



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: DA 02124 2013

**THE IMMIGRATION ACTS**

Heard at Field House 5 September 2017  
(last paper submissions 18 December 2017)

Decision & Reasons Promulgated  
On 16 July 2018

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

J--- M---  
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr R Khubber, Counsel instructed by Turpin & Miller Solicitors

For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant or members of his family. Breach of this order can be punished as a contempt of court. I make this order because, although there is a legitimate public interest in deportation appeals, especially when they are allowed, my reason for allowing this appeal arises from the needs of a small child and it is not in his or the public interest for him to be identified.

2. Although this case has taken a remarkable number of twists and turns it is at its heart an appeal by a citizen of Sierra Leone against a decision of the Secretary of State on 7 October 2013 to make him the subject of a deportation order. It is the Secretary of State's case that Section 32(5) of the United Kingdom Borders Act 2007 applies and that therefore the appellant should be deported.
3. The appellant was born on 1 January 1968 and has lived in the United Kingdom since March 1991. His behaviour has been discreditable in many ways. According to the summary on the printout from the Police National Computer he has a total of 21 "fraud and kindred offences", twelve "theft and kindred offences", four offences relating to the police or courts or prisons, three drug offences and miscellaneous other offences. His known criminal record began in May 1995 where he was sent to prison for a total of six months for offences of dishonesty. Most recently (which is not particularly recently) at the Crown Court sitting at Reading in November 2012 he was sent to prison for a total of 27 months, reduced to eighteen months on appeal to the Court of Appeal, for handling stolen goods.
4. His appeal was allowed by First-tier Tribunal Judge Beach in a determination promulgated on 1 October 2014 but that decision was found to be in error and was set aside by Upper Tribunal Judge Coker in a decision promulgated on 20 January 2016. The appeal was heard and dismissed by First-tier Tribunal Judge S J Clarke in a decision promulgated on 30 August 2016 but that too was found to be in error. The reasons for finding an error of law are set out in the decision of Upper Tribunal Judge Craig in a decision signed on 13 January 2017 but his task was made easier because the Secretary of State at that hearing was represented by Mr Deller who conceded that there had been a material error of law because, when conducting the Article 8 balancing exercise, Judge Clarke had given no consideration to whether discretion should be exercised in the present appellant's favour because he identified himself as an extended family member of an EEA national. Although the agreed error was confined to EEA matters it was plainly right to permit argument on all article 8 related points, especially as there was fresh evidence concerning the appellant's new born child.
5. It is plain that at that stage there was concern that the appellant might have been entitled to remain in the United Kingdom as the partner of an EEA national exercising treaty rights and after discussion with the parties, Judge Craig gave directions that were no doubt intended to facilitate a decision on that point. Judge Craig's directions noted that Mr Deller had agreed that the Secretary of State would file a decision on the question of whether the respondent would use her discretion to issue a residence card no later than 27 January 2017 but the Secretary of State did not file such a decision.
6. The case came before Deputy Upper Tribunal Judge Eshun on 23 May 2017 and further directions were given requiring the Secretary of State to serve and file a skeleton argument and take other steps. The Secretary of State did not do as she was directed.
7. The case came before me on 14 July 2017 and after considerable discussion between Mr Khubber and Mr Deller I gave further directions essentially clarifying and extending the time to comply with those given by Judge Craig in December 2016 to which there was a limp response.

8. Mr Deller asked for an adjournment. Mr Deller is a gentleman and blamed himself but he had been let down by the Secretary of State's officers who were dealing with the questions raised. They had required sight of his papers and had neglected to return them.
9. The order that I had made was made carefully and after discussion with the parties and gave the Secretary of State more time than Mr Deller sought and had not proved effective in making the Secretary of State given the assistance that was required. I decided to refuse the application for an adjournment with all these things in mind but mainly because I did not accept that any further time would lead to the decision being any clearer.
10. Notwithstanding the difficulties Mr Deller was able to be extremely helpful and I am grateful to him both for his grasp of the facts and understanding of the law. I am confident that the Secretary of State was not disadvantaged by my decision to go ahead with the hearing.
11. At the end of the hearing Mr Deller made two important concessions which I record below. The appellant had shown that he was in a durable relationship with an EEA national, a Ms S, and their son, T, who was born in March 2017, is both a national of the United Kingdom and a national of the same EEA state as is his mother.
12. Perhaps unnecessarily, given these concessions, but so that my decision might be better understood, I set out below a resume of the evidence that was called before me. I very much regret my part in adding to the delay in these proceedings. The oral evidence was not challenged and I not only made detailed notes but I prepared most of this part of the decision the day after the hearing.
13. The papers show that the appellant was born in 1968.
14. The appellant gave evidence before me. He adopted statements dated 5 September 2017 although one of them was clearly prepared earlier and the other was described as an updated statement. There were additional statements from the appellant and his partner. These show that he has lived continuously in the United Kingdom since 1991 and all of his immediate family are settled there including three children from a previous relationship and his present partner, the EEA national, as well as his mother and siblings.
15. He said he grew up in Sierra Leone where he was born and worked as an accounts clerk for a year.
16. His father died in 1985 and his mother removed to the United Kingdom leaving the appellant and his siblings in the care of a half-sister. The children joined their mother one by one. The appellant was the last to be called to the United Kingdom. At that time he was living with his maternal uncle.
17. He had not returned to Sierra Leone since he left and he said that "we have nothing and nobody to go back to in Sierra Leone". He said he was 19 years old when he arrived and he was 45 (years old now, having spent more than half his life in the United Kingdom. His paternal relatives were killed in the civil war and the rest of his family from Sierra Leone are settled in the United Kingdom.
18. He understood that the Home Office had a note saying that they had received a phone call from the Thames Valley Police saying the appellant had told the police that he had gone to Sierra Leone for a holiday in 2008. He said that is just wrong and indeed it should have

been obvious to the Home Office that the message was wrong because the Home Office held his passport at the time that he was supposed to have been on holiday. I mention this solely to show that I have disregarded the suggestion that he returned to Sierra Leone in 2008.

19. He talked about his circumstances in arriving in the United Kingdom. He said that he was the first of his siblings to join his mother and he had six months' leave to remain as a visitor. He had no idea why it had been recorded that he had had leave to see his uncle. He lived with his mother and her partner at the time being. He talked about his removal to Berkshire and his own cohabitation with his current partner starting in 2007. He was with his partner when he went to prison in November 2012. He said he had established his family life in the United Kingdom. He had made attempts to regularise his stay.
20. When the deportation decision was made his application on human rights grounds was still pending.
21. He talked about his relationship with Ms S which was now more than ten years old. He was ashamed of what she had suffered on his account. He was also aware of how he had let down his children.
22. He had three children from an earlier relationship with "J", those children were at the time of making his statement aged 19, 17 and 9 years. Although the youngest child was not his and was adopted after he and J had ceased to be partners and he supported her decision to adopt. He insisted that he regarded her as being his daughter.
23. He described himself as "not proud" of his criminal past. He claimed that the victim awareness course available to him in prison had made him see things differently and he realised that his bad behaviour was hurting people and that his crimes had victims. He was 45 years old and had enough of the life of crime.
24. He insisted that he now had a responsible attitude.
25. In his updated statement he gave more details of his relationship with his former partner J and her adopted child describing her as strong-willed.
26. He would not let his children visit him in prison but he had seen them since.
27. Concerning his current partner he said how he would be lost without her. She had a good relationship with his children and they were happy when they were together.
28. He saw his future as being in the United Kingdom. He wanted to take a proper job and provide for his family. He worried about what would happen to his family if he were deported. He was particularly concerned about his mother and stepfather as his step father suffered from dementia.
29. His fiancée and children could not remove to Sierra Leone.
30. The additional statement of the appellant confirmed that he and his partner were living together as a nuclear family. He said that it was only that his passport was inaccessible that had prevented them marrying. He commented on how his partner was struggling with problems in her pregnancy and there was considerable stress because their child T was poorly and needed surgery. This was a very important part of the evidence and I consider it further below.

31. He commented tenderly on the other children. He was proud to have become a grandfather and he spoke of his pleasure in his children.
32. In answer to additional questions he insisted that he would respect the law. He had been out of trouble for ten years and his last lapse he was wrong.
33. He was cross-examined and said how he had taken steps to get a passport because he was told he could not marry without a current passport. He was not re-examined.
34. His partner Ms S gave evidence. She adopted the statement signed as long ago as 2 April 2014.
35. There she explained that she had a good job as a local authority civil servant. She described her relationship with the appellant as "loving and committed" and gave details of how they got to know each other. She spoke appreciatively of his support when she was suffering from a mental breakdown after the death of her father. She thought he had been frank with her about his criminal past and she insisted that his criminal behaviour did indeed belong in the past. She visited him in prison and was a surety in his application for bail.
36. She said that the appellant made it very clear at the beginning of their relationship that he had children and there was no future in their relationship if she could not accept them. She said that she was happy to accept them as part of her life. She explained how they spent time together with the children and referred jokingly to "dad's taxi service".
37. Her additional statement made substantially similar points to those made by the Appellant but from her perspective. She confirmed that she had no intention of letting her children grown up in Sierra Leone and did not know how she can afford to keep in contact with her partner if he was sent there. Their child T needed surgery and this was adding to their worries. His kidneys did not function properly but he was too small to cope with the necessary operation so that it had to be delayed. They had reason to hope that he would make a full recovery but only time would tell.
38. When she gave evidence she was on maternity leave. She wanted the appellant to remain with her and support her with their child.
39. She was cross-examined. It is not important to set out the details of the questions. Mr Deller's questions were not challenging the evidence but were, no doubt intentionally, laying the foundation for the concession on T's nationality. There was no challenge to the underlying thrust of the evidence that they were a family together.
40. Mrs B gave evidence. She is the appellant's mother. She adopted her statement signed on 5 September 2017.
41. There she confirmed that she was married and working in the United Kingdom and was now a British citizen. She confirmed the circumstances in which she and the appellant came to the United Kingdom and that she had little contact with Sierra Leone. She was critical of the appellant's behaviour, making clear that although she loved her son she had not approved of his criminal behaviour but wanted to support him. She believed that he had taken steps to establish himself responsibly, for example by training to become an HGV driver. She was concerned how the uncertainty over the appellant's future was worrying her grandchildren. She also confirmed that the appellant and his former partner J remained

on good terms and the appellant was involved in the lives of his children from that relationship. She did not want to live without her son.

42. She also emphasised that she was struggling to cope with her husband who was suffering from dementia. I recognise that I must not be swayed by emotional pressure but I think her evidence was well summed up by the last paragraph which said quite simply: "I cannot live without my son. I urge you not to separate us. I have already lost my husband, Joseph's father. I cannot bear the idea of losing my son too".
43. Her wishes are not important. Her rights may be.
44. She was not questioned further by Mr Deller.
45. The papers include statements from the former partner J and the (then) 17 years old boy. It does not matter that they were not called to give evidence. Their claims are not controversial. They confirm the appellant's evidence that he is still an important part in the lives of his children with J.
46. I confirm that I have read all the papers before me. I note particularly there are supporting statements or letters from close friends and family members. There is no point in setting them out in detail. It is clear from Mr Deller's restrained cross-examination that it is not doubted that the appellant does have significant contacts in the United Kingdom and, notwithstanding his criminal behaviour, does have commendable qualities going to his responsibility and the concern for his family and his desire to work. The fact that I have not found it necessary to spell them out in detail should not be thought to indicate that I have given them little or no consideration. However, none of these positive things alter the fact or seriousness of his convictions or the prima facie requirement that the public interest requires that he be deported but they do emphasise that his convictions do not say everything that is to be said about him and the positive things have to be considered.
47. The case was closed and Mr Deller made submissions.
48. I have a full note of the submissions but they were confirmed in writing soon after the hearing. Mr Deller's submissions on the approach that I need to take are, I find, uncontroversial and are particularly apposite. He says:

"This is the protracted appeal against a decision of 2013 that Section 32(5) of the 2007 Act applies to [the appellant] consequent to his conviction and sentence. It is an appeal brought under Section 82(3A) of the 2002 Act, an 'immigration decision' permitting reliance on the pre-amendment grounds of appeal in Section 84. It is not controversial that as an appeal under the same provisions pending at the relevant time the amendments to Part V effected by Section 15 of the 2014 Act do not apply. Given the terms of Section 32(5), the appeal essentially fell to be considered on three grounds:

  - (i) the removal in consequence of the decision would be unlawful under Section 6(1) of the Human Rights Act 1998 as incompatible with the European Convention on Human Rights;
  - (ii) that removal would be in breach of the appellant's rights under the Community Treaties;
  - (iii) that the decision was otherwise not in accordance with the law".
49. Mr Deller then made submissions on these points.

50. The first point to be considered then is if the appellant has a right under European Union treaties. Again it is accepted realistically and sensibly that the appellant is in a durable relationship with his partner, a Polish national, who has acquired a permanent right of residence and the couple have a child T born in March 2017 who is a British citizen by birth.
51. Nevertheless, Mr Deller contended that the appellant had not established a right to remain as the extended family member of an EEA national. It was his point that extended family members have no primary rights under the treaties but are reliant on derived rights which is in the discretion of the host state, in this case the United Kingdom.
52. He further maintained that there was no question of the appellant relying to his advantage on the decision of the Court of Justice of the European Union known as **Ruiz Zambrano v Office national de l'emploi [2012] QB 265**. This would avail the appellant if he could show that removing him would necessarily result in the child leaving the European Union as a whole. This case does not begin to get off the ground. The child is in the care of its mother who can maintain him in the United Kingdom where she is entitled to be or within her country of nationality. There is no reason to think that the child would, still less that he would have to, leave the European Union. The point, he said, just does not run. I agree.
53. He submitted that stripped of the potentially distracting features this is essentially a case that turns on the proper operation of Section 117C(iii) of the Nationality, Immigration and Asylum Act 2002. This is a case of a foreign criminal who has not been sentenced to a period of imprisonment of four years or more. The Act says that the public interest requires his deportation unless he can rely on one of the two statutory exceptions. Exception 1 requires that he has been lawfully resident in the United Kingdom for most of his life and is socially and culturally integrated into the United Kingdom and there would be "very significant obstacles" to his integration into the country to which he would be deported, and Exception 2 applies where he has a "genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of [his] deportation on the partner or child would be unduly harsh".
54. It is a matter of record that the decision to deport is an automatic deportation decision under Section 32 of the UK Borders Act 2007, however Section 33 of that Act recognises there are exceptions which mean a person does not have to be deported. The Act creates exceptions. Two exceptions might be relevant in this case. The first, Exception 1 is where the removal of the foreign criminal in pursuance of a deportation order would breach a person's rights under the European Convention on Human Rights. That is applicable here and, for reasons I explain in more detail later, is proper reason to allow the appeal. Exception 3 applies "where the removal of the foreign criminal from the United Kingdom in pursuance of a deportation order would breach rights of the foreign criminal under the EU Treaties".
55. Clearly the case against deportation is likely to be very much stronger if the appellant can establish an EU right to remain in the United Kingdom.
56. As the appellant recognises, the difficulty in relying on Exception 3 is the decision of this Tribunal (the Honourable Lady Dorrian sitting as a Judge of the Upper Tribunal and Senior Immigration Judge Storey) in **Rose (Automatic deportation - Exception 3) Jamaica [2011] UKUT 00276(IAC) Rose**, which determined, broadly, that extended family members of EEA nationals are not persons exercising treaty rights but are in many circumstances to be treated as if they were persons exercising treaty rights. Mr Khubber has expended considerable

energy, particularly in the skeleton arguments, seeking to persuade me that the decision in **Rose** is wrong. I am not persuaded. It is a decision by a particularly senior panel and was directed precisely to the relevant issues. It does not strictly bind me but I agree with it and I intend to follow it. Mr Khubber is right to say that it has not been the subject to consideration by the higher courts. That is not a reason to assume that it was decided wrongly.

57. Further, I accept Mr Deller's submission that this view is supported not only by the decision in **Rose** but to some extent the decision in **Sala** which, as Mr Deller rather pragmatically put it, is "better known for its views on the existence of appeal rights".
58. It follows therefore that I reject the contention that the appellant can put himself in the position of a person exercising treaty rights and therefore for that reason he does not come within the scope of Exception 3.
59. It is a cause of considerable vexation to the appellant that the Secretary of State would not deal properly with his claim to an EEA residence card. Eventually, on 25 August 2017, the Secretary of State gave a supplementary letter making it plain that she would not exercise a discretion to give a residence card. Rather, she had decided that would not be appropriate because the appellant was a criminal and should not benefit from discretionary measures.
60. Mr Deller very fairly described the reasoning in that decision as "not easy to follow" but, as far as these proceedings are concerned, I find the contention that the decision is not in accordance with the law because it cannot be made properly until the disputed entitlement to a residence card is resolved stands or falls with the **Rose** point. I accept that extended family members are not exercising treaty rights but rather can in the discretion of the Secretary of State be treated as if they were and the Secretary of State does not on this occasion treat the claimant as if he were exercising treaty rights because he is a criminal.
61. It is possible that there is an appealable decision against the refusal of a residence card but that is not before me and I deal with the facts as they are. The appellant does not have a residence card and should not be treated as if he did.
62. Mr Khubber's submissions are extensive, and I mean them no discourtesy by not saying very much more about them. They come from a determined effort to raise the case to EU levels of protection. This is not such a case. The appellant is not an EEA national and I am persuaded that I should follow **Rose** and rule that he should not be entitled to that degree of protection.
63. I permitted the parties to serve further submissions particularly following the decision of the Court of Appeal in **Khan v SSHD & Anor** [2017] EWCA Civ 1755. The decision in Khan reversed the decision of this Tribunal in Sala (EFMs: Right of Appeal) [2016] UKUT 0411 (IAC) which Mr Deller had relied on in part to support his argument that **Rose** is decided correctly.
64. As I understand it, Mr Khubber's arguments about Khan depend on Rose being wrong and I disagree.
65. I find that the extended family member provisions in UK law go beyond the minimum required by the Directive and rights under the Regulations are not treaty rights.
66. In short, **Khan** had not changed the approach needed in this case.



67. The parties do agree that I have to conduct a balancing exercise illuminated by section 117C.
68. The appellant's relationship with this former partner and children of the relationship are not relevant. The appellant's son from that relationship is now an adult and the post separation child does not qualify. The appellant is not in a parental relationship with his former partner's adopted daughter.
69. I come back to the starting point which is the Article 8 appeal. I do not see any purpose in going into the Rules in great detail although this is old enough to be a rules-based appeal. I have to apply the Act and the Act is quite clear. The public interest is in deportation and a deportation order is the automatic consequence of the kind of sentence that this appellant has received. However, there are exceptions when the criminal person has not been sentenced to four years' imprisonment or more.
70. Section 117C states that the public interest requires deportation unless Exception 1 or Exception 2 applies.
71. Exception 1 applies where (inter alia) the appellant has been lawfully resident in the United Kingdom for most of his life. He was born in 1968 and has lived in the United Kingdom since about 1988. That is a long time but he his residence has only been lawful for about half of that time. Exception 1 cannot help him.
72. Exception 2 applies if the appellant has a "genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting relationship with a qualifying child.
73. He clearly does. Both Ms S and T "qualify".
74. There can be no question of them removing to Sierra Leone. Ms S needs to stay with T and T should not be required to live outside the UK. The contrary was not suggested.
75. I accept that the appellant lives with Ms S and T in a nuclear family where he is needed not just because fathers generally are needed (and that is important; the appellant's skeleton argument reminds me that children are entitled to be brought up by both parents) but because special support is needed as a consequence of T's health problems.
76. I do not seek to minimise the appellant's criminality but, as statute recognises, it is not so severe that deportation is almost unavoidable.
77. I accept that the appellant has resolved to live honestly and is unlikely to offend again. I recognise that deportation is justified by past conducted and that the most genuine intentions about future conduct do not undo the consequences of past wrongs but they do, I find, have some bearing on what is unduly harsh. Disruption that might be duly harsh in the case of a person who will reoffend may not be in the case of a person who has reformed. However I make clear that I have given very little weight to the risk of future offending except to note that it is not an aggravating factor here.
78. The balancing exercise requires me to consider particularly what is unduly harsh for the child and partner. The partner to some extent has to accept the fact that she has chosen to be in a relationship with a criminal but their relationship is genuine and strong and tested. Broadly, it is a relationship that has to be respected by the law and promoted although of course that is not determinative of anything. It would be a very serious matter for her to have to leave the country where she is established and trying to establish herself in Sierra Leone. I have little doubt she could manage. She speaks English and is hardworking and

there would be opportunities in that country but it would not be easy. However, she has a child to consider. She cannot leave him and he cannot go. However, if there was not a child to consider, I would find her sorrow on deportation the sad consequence of deportation which, in my experience, is often a savage sanction. Deportation would not be unduly harsh.

79. However, I have to consider not only her but her child who also has rights. He has the rights of a British citizen and has a particular need of access to high quality healthcare. It may be that such care is available in Sierra Leone but I have no reason to think it would be available to him. He is entitled to remain in the United Kingdom. Removing the father from that nuclear family would have a very bad impact on the innocent child and on the partner. That is sufficient reason to allow the appeal and I do.
80. It follows therefore that I allow the appeal on human rights grounds.

Signed



Jonathan Perkins, Upper Tribunal Judge

Dated: 12 July 2018