Secretary of State. The passage of time since the person was deported may also in itself amount to such a change of circumstances as to warrant revocation of the order.
>
> …
>
> **Rights of appeal in relation to a decision not to revoke a deportation order**
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> …
>
> 396. Where a person is liable to deportation the presumption shall be that the public interest requires deportation. It is in the public interest to deport where the Secretary of State must make a deportation order in accordance with section 32 of the UK Borders Act 2007.
>
> 397. A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the Human Rights Convention. Where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed."

12. Paragraphs A398 to 400 concern cases where a person liable to deportation claims that his or her deportation would be contrary to the United Kingdom's obligations under Article 8 of the European Convention on Human Rights ("the ECHR").

13. Since 2013 provision has been made for stateless persons in Part 14 of the Immigration Rules. Paragraph 401 adopts the definition of "stateless person" in Article 1(1) of the 1954 Convention. Paragraph 403 then sets out the requirements for limited leave to remain in the United Kingdom as a stateless person:

> "403. The requirements for leave to remain in the United Kingdom as a stateless person are that the applicant:
>
> (a) has made a valid application to the Secretary of State for limited leave to remain as a stateless person;
>
> (b) is recognised as a stateless person by the Secretary of State in accordance with paragraph 401;
>
> (c) is not admissible to their country of former habitual residence or any other country; and
>
> (d) has obtained and submitted all reasonably available evidence to enable the Secretary of State to determine whether they are stateless."

14. Paragraph 404 sets out the general reasons for refusal of limited leave to remain as a stateless person. It states that an applicant will be refused limited leave to remain if, among other things, his or her application would fall to be refused under any of the grounds set out in paragraph 322 of the Immigration Rules. Paragraph 322(1B) of the Immigration Rules states that leave to remain is to be refused if the applicant is, at the date of application, the subject of a deportation order or a decision to make a deportation order.

The background

15. The appellant was born in Guinea on 27 December 1986. At some point, probably very early in December 2004, he entered the United Kingdom clandestinely and using a passport to which he was not entitled. On 3 December 2004 he claimed asylum, asserting that he was a national of Guinea and that he faced a risk of persecution in that country because he and other members of his family were perceived as opponents of the government.

16. Following his arrival in the United Kingdom, the appellant started to take drugs and became addicted. He then began to offend in order to fund his addiction. On 8 January 2007, at Bradford Crown Court, he was convicted of robbery. On 12 January 2007, at Huddersfield Magistrates Court, he was convicted of six counts of theft and going equipped for theft. On 28 February 2007 he was sentenced to two years' imprisonment in a young offender institution for robbery and 91 days' imprisonment in a young offender institution for theft, the sentences to run concurrently. The judge explained in his sentencing remarks that the robbery was particularly serious. The appellant approached a woman on her way to work, demanded that she give him her bag and when she refused, continued to pull it, dragging her along the floor as a result of which she suffered injuries to her fingers and knees. He then made off with the bag.

17. Meanwhile, the appellant's original asylum claim had proceeded to a conclusion. However, in November 2007, the respondent withdrew her decision and restarted the process, scheduling an asylum interview for 3 January 2008.

18. On 7 December 2007 the respondent issued a notice of her decision to deport the appellant, subject to the outcome of his asylum claim.

19. On 10 January 2008 the appellant's asylum claim was refused but in August 2008 an appeal by the appellant against the decision to deport him was allowed on the basis of a procedural irregularity. In October 2008 the respondent therefore issued a further notice of her decision to deport the appellant and in February 2009 he was served with a deportation order. The appellant sought to have that order revoked but revocation was refused by the respondent by a decision dated 18 February 2011 and an appeal against that decision was dismissed by the First-tier Tribunal on 12 July 2011. That tribunal found, among other things, that the appellant had not established any family life relationships and that he had failed to present satisfactory evidence of any significant private life. Further, even if his account of his experiences in Guinea were true, he did not face a real risk of persecution on return.

20. On 21 August 2013 the appellant submitted a fresh claim for asylum and sought permission to remain on human rights grounds and on the basis that he was a stateless person. He maintained, among other things, that, although he was born and brought up in Guinea, he had never had any identity documents, had never seen his birth certificate and had never had a passport. He said that he had cooperated with attempts by the Home Office to get him an emergency travel document ("ETD") to facilitate his return to Guinea. He also claimed that he had been in contact with the Guinean embassy by telephone, by attending in person and, through his solicitors, by correspondence but that the embassy had told him that they had no evidence of his nationality.

21. By letter of 21 May 2014 the respondent refused the appellant's application for leave to remain as a stateless person because, at the date of his application, he was the subject of the deportation order made against him on 12 February 2009. There was no right of appeal against that decision, as the appellant accepts, and no other challenge was made to it.

22. The respondent also treated all of the matters raised by the appellant as an application to revoke the deportation order. This application was refused by letter dated 23 May 2014. The respondent explained that the application had been considered in accordance with paragraphs 390 and 391 of the Immigration Rules and that his expulsion until 10 years had elapsed since the making of the deportation order would normally be the proper course; that it had also been considered whether the appellant's situation had materially altered; and that an assessment had been made as to whether refusal to revoke the deportation order would be contrary to the ECHR or the Convention and Protocol relating to the Status of Refugees ("the Refugee Convention"). The respondent concluded that a refusal to revoke the deportation order would not result in any such breach. In reaching that conclusion the respondent found, among other things, that the appellant had failed to establish any fear of persecution in Guinea. Further, he had produced no evidence to suggest that the Guinean authorities had deprived him of Guinean citizenship or that they were unwilling to issue him with an ETD to effect his removal; and when he underwent a face-to-face interview with the Guinean authorities on 2 February 2011, the Consulate official accepted that he was a Guinean national. Yet further and while it was true that the Guinean authorities had not agreed to issue him with an ETD to date, they had not informed the Home Office that they were unwilling to issue him with an ETD to effect his removal to Guinea. Moreover, he had provided no evidence to suggest that he had been deprived of Guinean nationality and it seemed that the only reason the authorities had not issued him with an ETD was

because, in the absence of the necessary documents, they had been unable to verify his true identity.

The decision of the First-tier Tribunal

23. On appeal to the First-tier Tribunal, Judge Talbot noted there were two decisions in the case. The first was the decision of 21 December 2014 which he dealt with very shortly. He observed, correctly, that the appellant could not meet the requirements of paragraph 403 of the Immigration Rules because he was the subject of a deportation order.

24. The second was the decision not to revoke the deportation order. Here Judge Talbot explained that, because the appellant did not meet the provisions of paragraph 399 or 399A of the Immigration Rules, it would only be in exceptional circumstances that the public interest in maintaining the deportation order would be outweighed by other factors. So the critical question for him was whether such exceptional circumstances existed. In this regard, counsel for the appellant described the issue of statelessness as being the key issue. He submitted that the appellant was stateless and that this amounted to exceptional circumstances under the Immigration Rules and a change of circumstances under paragraph 391A.

25. Judge Talbot heard oral evidence from the appellant in English. The appellant said that he wished to return to Guinea and had done everything he could to establish his nationality so that he could be returned. The judge did not accept that evidence, however. He found that the appellant had been remarkably inactive about establishing his nationality. For example, he had made no attempt to contact the college at which he studied; had not tried to get help from Guinean nationals with whom he had been in contact in the United Kingdom; had not contacted the birth registration authorities in Guinea; had not approached any agency such as the Refugee Council or the Red Cross; and had not attempted to contact members of his family, including his mother and sister. In the light of these matters, the judge rejected the appellant's evidence that he wanted to return to Guinea.

26. Judge Talbot then directed himself as to the law and referred to the decision of the Court of Appeal in *MA (Ethiopia) v Secretary of State for the Home Department* [2009] EWCA Civ 2009 before expressing his conclusions in these terms:

> "26. …. The Appellant, who was born in Guinea of Guinean parents is a Guinean national. I am not satisfied that he genuinely wishes to return to Guinea as he has not taken active steps which he could reasonably have taken to provide proof of his identity. He has approached the Guinean Embassy and they appear to have done little or nothing to assist him in providing evidence of his identity. This may be because they are unenthusiastic about his return in the light of his criminal record. However, as their recent letter makes clear, their reason for not issuing an Emergency Travel Document is because of the lack of evidence provided by the Appellant of his identity and nationality. They have not stated that they are regarding him as having renounced his nationality …. nor that they are revoking his nationality because of his criminal record. If the appellant were to take reasonable steps on his own initiative to obtain proof of his

> identity and nationality, I have no reason to believe on the evidence before me that he would be refused an Emergency Travel Document. Having taken due account of the relevant law, I therefore found that the appellant cannot be considered to be a 'stateless person' within the meaning of the immigration rules and the 1954 Convention."

27. The appellant's other arguments either fell away or were disposed of by the judge and so the appeal fell to be dismissed.

The decision of the Upper Tribunal

28. The appellant contended before the Upper Tribunal that the First-tier Tribunal had fallen into error in the following respects: it had imposed too high an evidential burden upon him and ought to have approached the appeal on the basis that he only had to establish a reasonable degree of likelihood or a real risk that he was stateless; that he was only required to approach the competent authority, here the Guinean embassy, and seek its assistance in establishing his nationality; that the embassy was well placed to ascertain whether he was a national of Guinea; that he had approached the embassy; that he had had a number of meetings with embassy officials; that the embassy had responded by letter dated 8 January 2015 that they were not satisfied that he was a Guinean national and so would not issue him with an ETD; and that this response was sufficient to establish that he was stateless. He was not required to do more and, in particular, was not required to make further enquiries himself. The First-tier Tribunal had set the bar too high and had wrongly imposed upon him an obligation to establish that he was stateless on the balance of probabilities. Furthermore, the appellant continued, a person's statelessness is capable of amounting to an exceptional circumstance for the purposes of the Immigration Rules or is at least capable of having a material bearing on whether there are exceptional circumstances, and in failing so to find Judge Talbot had again fallen into error.

29. The Upper Tribunal was not persuaded by these submissions. It held that the question whether a person is stateless for the purposes of the Immigration Rules can only be determined by reference to the meaning of that term in the 1954 Convention. However, the Convention does not make provision for the burden or standard of proof that a person is stateless and says nothing about how an application for a determination whether a person is stateless is to be assessed. It is true that the Handbook gives guidance that the lower standard of proof should be applied, but this is merely advisory. By contrast, the question whether a person is stateless raises similar issues to those arising when a person asserts he is unable to obtain documents establishing nationality or enabling return to a state and here the question is to be answered on the balance of probabilities.

30. The Upper Tribunal then reviewed the assessment carried out by Judge Talbot in the First-tier Tribunal and held that he was entitled to find that the appellant had not established that he was stateless for the reasons he gave. Judge Talbot had made no error in his approach to the issues before him and had arrived at a conclusion which was properly open to him. However, the Upper Tribunal continued, if it was wrong on this point, it was nevertheless satisfied that any error Judge Talbot had made could not have made a material difference to the exercise of discretion under paragraph 390A of the Immigration Rules. It therefore dismissed the appeal.

This appeal

31. There are two grounds of appeal. First, the Upper Tribunal misdirected itself in holding that the appellant was bound to prove that he was stateless on the balance of probability.

32. Secondly, the Upper Tribunal erred in law in finding that, if the appellant was stateless, this fact could make no material difference to the assessment of exceptional circumstances under paragraph 390A of the Immigration Rules.

Ground 1- submissions

33. The submissions of the appellant and UNHCR begin, by way of introduction, with the guidance issued by UNHCR in the Handbook which states parties should (a) apply a shared burden of proof, and (b) adopt the same standard of proof as that applied in refugee cases, such that statelessness must be established to a reasonable degree. The appellant and UNHCR say this is for two reasons: first, because of the fundamental importance of the substantive rights conferred on stateless persons by the 1954 Convention and the serious consequences of incorrectly rejecting an application for stateless status; and secondly, in recognition of the practical difficulties inherent in proving statelessness. These are, they say, the same reasons as those that lie behind the standard and burden of proof in refugee cases, and there is no policy basis for setting the bar to protection under the 1954 Convention higher than that under the Refugee Convention.

34. Against this background, the appellant and UNHCR have developed the following seven submissions. First, as an international treaty, the 1954 Convention must have an autonomous and international meaning because disparate interpretations would frustrate the intention to provide a uniformity of approach. UNHCR has a mandate to address the problem of statelessness, a responsibility to provide interpretive legal guidance and experience of the problem of statelessness worldwide. Accordingly, this court should take into account the guidance it has issued in the Handbook. The appellant and UNHCR support these submissions by reference to the guidance issued by UNHCR in relation to the Refugee Convention and the recognition by courts in the United Kingdom at the highest level that this constitutes a valid source of interpretation under Article 31(3)(b) of the 1969 Vienna Convention on the Law of Treaties, has high persuasive authority and is a guide to the international understanding of the Convention obligations as worked out in practice. They argue that these same considerations apply or ought to apply to the guidance issued by UNHCR in relation to the 1954 Convention and that the Handbook should therefore be afforded considerable weight.

35. Secondly, the 1954 Convention must be interpreted in the light of its human rights and humanitarian objectives (see Article 31(1)). The purpose of the 1954 Convention is to afford protection to a particularly vulnerable group, namely stateless persons. These persons are susceptible to a range of abuse and have distinct protection needs. They are often denied access to education, healthcare and legal employment and they face discrimination and restrictions on freedom of movement, and are vulnerable to arbitrary and prolonged detention and trafficking. The rationale for the adoption of a lower standard of proof in refugee cases applies also to stateless persons because of the serious detrimental impact of statelessness and the consequences of an application for statelessness being incorrectly rejected.

36. Thirdly, the 1954 Convention contemplates that any individual person is either stateless or a national of a nation state. It does not envisage what UNHCR describes as an undistributed category of persons who are neither nationals of a nation state nor recognised as stateless and are in this way left in limbo. So the 1954 Convention ought to be interpreted and applied liberally in a manner that furthers its humanitarian objects and purposes and minimises the possibility of any person being left in limbo. That requires the adoption of a lower standard of proof than the balance of probabilities.

37. Fourthly, a person seeking to establish statelessness is faced with the difficulty of trying to prove a negative, that is to say that he or she is not a national of any state. What is more, such a person will often be outside his or her home country, without documents and have limited or no resources. By contrast, state parties have far greater means to establish a positive, that is to say that a person is a national of another state. These factors point to the real risk standard of proof and a shared burden of proof.

38. Fifthly, it is appropriate to take into account the practice of other states in interpreting and applying the 1954 Convention. Counsel for UNHCR has informed us on instructions that, as of February 2018, fewer than 25 signatory states had statelessness determination procedures established through legislative or sub-legislative acts and four others had administrative or judicial statelessness determination procedures. He has also told us that, of these, six have adopted a standard of proof of statelessness which is lower than the balance of probabilities.

39. Sixthly, authorities dealing with the standard of proof in cases where a person seeks to establish that he or she is unable to return to a particular state are of limited or no assistance and were decided without reference to or consideration of the 1954 Convention and its objects and purposes.

40. Finally, the respondent's own statelessness guidance issued in 2016 states that "*where the available information is lacking or inconclusive, the caseworker must assist the applicant by undertaking relevant research and, if necessary, making enquiries with the relevant authorities and organisations*". The respondent has in this way recognised the importance of a shared burden and this again points to a lower standard of proof than the balance of probabilities.

41. The respondent's position is quite straightforward. He submits that the Upper Tribunal was right to dismiss the appeal for the reasons it gave.

Ground 1 – discussion

42. In assessing the appellant's submissions, the starting point is the 1954 Convention for this defines the term "stateless person" in Article 1(1) as "*a person who is not considered a national by any state under the operation if its law*". The same definition is adopted in Part 14, paragraph 401 of the Immigration Rules and it is common ground that it has the same meaning in both provisions. Further, I accept that the 1954 Convention seeks to address the vulnerability of stateless persons by providing that contracting states shall accord to such persons a core set of civil, economic, social and cultural rights. Nevertheless, it is important to have well in mind from the outset that, as UNHCR recognises, the 1954 Convention says nothing about how states are to determine whether a person is or is not stateless. The position under the 1954 Convention may be contrasted with that under the Refugee Convention. There the

definition of refugee depends upon there being a well-founded fear of persecution. This leads naturally to a consideration of whether there is a real risk of persecution: if there is, the fear of persecution will be well-founded.

43. I recognise that the UN General Assembly has entrusted UNHCR with a mandate to identify and prevent or at least reduce statelessness and to protect stateless persons, and that UNHCR has issued the Handbook pursuant to this mandate. In *R v Secretary of State for the Home Department, ex parte Adan* [2001] 2 AC 477, 520, Lord Steyn described similar guidance issued by UNHCR concerning the application of the Refugee Convention as having "*high persuasive authority*", and observed that it was "*much relied on by domestic courts and tribunals*". Similarly, in *R v Secretary of State for the Home Department, ex parte Robinson* [1998] QB 929, 938, Lord Woolf MR said of the same guidance that it was "*particularly helpful as a guide to what is the international understanding of the Convention obligations, as worked out in practice*". Further, and reverting to the Handbook with which this appeal is concerned, this contains guidance (in paragraphs [22] to [24] and [47] to [48]) that "law" in Article 1(1) is to be read broadly to encompass, not just legislation, but also customary practice. In *Pham v Secretary of State for the Home Department (Open Society Justice Initiative intervening)* [2015] 1 WLR 1591 the Supreme Court considered this aspect of the guidance. The Secretary of State did not question its authority and although Lord Carnwath JSC expressed some concern (at [38]) that parts of it were not easy to reconcile with the words of the article itself, he considered that, in light of the position taken by the Secretary of State, it was appropriate to take it into account.

44. In light of the foregoing I have no doubt that it is permissible and appropriate for a court to consider the guidance in the Handbook as to how the 1954 Convention is to be applied, and to have regard to the explanation given by UNHCR as to how and why that guidance has been formulated in the way that it has. But that, so it seems to me, is precisely what the Upper Tribunal did. It observed, correctly in my judgment, that the guidance should be accorded considerable weight but that it remained advisory. It made no error in proceeding in this way.

45. That brings me to the second submission advanced by the appellant and UNHCR, namely that the 1954 Convention must be interpreted in light of its human rights and humanitarian objectives and that the rationale for adoption of a lower standard of proof in refugee and human rights cases also applies to stateless persons, not least because of the serious detrimental impact of statelessness and the grave consequences of an application being incorrectly rejected. This submission is conveniently considered together with the fourth submission which is founded upon the difficulty facing applicants for statelessness status of proving a negative.

46. I accept without question that the 1954 Convention must be interpreted in light of its objectives and that the consequences of an error in the assessment of whether a person is or is not stateless may be serious. But it seems to me that the nature of the issue facing the adjudicator and the steps that an applicant needs to take in order to establish statelessness are generally very different from those that arise in relation to an application for recognition of refugee status. The steps necessary to establish statelessness will usually be steps that an applicant can readily take without any risk of harm. The applicant can gather together all reasonably available evidence about his or her identity and residence in the state in issue. Further, the applicant may make an application to the embassy or other representatives of that state for formal recognition

of his or her status and may request the necessary documents to enable his or her return. If an applicant has made all reasonable efforts to gather the available evidence and has made an appropriate application which has been rebuffed or refused then the tribunal may draw appropriate inferences about the applicant's status. If an applicant is unable to take the necessary steps for good reason then, as the Secretary of State has made clear in his own policy instruction, he will assist the applicant and undertake research on his or her behalf and, if necessary, make the necessary enquiries with the relevant authorities. There is therefore no need to speculate as to whether a person is or is not stateless; that person's status can be ascertained.

47. The position of someone seeking to establish that he or she is a refugee within the meaning of the Refugee Convention is, in my judgment, very different. It will generally be very hard for such a person to establish anything more than a reasonable degree of likelihood that he or she will be persecuted if returned to the country of his or her nationality, and the consequences of an error may be very severe indeed.

48. These considerations do, in my view, emerge from a series of decisions to which we were referred at the appeal hearing and to which I now turn. Some concern statelessness and others the closely related concept of inability to return. The first is *R v Secretary of State for the Home Department Ex parte Valentina Bradshaw* [1994] Imm Ar 359. Ms Bradshaw, a citizen of the former USSR, had been granted indefinite leave to remain in the United Kingdom as a result of her fraudulent misrepresentations but asserted that she was stateless and so could not be removed. Lord MacLean, sitting in the Outer House of the Court of Session, found that she had failed to establish that she was a stateless person and that before she could be said to be stateless within the meaning of Article 1 of the 1954 Convention, she would have had to apply to those states which might consider her to be and might accept her as a national, and that she had not done.

49. This reasoning was referred to without criticism by Pill LJ in *Revenko v Secretary of State for the Home Department* [2001] QB 601 at page 624 G-H and has become known as the Bradshaw principle. We have been referred to a number of decisions in which it has been applied, albeit, on occasion, with some qualification: see, for example, *YL (Nationality, Statelessness, Eritrea, Ethiopia) v Secretary of State for the Home Department v* [2003] UKIAT 00016 and *R (on the application of Tewolde) v Immigration Appeal Tribunal* [2004] EWHC 162. In this latter case Henriques J said this concerning the appellant's claim to be stateless:

> "16 … In the present case the adjudicator had to decide whether the claimant was eligible for citizenship of Eritrea and in my judgment quite correctly adopted the higher test, that most favourable to the claimant, namely, the balance of probabilities.
>
> 17. In considering whether the claimant would be persecuted or suffer a breach of human rights he quite correctly applied the lower asylum standard.
>
> 18. Whether the claimant was eligible for Eritrean citizenship was a matter for the judgment of the adjudicator who plainly applied the correct test, namely, was it more likely than not. There is a distinction between eligibility and success. The

> adjudicator was entitled to conclude that if the claimant so chose he could more likely than not establish citizenship in Eritrea. Accordingly he is eligible.
>
> 19. The difficulty for the claimant lies in the principle enunciated in *Bradshaw*, namely, that a person who claims to be stateless must apply for the citizenship of any country with which she has a close connection and must be refused before he can be entitled to reside in this country. *Bradshaw* was recently followed by the IAT in their recent decision in appeal number 2003 UK IAT 00016 (Ethiopia):
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>> "Following *Bradshaw* [1994] Imm AR 359 we consider it settled law that when a person does not accept that the Secretary of State is correct about his nationality, it is incumbent on him to prove it, if need be by making application for such an nationality… Bearing in mind that the burden rests on him, the claimant, it is always relevant to enquire in such cases whether a person has taken steps to apply for the nationality of the country in question, or, if they have taken steps whether they have been successful or unsuccessful.""

50. The *Bradshaw* test was considered again by the Court of Appeal in *MA (Ethiopia) v Secretary of State for the Home Department* [2009] EWCA Civ 289. Here an Ethiopian of Eritrean origin contended she would face a real risk of persecution were she to be returned to Ethiopia. But it became apparent that she would not suffer persecution if the Ethiopian authorities were prepared to allow her to return. The issue before the Court of Appeal was whether the Secretary of State could rely upon the findings the AIT had made about the prospects of the appellant being authorised to return, and whether the tribunal had applied the right test when considering that question. Elias LJ, with whom Stanley Burnton and Mummery LJJ agreed, said this:

> "49. However, this is a highly unusual case in which it became apparent during the hearing before the AIT that the outcome depended upon whether the Ethiopian authorities would allow the appellant to return to Ethiopia. I do not accept the appellant's submission that the AIT simply had to determine this question to the usual standard of proof. It is a question which can, at least in this case, be put to the test. There is no reason why the appellant should not herself make a formal application to the embassy to seek to obtain the relevant documents. If she were refused, or she came up against a brick wall and there was a failure to respond to the request within a reasonable period such that a refusal could properly be inferred, the issue would arise why she had been refused. Again, reasons might be given for the refusal. Speculation by the AIT about the embassy's likely response, and reliance on expert evidence designed to assist them to speculate in a more informed manner about that question, would not be necessary.

50. In my judgment, where the essential issue before the AIT is whether someone will or will not be returned, the Tribunal should in the normal case require the applicant to act bona fide and take all reasonably practicable steps to seek to obtain the requisite documents to enable her to return. There may be cases where it would be unreasonable to require this, such as if disclosure of identity might put the applicant at risk, or perhaps third parties, such as relatives of the applicant who may be at risk in the home state if it is known that the applicant has claimed asylum. That is not this case, however. There is no reason why the appellant should not herself visit the embassy to seek to obtain the relevant papers. Indeed, as I have said, she did so but wrongly told the staff there that she was Eritrean.

51. I am satisfied that there is no injustice to the appellant in this approach: it does not put her at risk. The real risk test is adopted in asylum cases because of the difficulty of predicting what will happen in the future in another country, and because the consequences of reaching the wrong decision will often be so serious for the applicant. That is not the case here. As Ms Giovannetti pointed out, there is no risk of ill treatment if an application to the embassy is made from the United Kingdom, even if it is refused.

52. Furthermore, this approach to the issue of return is entirely consistent with the well-established principle that, before an applicant for asylum can claim the protection of a surrogate state, he or she must first take all steps to secure protection from the home state. That was the approach adopted in Bradshaw, to which I have made reference. It can be seen as an aspect of the duty placed on an applicant to co-operate in the asylum process. Paragraph 205 of the UNHCR handbook expressly states that an applicant for asylum must, if necessary, make an effort to procure additional evidence to assist the decision maker. Bradshaw is an example of such a case. The issue was whether the applicant was stateless. Lord MacLean held that before a person could be regarded as stateless, she should make an application for citizenship of the countries with which she was most closely connected.

53. Any other approach leads, in my view, to absurd results. To vary an example given by my Lord, Lord Justice Stanley Burnton in argument: the expert evidence might show that three out of ten in the appellant's position were not allowed to return. If that evidence were accepted it would plainly be enough to constitute a real risk that the appellant would not be successful in seeking authorisation to return. But it would be strange if by the appellant's wilful inaction she could prevent the Tribunal from having the best evidence there is of the state's attitude to her return. She could refuse to put to the test whether she might

be one of the seven who would be successful. It would in my view be little short of absurd if she could succeed in her claim by requiring the court to speculate on a question which she was in a position actually to have resolved."

51. Stanley Burnton LJ, with whom Mummery LJ also agreed, added:

> "78. There was debate before us as to the standard of proof to be applied in a case in which a person contends that he is unable to obtain in this country the passport or emergency travel document that is her right as a national of her country of origin. In my judgment, it is not the "real risk" test.
>
> The "real risk" test applies to the question whether the fear is well-founded: it is well-founded if there is a real risk of persecution. Thus a person who is unwilling to return owing to a fear that is so justified is entitled to refugee status. Inability to return is not qualified in the Convention by the words "owing to such fear", and like the majority of the Court of Appeal in Adan, Nooh, Lazarevic and Radivojevic I see good reason why it is not. Inability to return can and should be proved in the ordinary way, on the balance of probabilities.
>
> 79. There are, as Miss Giovannetti submitted, good reasons other than the wording of the Convention for this conclusion. Most importantly is the nature of the risk. If a person is returned when there is a real risk of persecutory ill treatment on his return, that risk may eventuate with commensurately serious consequences. To require a person here to take reasonable steps to apply for a passport or travel document, or to establish her nationality, involves no risk of harm at all. I take into account that there may be cases in which the application to the foreign embassy may put relatives or friends who are in the country of origin at risk of harm. If there is a real risk that they will suffer harm as a result of such an application, it would not be reasonable for the person claiming asylum to have to make it. The present is not such a case.
>
> 80. Secondly, the application of a "real risk" test leads to absurdity. It would mean that a person could establish that he could not return to his country of origin by showing that a significant number of persons in a similar position had been refused a travel document, even if the majority had obtained one and been able to return without fear of ill treatment.
>
> 81. The third reason why the "real risk" test is inappropriate is that it is easy for the facts in issue to be proved. The person claiming asylum can give evidence of her application to her embassy or consulate, including any application made in person and of the refusal or other response (or lack of it) of her embassy. Her solicitors can write to the embassy on her behalf and produce

> the correspondence. By contrast, it may be difficult for a person here to prove what is happening in her country of origin, let alone what may happen to her in the future if she returns.
>
> 82 The fourth reason is that if leave to remain is refused on the ground that the applicant can and should obtain her foreign passport and recognition of her nationality, and it turns out that she cannot, she can make a fresh claim based on the refusal."

52. In *R (on the application of Nhamo) v Secretary of State for the Home Department* [2012] EWHC 422, the issue before the court was whether the refusal of the South African authorities to recognise that the claimant was a South African national gave rise to a reasonably arguable case on her part that she was not such a national. In considering that issue, Sales J (as he then was) explained that it is the domestic law of a state which lays down the criteria by reference to which a judgment is to be made whether a person is or is not a national of that state. But that did not mean to say that, where the authorities of a state declined to accept that someone was a national of a state, that was determinative of the question of nationality. He continued:

> "35. …. the view of the national authorities of the foreign state (particularly a view given by the executive authorities of that state, as distinct from, say, a formal ruling by a judicial authority) will not usually be determinative on the question whether a particular individual is or is not a national of the state according to the laws of that state. For example, it may be that the authorities of a foreign state considering whether an individual is a national of that state have simply made a mistake in their understanding of the relevant facts when they come to apply their national law, or they may not have the full range of evidence bearing on that question which is available to the UK authorities.
>
> 36. Where the question of nationality arises as a matter which has to be assessed by the authorities in the United Kingdom, it is for those authorities to assess the position on the evidence available to them. So, for example, the position in an English domestic court or tribunal, if asked to consider when whether a person is or is not a national of some other state, would be to assess that question by reference to the law of that state, but making its own findings of relevant fact. Thus, where there is an issue between the Secretary of State and a person claiming refugee status, whether that person is a national of some other state, the issue is to be resolved between the Secretary of State and that person (if necessary in legal proceedings) on the balance of probabilities by reference to the relevant national law of the state in question.
>
> 37. Obviously, the authorities of that other state, not being a party to the decision or to any English domestic legal proceedings, will not be formally bound by the result of that determination; and that can create practical impediments to the removal of the individual in question to that state if those

> authorities do not accept the conclusion of the Secretary of State or an English court or tribunal. But as between the Secretary of State and the individual concerned, the Secretary of State is entitled and bound to assess the matter on the basis of the evidence before her. The same applies if the matter becomes the subject of a domestic court or tribunal: the court or tribunal would have to assess the matter on the evidence before it, and the Secretary of State and the individual who are parties to the proceedings would be bound by the court or tribunal ruling on the point, even though the foreign state would not be."

53. Here the available evidence pointed to the conclusion that the claimant was indeed a South African national. Further, she had not put the matter to the test by applying to the South African authorities for a passport or travel document. In these circumstances, Sales J considered that application of the *Bradshaw* principle provided further support for the conclusion he had reached.

54. In *Abdullah v Secretary of State for the Home Department* [2013] EWCA Civ 42 the Secretary of State sought to return the appellant to Saudi Arabia. The appellant accepted that he was born in Saudi Arabia but contended that he was Bidoon and so would be at risk of persecution. The Upper Tribunal found there was no reasonable likelihood that he was Bidoon but that there was a reasonable likelihood that he was a Palestinian and not a Saudi national, and that for this reason it was arguable that Saudi Arabia would not admit him; but it did not mean that, if returned, he would be at risk of persecution. Sir Stanley Burnton, with whom Beatson LJ and I agreed, said this at [16]:

> "16. I do not think that the Senior Immigration Judge did find that the Appellant is of Palestinian origin and in consequence unable to return to Saudi Arabia, and certainly did not do so to the applicable standard of proof. In my judgment (with which Mummery LJ agreed) in MA (Ethiopia) …) at paragraph 78, I said that, in contrast to the question of risk of persecution on return, inability to return is to be proved on the balance of probabilities. The Senior Immigration Judge rejected the Appellant's claim that he would be persecuted if returned to Saudi Arabia. In these circumstances it was and is for the Appellant to prove on a balance of probabilities that he is a Palestinian and for that reason unable to return to Saudi Arabia. All that the Senior Immigration Judge found was that was a 'reasonable degree of likelihood' that he is of Palestinian origin."

55. The final decision to which I must refer is *RM (Sierra Leone) v Secretary of State for the Home Department* [2015] EWCA Civ 541. Here the appellant, faced with deportation to Nigeria, contended that he was not a Nigerian national but was in fact a national of Sierra Leone, that he was homosexual and that if deported to Nigeria he would be at risk of persecution there as a homosexual. The First-tier Tribunal concluded, on the balance of probabilities, that the appellant was Nigerian and that it was not reasonably likely that he was homosexual. The Upper Tribunal allowed the appellant's appeal, finding (apparently on a concession by the Home Office Presenting Officer) that the First-tier Tribunal had misdirected itself in law because all the appellant had to show was a reasonable likelihood that he did not come from Nigeria

and did come from Sierra Leone and that he would have to face the persecution he feared there. At a re-hearing the Upper Tribunal observed that the concession made by the Presenting Officer at the previous hearing was wrong in light of *Abdullah* but that even if the appellant only had to show a reasonable likelihood that he was not returnable to Nigeria, he had failed to do so. On further appeal by the appellant to the Court of Appeal, Underhill LJ, with whom Christopher Clarke LJ and I agreed, referred to *MA (Ethiopia)* and *Abdullah* and then summarised the position in these terms at [35]:

> "35. What emerges from those cases – and would in truth be clear enough even in the absence of authority – is that what standard of proof applies to the question of an applicant's nationality depends on the legal issue to which it is relevant. If it is relevant to whether he will suffer persecution (whether by reference to the Refugee Convention or article 3), the lesser standard will apply. But if it is relevant to some other issue – such as whether it is in fact possible in practice for him to be returned, and any rights that may accrue if it is not – the standard is the balance of probabilities."

56. Here the appellant's assertion that he was at risk of persecution in Nigeria as a homosexual did not depend on whether he was a Nigerian national; the tribunal had found that there was no reasonable likelihood that he was a homosexual; and there was no evidence that in the event of onward removal to Sierra Leone he would face persecution there.

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.

58. I can deal with the appellant's remaining submissions relatively shortly. I accept that the 1954 Convention contemplates that a person is either stateless or a national of a state and that it is undesirable that persons should be left in limbo but I am not persuaded that the conventional balance of probabilities test has created a material problem in this regard. I also accept that it is appropriate to take into account the practice of other states

in interpreting and applying the Convention but I do not consider this to be a particularly persuasive factor in light of the fact that, as of February 2018, fewer than 25 signatory states had statelessness procedures and only six had adopted a standard of proof which is lower than the balance of probabilities. We have been provided with no information as to the position in the others. Finally and as I have mentioned, the Secretary of State has indeed indicated that, where necessary and appropriate, he will assist an applicant by undertaking relevant research and making enquiries on the applicant's behalf, but I do not accept this points to a lower standard of proof than the balance of probabilities.

59. For all of these reasons I would reject the first ground of appeal. The Secretary of State, the First-tier Tribunal and the Upper Tribunal approached the standard of proof entirely correctly. The applicant was required to establish that he was stateless on the balance of probabilities and that he failed to do. Indeed, as Judge Talbot in the First-tier Tribunal explained, the appellant had been remarkably inactive about establishing his nationality and had failed to take many of the quite straightforward steps that he could have taken.

Ground 2

60. In these circumstances it is not necessary to deal with ground 2: namely the relevance of a finding of statelessness to the assessment called for by paragraph 390A of the Immigration Rules. The appellant, supported by UNHCR, recognises that, this being a case falling within paragraph 390A (and to which neither paragraph 399 or 399A applies), it would require exceptional circumstances to outweigh the public interest in maintaining the deportation order. He also recognises that the Supreme Court held in *Hesham Ali v Secretary of State for the Home Department* [2016] 1 WLR 4799 that cases not covered by paragraph 399 or 399A are to be dealt with on the basis that great weight should generally be given to the public interest in the deportation of the offender, but that it can be outweighed, applying a proportionality test, by very compelling circumstances. It seems to me that whether a finding of statelessness is capable of amounting to very compelling circumstances and, if it is, the weight that should be attached to it, are matters more appropriately considered in the context (and in light of the particular circumstances) of a case where it is necessary to do so.

Conclusion

61. For the reasons I have given, I would dismiss this appeal.

Lord Justice Mc Combe:

62. I agree.

Lord Justice Lindblom:

63. I also agree.