Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: DA/01251/2012

THE IMMIGRATION ACTS

Heard at : Field House	**Determination Promulgated**
On : 15 July 2013	**On : 18 July 2013**

Before

UPPER TRIBUNAL JUDGE KING
UPPER TRIBUNAL JUDGE KEBEDE

Between

BERNARD EKUBOLAJEH LEONARD DAVIES

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr K Mak of MKM Solicitors
For the Respondent: Ms A Holmes, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Sierra Leone, born on 18 May 1973. Following a grant of permission to appeal against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision that section 32(5) of the UK Borders Act 2007 applied, we found, at an error of law hearing on 10 June 2013, that the Tribunal had made errors of law in their decision. We directed that the decision be set aside and re-made by the Upper Tribunal.

2. The appellant arrived in the UK on 29 July 1978, aged five, with his adoptive mother Dorothy Ashley and her biological son Reginald Ashley, and was granted two months

leave to enter. The family were granted further leave and on 24 April 1990 they were all granted indefinite leave to remain.

3. On 1 April 1999 the appellant was convicted of harassment and sentenced to four months' imprisonment, varied to two months at appeal. On 23 December 2005 he was convicted of failing to surrender to custody at the appointed time and received a fine. On 2 April 2009 he was convicted of wounding/ inflicting grievous bodily harm, doing an act of cruelty to a child and assault occasioning actual bodily harm, for which he was sentenced to four years' imprisonment with a licence extended by twelve months.

4. On 28 April 2009 the appellant was notified of his liability for deportation, but on 16 June 2011 the UKBA Strategic Director agreed not to pursue deportation at that time, given his length of residence in the UK. He was issued with a warning letter along with an intention to revoke his indefinite leave. However, action was placed on hold whilst a prosecution for further charges was dealt with.

5. On 31 October 2011 the appellant was convicted of two counts of doing a series of acts intended to pervert the course of justice and was sentenced to three years' imprisonment with three years to run concurrently, plus a restraining order was made against him. On 13 December 2011 a further notification of liability for deportation was served and representations were made in response.

6. A deportation order was signed against the appellant on 30 November 2012 and a decision was made the same day that section 32(5) of the UK Borders Act 2007 applied.

Basis of deportation decision

7. In her decision, the respondent considered Article 8 of the ECHR and, with regard to the appellant's family life, noted that he had four children from three different mothers, all of whom were British citizens, but with none of whom he had any contact. His offence of cruelty to a child was in relation to his son to whom he had no current access and his offence of intimidating a witness was with regard to the intimidation of the mother of his son, his ex-wife. His eldest child was over 18 years of age. Social services had had involvement with his two other children as a result of the risk he posed to them, but their mother had confirmed that she did not want him to have any contact with them. The respondent noted that, whilst the appellant claimed to be a British citizen, it was not accepted that that was the case. It was considered that the best interests of the children lay with them remaining with their mothers and with no physical access to the appellant. The appellant had no subsisting relationships and there was no proof of subsisting contact with his adoptive mother and her son.

8. The respondent accepted that the appellant had formed a private life in the United Kingdom, noting that he had been legally resident here for 34 years, of which approximately three years and seven months had been spent in prison. Consideration was given to the immigration rules relevant to Article 8 and deportation. It was noted that, whilst the appellant became liable for deportation in the light of his further conviction for

which he received three years' imprisonment, he had previously received a sentence of four years' imprisonment and was thus deemed to fall within paragraph 398(a) of the immigration rules. As such, paragraphs 399 and 399A did not apply and he had to demonstrate that exceptional circumstances existed to outweigh the public interest in deportation. The respondent went on, nevertheless, to consider paragraphs 399(a), 399(b) and 339A. With regard to paragraphs 399(a) and (b) it was considered that he did not have any genuine and subsisting relationships with his children or a partner. With regard to paragraph 399A, the respondent accepted that the appellant had lived continuously in the United Kingdom for at least 20 years but considered that he retained ties to Sierra Leone and thus could not benefit from that paragraph. The respondent concluded that, even if the category of less serious criminality were considered, the appellant's personal circumstances would not outweigh the public interest in pursuing his deportation. In any event, his level of criminality was deemed to exempt him from consideration under paragraphs 399 and 399A and there were no exceptional circumstances outweighing the public interest in deporting him. Any interference with his and his relatives' rights caused by his deportation would therefore not breach Article 8 of the ECHR.

Appeal before the First-tier Tribunal

9. The appellant appealed against that decision and his appeal was heard on 8 March 2013 before the First-tier Tribunal, by a panel consisting of First-tier Tribunal Judge Devittie and Dr T Okitikpi. The Tribunal heard from the appellant and his adoptive mother. They found that paragraphs 399(a) and (b) did not apply since the appellant did not have a genuine and subsisting relationship with his children or any partner and that paragraph 399A did not apply to him either, since he had retained social, cultural and family ties to Sierra Leone. They went on to consider Article 8 on the wider basis and recorded the sentencing remarks of the judges in relation to his conviction and four year sentence in April 2009 and his conviction and three year sentence in October 2011. They noted that the sentencing remarks showed him to be a dangerous person who continued to pose a high risk to known adults, that he was lacking in remorse and unwilling to accept any responsibility for his actions, that he had refused to cooperate with a psychiatric assessment and that he had a propensity to manipulate his victims in order to escape justice for his conduct. The Tribunal concluded that very serious reasons existed to justify the appellant's deportation and that his deportation would accordingly not breach Article 8 of the ECHR. They dismissed the appeal under the immigration rules and on human rights grounds.

10. Permission to appeal to the Upper Tribunal was sought on behalf of the appellant on the grounds that the Tribunal had failed to refer to, or place any reliance upon, the decision in Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 00060; that the Tribunal's reasons for finding that the appellant had retained social and cultural ties to Sierra Leone were perverse; and that the Tribunal had erred in their Article 8 proportionality assessment.

11. Permission to appeal was granted on 18 April 2013, primarily with respect to the application of the principles in Ogundimu.

Error of Law

12. At the error of law hearing on 10 June 2013 we sought clarification from Ms Holmes as to whether the respondent was pursuing the argument at paragraph 37 of the deportation decision letter that, as a result of his previous conviction and four year sentence in April 2009, the appellant fell within the higher category of criminality under paragraph 398(a) of the immigration rules and that paragraphs 399 and 399A accordingly did not apply to him. That did not appear to have been a matter raised before the First-tier Tribunal or recorded in their determination and indeed the appeal appeared to have proceeded on the basis that paragraph 399A was potentially applicable to the appellant. It was not clear whether that was because the respondent was no longer pursuing the matter. Mr Mak submitted that as it was not the index offence, the respondent ought not to be relying upon the four year sentence as that had been "condoned" by the respondent. Ms Holmes asked for time to consider that matter and then advised us that she was not relying upon paragraph 398(a) and we therefore proceeded on that basis.

13. We found the Tribunal's determination to be materially flawed, for the following reasons:

> "We find particular merit in Mr Mak's first ground of appeal, which relies upon the Tribunal's failure to refer to the case of Ogundimu. Whilst we do not consider that any such error would necessarily have been a material one had the Tribunal clearly applied the principles in that case or demonstrated that they had assessed the appellant's circumstances with those principles in mind, we cannot see any indication in their decision that that was what they in fact did. It is clearly the case that Mr Mak relied upon that case in presenting the appellant's appeal before the First-tier Tribunal, as his skeleton argument refers to it in some detail and the decision was included in the appeal bundle. However, there is nothing in the Tribunal's determination to indicate that they had regard to the skeleton argument or to the case law in the appellant's appeal bundle: neither is referred to at paragraph 13, where the documentary evidence is listed. Thus, whilst the Tribunal made findings at paragraph 17 with respect to the appellant's ties to Sierra Leone, there is no indication that those findings were made with any regard to the principles and guidance in Ogundimu, in particular the guidance at paragraphs 123 to 125 of the decision in that case. We consider such a failure to be material, given that we are unable to ascertain from those findings whether the Tribunal's conclusion was that the appellant's ties, albeit remote and tenuous, were sufficient to meet the requirements of paragraph 399A(a), or that his ties were not remote and tenuous and that there was a continued connection to Sierra Leone.
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> Indeed, we find the Tribunal's findings in that paragraph to be somewhat unclear in several respects. At paragraph 17(ii) the Tribunal found that the appellant had sought to understate the number of visits he had made to Sierra Leone. It is not clear whether the Tribunal, in so doing, thereby considered that he was being untruthful as to the ties he currently maintained with that country, or merely that he had been untruthful about the number of visits he had made in the past. Furthermore, whilst the Tribunal noted inconsistencies between the evidence of the appellant and his mother in regard to his previous visits to Sierra Leone, they did not make any clear findings as to whether or not they found his mother's evidence to be reliable. Since she stated in her evidence that neither she nor the appellant had any family

left in Sierra Leone, it was important for the Tribunal to make clear findings as to whether or not that evidence was accepted, which they failed to do.

As such, we consider that the Tribunal's decision has to be set aside, with a view to fresh findings being made with respect to paragraph 399A(b) of the immigration rules.

Whilst both parties were content for us to re-make the decision on the evidence already before us and we did not indicate any other intention, we have now reached the view, having fully considered the nature of the error of law, that we would be in some difficulty in so doing. As we have stated above, we do not consider that the First-tier Tribunal made clear findings on the evidence of the appellant and his mother with regard to the family and other ties to Sierra Leone and we would therefore need to hear further evidence ourselves in order to make our own findings. Furthermore, the issue of the whereabouts of the appellant's passport was not resolved at the hearing before us and is a potentially significant matter, given the inconsistent evidence about the appellant's visits to Sierra Leone. The appellant claims to have handed his passport to the UKBA in April 2009 when deportation proceedings were considered at that time and to have never had it returned to him. However, paragraph 48 of the deportation decision letter suggests that the UKBA had only been given a copy of the bio-data page of his passport and had never been provided with the original document or a complete copy of it. We would therefore need to be provided with further evidence in that regard."

14. We accordingly set aside the decision and made the following directions for the resumed hearing:

"(No later than ten days before the date of the next hearing:

(a) the appellant and the respondent are to provide written confirmation, where possible, as to the whereabouts of the appellant's passport;

(b) any additional documentary evidence relied upon by either party, including as to the whereabouts of the appellant's passport, is to be filed with this Tribunal and served on the opposing party."

Appeal hearing and submissions

15. The appeal came before us for the resumed hearing on 15 July 2013, by which time both parties had responded to the directions with respect to the whereabouts of the appellant's passport. The respondent, in her response, was unable to comment on the whereabouts of the passport, other than to state that only a copy of the bio-data page of the passport was held on file and had been provided by the appellant's girlfriend. The appellant, by way of a supplementary statement, explained that his former girlfriend Ms Bovell had provided a copy of the passport to the UKBA in April 2009 when the document was requested by immigration officials, and that the original document was taken from Ms Bovell by his former partner Miss Williams in order to support her application for their son's British passport, and that she had refused to give it back.

16. We confirmed that the relevant issue before us was the appellant's ties to Sierra Leone, pursuant to paragraph 399A. In the event that we found he was unable to meet the

requirements of paragraph 399A we would then go on to consider Article 8 in the wider context.

17. The appellant appeared before us, but his adoptive mother, Dorothy Ashley, was not present due, according to the appellant, to the same mobility problems that had prevented her from attending his bail hearing. His surety Susan Sesay, his biological mother's sister, was in attendance but we were advised that she was not intending to give oral evidence.

18. The appellant adopted his supplementary statement by way of evidence in chief and was cross-examined by Ms Holmes. With respect to paragraph 17(ii) of the First-tier Tribunal's determination, he denied that the purpose of his second visit to Sierra Leone was to make contact with his maternal family and said that the purpose was a holiday and that he had stayed with his grandmother, Ms Ashley's mother. He met two uncles there, one of whom had since passed away and the other had emigrated to the USA with his family but had also since died. He had stayed in Freetown and had visited sites and gone to the beach. As regards his birth mother, as far as he knew she was in Gambia. He had had no contact with her whilst in custody but had been in contact with her since his release, to tell her about his proposed deportation to Sierra Leone. The reference in his previous evidence to her having visited him in prison was during his previous period of imprisonment, in 2008, when she came to the United Kingdom to visit him. They currently maintained communication but she was not willing to return to Sierra Leone if he was deported and he did not have the funds to travel to Gambia from Sierra Leone. She had left Sierra Leone during the civil war and had lived in Liberia for over 20 years before moving to Gambia and had no ties remaining in Sierra Leone. He did not know his adoptive mother's friend and would not be able to go to her for assistance. He had no connections or ties to Sierra Leone other than the fact of having been born there. His family members in the United Kingdom, all of whom were British citizens, were fully anglicised and did not speak Krio.

19. In response to our further enquiries, the appellant said that he had never been formally adopted by Mrs Ashley. She left Sierra Leone with him when he was four. His father came to the United Kingdom and was given political asylum but he did not have contact with him. He had never had anything to do with his adoptive father's family. His biological mother had two sisters who lived in the United Kingdom, Gladys and Susan, and a brother who lived in the USA. The sisters had left Sierra Leone many years ago. His adoptive mother had two sisters here, Gloria Williams and Pearl Scott, who were British citizens. He had never returned to Sierra Leone after 1990 and had renewed his Sierra Leonean passport in 2005 solely for identification purposes. He did not have his indefinite leave to remain stamp transferred into his Sierra Leonean passport because he believed that he was a naturalised British citizen (Ms Holmes confirmed that she could not find any evidence of an application to transfer the stamp to another passport). He did not apply for a British passport as he thought it would be easier to get his Sierra Leonean passport renewed. He had not seen his passport since his former partner Wilhelmena Williams got hold of it.

20. Both parties made submissions before us. Ms Holmes submitted that the appellant had not given credible evidence about his ties to Sierra Leone for the purposes of paragraph 399A. His mother's evidence was very skimpy. He could not succeed under the immigration rules and he could not succeed under the wider Article 8. There were very serious reasons for deporting him, pursuant to the principles in Maslov v. Austria - 1638/03 [2008] ECHR 546.

21. Mr Mak referred to the UKBA proposal not to pursue deportation action against the appellant, which referred to him as a "home-grown criminal" and submitted that the current proposal to deport was political. He had no ties to Sierra Leone and had been residing in the United Kingdom lawfully. The immigration rules applied to him and he could not be deported.

Consideration and findings

22. We commence by setting out the relevant provisions of the Immigration Rules relating to deportation and Article 8, as introduced by the Statement of Changes in HC194 on 9 July 2102, at paragraphs 396 to 399B. We have highlighted the significant section for the purposes of this appeal:

> 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.
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> 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.
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> **Deportation and Article 8**
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> 398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
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> (a) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
> (b) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12
> months; or
> (c) the deportation of the person from the UK is conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,
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> the Secretary of State in assessing that claim 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 deportation will be outweighed by other factors.

399. This paragraph applies where paragraph 398 (b) or (c) applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or
(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
(a) it would not be reasonable to expect the child to leave the UK; and
(b) there is no other family member who is able to care for the child in the UK; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK, or in the UK with refugee leave or humanitarian protection, and

(i) the person has lived in the UK with valid leave continuously for at least the 15 years immediately preceding the date of the immigration decision (discounting any period of imprisonment); and
(ii) there are insurmountable obstacles to family life with that partner continuing outside the UK.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has lived continuously in the UK for at least 20 years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK; or
(b) the person is aged under 25 years, he has spent at least half of his life living continuously in the UK immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK.

399B. Where paragraph 399 or 399A applies limited leave may be granted for periods not exceeding 30 months. Such leave shall be given subject to such conditions as the Secretary of State deems appropriate. Where a person who has previously been granted a period of leave under paragraph 399B would not fall for refusal under paragraph 322(1C), indefinite leave to remain may be granted.

23. As we have stated above, the respondent is no longer relying upon paragraph 398(a) of the immigration rules and thus accepts that paragraph 399A is potentially applicable to the appellant on the basis of the index offence for which he was sentenced to three years' imprisonment. Whilst we do not necessarily share the respondent's view in that regard, given the previous four year sentence, we proceed on the basis that that is the case before us, given the clear concession made by Ms Holmes, and we have thus considered the appellant's ability otherwise to meet the provisions of paragraph 399A, there being no challenge to the findings of the First-tier Tribunal's findings that he cannot meet the requirements of paragraph 399(a) and (b).

24. Accordingly, the issue before us, in re-making the decision in the appellant's appeal, is whether or not he has retained social, cultural or family ties to Sierra Leone, the country which he left at the age of four or five years. In considering that issue, we turn to the guidance offered in Ogundimu, which the First-tier Tribunal had failed to do. We note in particular the following extracts from the decision:

> "123. The natural and ordinary meaning of the word 'ties' imports, we think, a concept involving something more than merely remote and abstract links to the country of proposed deportation or removal. It involves there being a continued connection to life in that country; something that ties a claimant to his or her country of origin. If this were not the case then it would appear that a person's nationality of the country of proposed deportation could of itself lead to a failure to meet the requirements of the rule. This would render the application of the rule, given the context within which it operates, entirely meaningless.
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> 124. We recognise that the text under the rules is an exacting one. Consideration of whether a person has 'no ties' to such country must involve a rounded assessment of all the relevant circumstances and is not to be limited to 'social, cultural and family' circumstances…
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> 125. Whilst each case turns on its own facts, circumstances relevant to the assessment of whether a person has ties to the country to which they would have to go if they were required to leave the United Kingdom must include, but are not limited to: the length of time a person has spent in the country to which he would have to go if he were required to leave the United Kingdom, the age that the person left that country, the exposure that person has had to the cultural norms of that country, whether that person speaks the language of the country, the extent of the family and friends that person has in the country to which he is being deported or removed and the quality of the relationships that person has with those friends and family members. "

25. It is the appellant's claim that he retains no ties to Sierra Leone: that he has not returned there since his last visit in 1990 when he attended his grandmother's funeral, that he has no family or friends there, that he is completely anglicised and has no cultural links to the country and that he does not even speak the language there. On the basis of the guidance in Ogundimu we consider that if we were to accept that claim, the appellant would be able to meet the requirements of paragraph 399A(a) and his appeal would stand to be allowed on that basis alone, irrespective of any views we may hold on his case within the context of the previous, wider Article 8 principles. However, unlike the case of the appellant in Ogundimu, we have considerable concerns about the credibility of the appellant's claim with respect to his ties to his country of birth and we do not accept that we have been provided with a genuine and honest account of those ties.

26. We reach the same conclusion as the First-tier Tribunal with regard to the appellant's attempt to understate the number of his visits to Sierra Leone. We note that his initial claim, to have never returned there following his arrival in the United Kingdom, as confirmed in the letter of 4 June 2010 Andrew Rankine, the Foreign Nationals Co-ordinator at HMP Brixton, at page O1 of the respondent's bundle, has since been contradicted by evidence produced by the respondent. That evidence was referred to at paragraph 48 of the deportation decision and appeared in the appellant's adoptive mother's file in a letter dated 28 March 1990 in which she mentioned his trips abroad in

1985, 1987, 1988 and 1989-1990, when he was aged 11, 14, 15 and 16 years. As a result of that evidence the appellant has now admitted to having visited Sierra Leone as a child. It is of note, however, that the evidence of those visits is not consistent and that his adoptive mother gave various different accounts which in turn differed from his account.

27. In her statement at pages 13 to 15 of the appeal bundle Mrs Ashley stated that the appellant had been back to Sierra Leone once or twice, that she had taken him only once and that he may have returned a second time but she could not be sure. In another statement dated 8 March 2013 she stated that he had been back three times, for a holiday when he was twelve years, and for her mother's funeral, followed by a third trip when he had left school. The Tribunal's determination, at paragraph 11, records another version in which she stated that he returned for a second time on his own in order to visit his biological mother's relatives. The appellant, for his part, denied having undertaken a trip to visit his biological mother's relatives, claiming before us that he simply went there on holiday and stayed with his grandmother. However, that in turn is somewhat contradicted by his mother's evidence that that trip was subsequent to the one that he took with her to attend his grandmother's funeral.

28. Aside from the inconsistencies in the accounts of those earlier visits, it is of note that the appellant has failed to provide any explanation for the significant change in his evidence and his previous denial of having ever returned to his home country. Such matters are of relevance in that they clearly serve to cast doubt on his current claim to have made no further visits to Sierra Leone since 1990, when he returned to attend his grandmother's funeral. We note that the only evidence to support that claim is the appellant's own evidence and that of his adoptive mother. However, as we have stated above, the evidence provided by Mrs Ashley before the First-tier Tribunal was far from consistent and we do not consider that we can place any particular weight upon her claim in that regard, in particular given the limited contact she has herself had with the appellant over the past years, as referred to in her statement before the First-tier Tribunal. Mrs Ashley did not appear before us in order to respond to further examination and there was no medical evidence before us to support the claim as to her inability to attend. Although, as Mr Mak pointed out, bail had been granted to the appellant in her absence, we do not consider that alone as sufficient reason to accept her written evidence at face value and note that there was in any event no medical evidence before the Tribunal when granting bail. We do not consider that we are able to place any weight upon the appellant's own evidence, given his previous denial of having ever returned to Sierra Leone.

29. We also find it of significance that there is evidence that the appellant could reasonably have been expected to produce to support his claim and which has not been produced. The relevance of his passport as evidence in support of his claim was raised by the respondent in the deportation letter of 30 November 2012, at paragraph 48. The appellant's response to that matter has been notably inconsistent, both with regard to the whereabouts of the document and his reasons for having obtained it.

30. As to the whereabouts of the passport, his evidence, at the error of law hearing before us on 10 June 2013, was that it was in the possession of the UKBA: that he had personally handed it in, in 2009, during the deportation proceedings, when he was in prison, and that he had not had it returned to him since that time. However his evidence now before us, in his supplementary statement, is that he had last seen his passport in 2008, that his former girlfriend Ms Bovell had sent a copy of it to the Home Office at his request in early 2009 and that she had given the original document to Ms Williams in May 2009, as confirmed to him during his telephone conversation with Ms Williams in May 2009. He claims that the passport remains with Ms Williams, that he believes she used it to support her application for their son's British passport and that she has refused to return it to him. There is nothing in his supplementary statement to explain the significant change in his evidence. Moreover, his claim, at paragraph 11 of that statement, to have never given permission to Ms Williams to use his details and documents for their son's British passport application form appears to be somewhat contradicted by his correspondence with the UKBA, at pages X1 to AA1 of the respondent's appeal bundle, in which he relies upon his son's British citizenship as evidence of his own naturalisation as a British national.

31. We do not find that the appellant has provided an honest account of the whereabouts of his passport. We consider his attempt to blame Ms Williams for his inability to produce the document to be remarkably reminiscent of his previous behaviour in seeking to attribute blame to his former partners, as referred to in detail in the pre-sentence report and OASyS report at Annex E and N of the respondent's appeal bundle. We do not accept his account of the passport being held and withheld by her. We note, in any event, and even if it were the case that the passport was held by her (which we do not accept), that there is no evidence of any attempts made by the appellant, through his legal representatives or through other means permitted under the terms of his licence, to request the return of the document. We conclude that the appellant has failed to provide a credible explanation as to his inability to produce his passport.

32. Likewise, we do not accept the reasons given by the appellant for having obtained the passport in 2005. He claims to have obtained it only for identification purposes, and that it was easier and quicker to renew his Sierra Leonean passport rather than apply for a British passport, to which he claims that he believed he was entitled. However he was unable, at the error of law hearing, to explain what prompted him to apply for it, whether it was for identification for work purposes or for banking purposes or to explain why he was unable to use his driving licence for such purposes. We do not consider that he has provided a credible account in that regard and consider it more likely than not that he obtained the passport in order to be able to travel and that, in view of the date of expiry in 2010, it afforded him the opportunity to travel up until his incarceration. As such, and in the light of our concerns as to his failure to produce the passport, or indeed his previous passport, we are not prepared to accept his claim not to have travelled outside the United Kingdom since 1990. We do not find the absence of evidence to confirm the transfer of his indefinite leave stamp to his new passport to be evidence of an inability to travel. There is no evidence before us to suggest that he would not have been able to travel with a valid national passport together with the letter confirming the grant of indefinite leave to

remain. In the circumstances we find that the appellant has failed to demonstrate that he has not visited Sierra Leone since 1990.

33. In any event, and aside from the matter of trips to Sierra Leone, we find that the appellant has failed to provide a credible account of his lack of ties to that country. Much has been made of the respondent's previous decision not to pursue deportation action against him on the basis of him being a "home grown criminal". However, it seems to us that that decision was made in the absence of information now available to us. Of particular relevance is the letter at page O1 of the respondent's bundle, referred to above, in which Andrew Rankine, the Foreign Nationals Co-ordinator at HMP Brixton confirmed the appellant's response to his enquiry in June 2010, that he had never left the United Kingdom since first arriving here. It is apparent, from the date of that letter and the timing of the subsequent correspondence at pages 27 to 31 of the appellant's appeal bundle, that the decision taken by the UKBA not to pursue deportation action following his conviction and four year sentence was made on the basis of that information and on the understanding that the appellant had, as a result of his adoption as a baby, ceased links to his biological family. Yet there is now evidence that he has visited Sierra Leone since his arrival in the United Kingdom, that he is in contact with his biological mother and that he has retained ties to his biological family.

34. Although the appellant has been at pains to produce a statement from his adoptive mother as to her lack of contacts in Sierra Leone, he has failed to provide any evidence from other relatives here, namely his two aunts, the sisters of his biological mother, with whom he claims to have current and direct contact and of whom one is acting as a surety for his bail. Indeed whilst in his letter at L4 in response to the proposed deportation action, he referred to his aunts Gladys and Susan, there was no indication in that letter nor in any of the other information provided that they were his biological mother's sisters, and that emerged only in the current proceedings before the Tribunal. Recognising, as we do, that they have now established their own family lives in the United Kingdom, we nevertheless find it of significance that no attempt has been made to present them, or to produce statements from them, providing support for the appellant's account of the absence of any of their family members remaining in Sierra Leone. We find that particularly significant in view of his denial, in his evidence before us, of having returned to Sierra Leone as an adolescent to make contact with his biological mother's family, as had been his adoptive mother's evidence before the First-tier Tribunal. Further concerns also arise from the lack of consistency in the appellant's evidence about family members in the United Kingdom, with his evidence at the error of law hearing being that his adoptive mother had three sisters in the United Kingdom, but at the resumed hearing that there were two sisters. All of these matters lead us to conclude that he has not been honest in providing the full details of his extended family, both in the United Kingdom and in Sierra Leone.

35. In all of these circumstances, considering in particular the appellant's initial denial of any connections to Sierra Leone since his departure and the absence of any credible explanation for his failure to produce available evidence that he could reasonably be expected to have produced to support his claim, we do not accept that he has presented a genuine account of his ties to Sierra Leone. We find that our concerns as to his credibility

as a witness of truth are reinforced by the views of the probation services in their earlier pre-sentencing report, and as subsequently adopted in the OASyS report, in which they refer to his denial of responsibility and to his manipulative character, leading them to disbelieve his account of his personal circumstances and his history, for reasons set out particularly at page 7 of the report.

36. We do, of course, accept the early age at which the appellant left Sierra Leone, the considerable length of time in which he has resided in the United Kingdom and the fact that the vast majority of his life has been spent in this country and we take account of the significance of those factors. We accept that, in such circumstances, it is entirely plausible that a person may have severed all links to their country of birth and indeed that was the case in Ogundimu. We are also mindful of the difficulties that can arise in demonstrating the absence of any continuing ties and that we must not impose too high a standard of proof upon the appellant to demonstrate such circumstances, particularly given that the consequences could serve to deprive him of the protection provided under the immigration rules. Nevertheless, we find the lack of detail and evidence he has provided to be significant, when put in the overall context of his circumstances, and we conclude that he has deliberately sought to conceal the extent of his connections to Sierra Leone in an attempt to avoid deportation.

37. Accordingly, we do not accept the appellant's claim not to have returned to Sierra Leone since 1990 and neither do we accept that he has no family members remaining in that country. We consider that he has retained considerably more than remote and abstract links to the country. We note in addition that he has been brought up in the United Kingdom by his adoptive mother and amongst extended family members, all of whom came here as Sierra Leonean nationals, and would thus have a knowledge of the customs, cultures and traditions of his country of birth on that basis. Whilst he may not speak Krio, the official language of Sierra Leone is English and he would therefore have no problems in communication. We consider, on the basis of such ties, and despite the length of his residence in the United Kingdom, that there remains the continued connection envisaged by the Upper Tribunal in their findings in Ogundimu and that, accordingly, paragraph 399A does not apply to him.

38. Having concluded as such, the appellant has to demonstrate that it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors, which we find that he is unable to do. There is nothing in the grounds of appeal to suggest that such circumstances exist and the grounds are all predicated upon his length of residence combined with the alleged lack of ties to Sierra Leone, which matters we have already dealt with. As such, the appellant has failed to demonstrate that he is able to meet the requirements of the immigration rules.

39. With regard to Article 8 in its wider context, Mr Mak acknowledged at the error of law hearing that the grounds of appeal, other than with respect to paragraph 399A, were simply a disagreement with the Tribunal's decision. We consider that that is indeed the case. The relevant issue before the Tribunal was proportionality and, in that regard, they gave careful consideration, at paragraphs 23 and 30, to the appellant's length of residence

in the United Kingdom and the age at which he left Sierra Leone as well as the consequences of his deportation on all relevant parties. They balanced this against his criminal offending, taking account of the serious nature of the offences and the judge's sentencing remarks, at both trials. They took account of the pre-sentencing report and the subsequent reports concluding that he remained a high risk of serious harm to known adults and was a dangerous person.

40. The Tribunal also took account of the internal memorandum upon which Mr Mak relied before us, in which the appellant was described as a "home-grown criminal" and they made findings in that regard, noting the warning he was given in the event of re-offending. Mr Mak's submission before us was that the subsequent deportation decision was no more than a political decision, given the previous decision not to pursue deportation action. However we have set out reasons above for concluding that the circumstances had substantially changed since that time, with the result that the basis for the decision was no longer a reliable one. It was also Mr Mak's submission before us that allegations made against the appellant should not be taken into account, given that they had not resulted in any convictions. However we consider that, in particular in the circumstances of the appellant's case and noting the comments made by His Honour Judge Karu at paragraph B, page 10 of the transcript of his sentence, such matters are of relevance and carry some weight.

41. The Tribunal concluded, at paragraph 31, by giving consideration to the principles in Maslov, finding, for reasons properly given, that there were very serious reasons to justify the appellant's deportation and that the interference caused to his private life in the United Kingdom, as a result of his deportation, was not disproportionate. That was a conclusion they were entitled to reach and that we find is the right decision in this case. We note further that of particular relevance, given the appellant's inability to meet the requirements of the immigration rules, is the recent decision in SS (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 550, in which the Court of Appeal emphasised the Secretary of State's margin of discretion and the weight to be attached to the public interest in deporting foreign criminals. We find, accordingly, that the appellant has failed to establish that he falls within the exceptions set out at section 33 of the UK Borders Act 2007 and his appeal must be dismissed under the immigration rules and on human rights grounds.

DECISION

42. The making of the decision of the First-tier Tribunal involved an error on a point of law and the decision has accordingly been set aside. We re-make the decision by dismissing the appeal on all grounds.

Signed Date

Upper Tribunal Judge Kebede