CASE NOTE

AS (GUINEA) v SECRETARY OF STATE FOR THE HOME DEPARTMENT [2018] EWCA CIV 2234

JUDITH CARTER*

TABLE OF CONTENTS

I INTRODUCTION

The decision of *AS (Guinea) v Secretary of State for the Home Department*[1] is an important United Kingdom case because it establishes the standard of proof to be applied in the UK in determining whether a person is stateless under art 1(1) of the *1954 Convention Relating to the Status of Stateless Persons* ('*1954 Convention*').[2]

The Court of Appeal of England and Wales decided that, in determining whether a person is stateless in accordance with art 1(1) of the *1954 Convention*, the applicable standard of proof is the balance of probabilities.[3] In doing so, it rejected all seven of the arguments raised by the appellant and United Nations

* Judith Carter is In-House Solicitor and Lecturer at the University of Liverpool Law Clinic (a member of the European Network on Statelessness and Immigration Law Practitioners' Association). She is co-author, with Sarah Woodhouse, of *A Best Practice Guide: Statelessness and Applications for Leave to Remain* (University of Liverpool 2016); and co-author, with Johanna Bezzano, of the University of Liverpool report: *Statelessness in Practice* (Report, 2018). Many thanks to Cynthia Orchard of Consonant for her comments.

1 [2018] EWCA Civ 2234 ('*AS (Guinea)*').

2 *Convention Relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960) art 1(1). The United Kingdom is a dualist system, so international agreements do not have legal effect in the domestic system until incorporated in domestic legislation. The UK is a state party to the *1954 Convention*, but only the art 1(1) definition of a stateless person is expressly referenced in the *Immigration Rules 1994* (UK) HC 395, [401] ('*Immigration Rules*'), introduced to the rules in April 2013 by the *Statement of Changes in Immigration Rules 2013* (UK) HC 1039 s 124. Amendments to the *Immigration Rules* are now announced online: see 'Immigration Rules Part 14: Statelessness', *Government of the United Kingdom* (Web Page) <https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-14-stateless-persons>.

3 *AS (Guinea)* (n 1) [28]–[29].

High Commissioner for Refugees ('UNHCR'), as intervener, that the standard should be the lower one of 'reasonable likelihood' suggested in the UNHCR *Handbook on Protection of Stateless Persons* ('*UNCHR Statelessness Handbook*'),[4] a standard elaborated upon in the European Court of Human Rights ('ECtHR') decision of *Hoti v Croatia* ('*Hoti*').[5] Instead it followed UK jurisprudence in the context of asylum and removal cases.[6]

Given that the court did not accept that the appellant had made out his case to be stateless, it declined to enter into the question of whether a finding of statelessness was relevant to the Secretary of State's decision to deport the appellant.[7]

II FACTS OF THE CASE

The appellant was born in Guinea in 1986.[8] He entered the UK as an asylum seeker in 2004.[9] He committed some offences and was sentenced to imprisonment for two years.[10] In 2014, a deportation order was made against him and he did not appeal.[11] He had never had a UK residence permit.[12] He approached the Guinean embassy, without any documents, to request return to Guinea.[13] The Guinean authorities refused to issue documents to enable him to return.[14] In 2015 they confirmed in writing that they did not consider him a national.[15] He requested that the respondent, the Secretary of State for the Home Department ('SSHD') revoke the deportation order, arguing that statelessness was a 'very compelling circumstance', which overcame the public interest in deporting him.[16] The SSHD refused to revoke the deportation order.[17] The appellant appealed that decision to the First-Tier Immigration and Asylum Tribunal on *Convention for the Protection of Human Rights and Fundamental* Freedoms ('*ECHR*') art 8 grounds (the only permissible ground of appeal in his case), citing his statelessness.[18]

The First-Tier Tribunal determined that the appellant had been 'remarkably inactive' and had not carried out his own enquiries to evidence his nationality to the Guinean authorities.[19] The Upper Tribunal agreed that the appellant had not

---

4 ibid [28]–[29], [33], citing *Handbook on Protection of Stateless Persons* (Handbook, United Nations High Commissioner for Refugees 30 June 2014) 34 [91] ('*UNHCR Statelessness Handbook*') <https://www.unhcr.org/dach/wp-content/uploads/sites/27/2017/04/CH-UNHCR_Handbook-on-Protection-of-Stateless-Persons.pdf>.

5 *Hoti v Croatia* (European Court of Human Rights, First Section, Application No 63311/14 26, 26 April 2018) ('*Hoti*').

6 *AS (Guinea)* (n 1) [23]–[26], [30].

7 ibid [60]. This question, therefore, remains outstanding.

8 ibid [15].

9 ibid.

10 ibid [16].

11 ibid [21].

12 See ibid [15]–[22].

13 ibid [22].

14 ibid.

15 ibid [28].

16 ibid [60]. See also at [12]: The paragraphs of the *Immigration* Rules (n 2) invoked, [A398]–[399A], reflect the UK's obligations under *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 8 ('*ECHR*').

17 *AS (Guinea)* (n 1) [21].

18 ibid.

19 ibid [25].

provided sufficient evidence that he was stateless, on the balance of probabilities.[20] The appellant appealed to the Court of Appeal on the standard of proof and the relevance of statelessness to revocation of the deportation order.

III ANALYSIS OF THE JUDGMENT

A *Main Arguments*

The appellant asserted that he met the standard of proof by approaching the embassy; he was not required to do more himself, by trying to obtain evidence from Guinea as to birth, residence or education etc. He relied on seven arguments, which were supported by UNHCR as Intervener, that the lower standard of proof, as applied in refugee cases, should also apply to statelessness cases:

1. The *1954 Convention* was an international treaty which 'must have an autonomous and international meaning because disparate interpretations would frustrate the intention to provide a uniformity of approach'.[21] The *UNCHR Statelessness Handbook* should be afforded considerable weight, equivalent to the 'high persuasive authority',[22] which is accorded to the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*.[23]
2. The *1954 Convention* must be interpreted in the light of its intentions, which include protection of stateless persons as a vulnerable group.[24]
3. To avoid persons being left in limbo, due to evidential problems, contrary to the humanitarian objectives of the *1954 Convention*.[25]
4. The difficulty of proving a negative — that they are not a national of any state — often from outside the country where evidence is most likely to be found. The burden of proof should be shared because states have better resources to investigate.[26]
5. The court should consider the practice of other states — of 25 states with statelessness determination procedures, six apply the lower standard of proof.[27]
6. The line of UK judicial authorities regarding proof of nationality and ability to return were decided prior to the explicit reference to the *1954 Convention* in the UK's *Immigration Rules*.[28]
7. The SSHD guidance on determination of statelessness in immigration procedures refers to a shared burden of proof — at least once the

---

20 ibid [30].
21 ibid [34].
22 ibid [43], citing *UNCHR Statelessness Handbook* (n 4). The Court referred to similar guidance in other cases: see *R v Secretary of State for the Home Department, Ex parte Adan* [2001] 2 AC 477, 520.
23 *AS (Guinea)* (n 1) [34]. See also *UNCHR Statelessness Handbook* (n 4); *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Handbook, United Nations High Commissioner for Refugees January 1992) <https://www.unhcr.org/4d93528a9.pdf>.
24 *AS (Guinea)* (n 1) [35].
25 ibid [36].
26 ibid [37].
27 ibid [38].
28 ibid [39].

applicant has made his own efforts. That 'points to a lower standard of proof'.[29]

The SSHD relied on the reasoning of the Upper Tribunal:[30]

1. The *UNCHR Statelessness Handbook* was 'advisory' only: the *1954 Convention* says nothing about any evidential standards.[31]
2. The assessment of statelessness was very similar to the assessment of ability to return, or of assertions that a person is unable to 'obtain' a nationality. The jurisprudence in those areas is relevant.[32]

B *Determination of the Appropriate Standard of Proof*

The court determined that a person claiming to be stateless must provide evidence satisfying the standard of balance of probabilities, and must even apply for nationality. It preferred the UK jurisprudence, which has been developed in cases where the appellant, in a Tribunal that can consider both fact and law, is required to prove whether they have a particular nationality in the context of asylum and removal.[33] It recognised it was departing from the guidance in the *UNCHR Statelessness Handbook*.[34]

The Court accepted that the *1954 Convention* must be interpreted in the light of its objectives, and that errors of interpretation may be 'serious', but considered that those consequences would be less serious than in refugee cases.[35] Additionally: 'the steps necessary to establish statelessness will usually be steps that an applicant can readily take without any risk of harm'.[36] 'It is easy for the facts in issue to be proved'.[37]

The court dealt with the other arguments briefly. Regarding the problem that people may be 'left in limbo': 'I am not persuaded that the conventional balance of probabilities test has created a material problem in this regard'.[38] The judge noted that only six of 25 states with a determination procedure applied the lower standard of proof.[39] The court did not accept that the SSHD guidance to the *Immigration Rules*, indicating that the SSHD would assist the applicant, pointed to there being a lower standard of proof.[40]

---

29 ibid [40].

30 There were arguments regarding statelessness and deportation, but these are not relevant here. See generally ibid [28].

31 ibid [29].

32 ibid.

33 ibid [48]–[57].

34 ibid [44].

35 ibid [35].

36 ibid [46]

37 ibid [51], citing *MA (Ethiopia) v Secretary of State for the Home Department* [2009] EWCA Civ 289, [81] ('*MA (Ethiopia)*'). The Court acknowledged that there may be cases where, if a person makes enquiries of a national authority, relatives or others may be at risk. Those were exceptions to the general rule.

38 *AS (Guinea)* (n 1) [36], [58].

39 ibid.

40 ibid [57].

IV ANALYSIS

A *Standard of Proof*

The principal difficulty with the court's reasoning is that it considers the risk of carrying out the enquiries into nationality. It does not engage with the consequences of an erroneous decision that a person holds a nationality. The court states breezily that there is 'no material problem'[41] in applying the balance of probabilities test and that obtaining evidence is 'easy'.[42] However, the consequences of an erroneous decision regarding statelessness are in fact 'very severe':[43] a stateless person who has erroneously been determined to 'hold' a nationality or to be able to 're-establish' their nationality,[44] will not enjoy the protections of the *1954 Convention*.[45] Moreover, it is not easy to establish whether a person holds a nationality in many cases.[46]

Earlier UK decisions cited by the court related to the possibility of removal and did not take place in a context of statelessness as a protection issue under the *1954 Convention*.[47] The key case, *R v Secretary of State for the Home Department Ex parte Valentina Bradshaw*,[48] concerned a woman who resisted removal on grounds of statelessness following withdrawal of her resident permit due to fraud. Other cases involved people who asserted they were from a particular country where they would face persecution, but the SSHD asserted that they could return elsewhere.[49] *MA (Ethiopia) v Secretary of State for the Home Department* is one such case — the appellant there was likely either Eritrean or Ethiopian, not stateless.[50]

---

41 ibid [58].

42 ibid [51], citing *MA (Ethiopia)* (n 37) [81]. See also (n 21).

43 *AS (Guinea)* (n 1) [47].

44 Wording was added to the *Immigration Rules* (n 4) following this case: at [403](e).

45 A stateless person who is refused a residence permit and has no other right to reside in the UK, faces withdrawal of all state support, combined with prohibitions on all work, driving, marrying or accessing any health care for free other than emergency treatment. A property owner is liable to pay a civil penalty if they rent property to a person with no lawful residence. The stated aim of these measures was 'to create here in Britain a really hostile environment for illegal migration': 'Theresa May Interview: "We're Going to Give Illegal Migrants a Really Hostile Reception"', *The Telegraph* (online, 25 May 2012) <https://www.telegraph.co.uk/news/uknews/immigration/9291483/Theresa-May-interview-Were-going-to-give-illegal-migrants-a-really-hostile-reception.html>. See also *R v Secretary of State for the Home Department, Ex parte Adam* [2005] UKHL 66, where an asylum applicant

> was obliged to sleep in the street, save perhaps for a short and foreseeably finite period, or was seriously hungry, or unable to satisfy the most basic requirements of hygiene the [*ECHR* (n 16) art 3] threshold would, in the ordinary way, be crossed.

46 See, eg, *Pham v Secretary of State for the Home Department* [2015] UKSC 19 ('*Pham*'). For an even more convoluted case, see *E3 and N3 v Secretary of State for the Home Department* [2017] SIAD 138, SIAC 146.

47 *AS (Guinea)* [48]: the court referred to statelessness and 'the closely related concept of inability to return'.

48 [1994] Imm AR 359.

49 *AS (Guinea)* (n 1) [52]–[53], citing *R (on the application of Nhamo) v Secretary of State for the Home Department* [2012] EWHC 422 [35]–[37]; *Abdullah v Secretary of State for the Home Department* [2013] EWCA Civ 42 [16]; *RM (Sierra Leone) v Secretary of State for the Home Department* [2015] EWCA Civ 541.

50 *MA (Ethiopia)* (n 37).

The court did not take note of *Hoti* where the ECtHR found it 'apparent' that the applicant was stateless, on limited evidence, some of which was the applicant's own testimony.[51]

B *Need to Apply for a Nationality*

The Court of Appeal, in stating that the applicant must apply for a nationality, ignored two Supreme Court decisions regarding deprivation of British nationality on national security grounds — *Secretary of State for the Home Department v Al-Jedda* ('*Al-Jedda*'),[52] and *Pham v Secretary of State for the Home Department* ('*Pham*').[53] This jurisprudence established that a person is stateless if they do not hold a nationality *at the time of the deprivation*.[54] Although *Al-Jedda* and *Pham* are deprivation cases, the Upper Tribunal in the case of *R (on the application of Semeda) v Secretary of State for the Home Department*[55] explicitly applied the reasoning in *Pham* to the immigration context, as did the Court of Appeal in *R (on the application of JM (Zimbabwe)) v The Secretary of State for the Home Department*.[56]

It is clear that the UK is now out of step with international standards in the determination of statelessness. The ECtHR in its decision in *Hoti* noted that the applicant had at one point refused to apply for Croatian nationality. The Court did not demand that the applicant request a nationality before he could be recognised as a stateless person. In fact, it explicitly stated that the applicant did not have to request naturalisation in order to have a right under art 8 ECHR to resolution of his residence status, and found that he was stateless.[57]

V CONCLUSION

The court's decision shows a very limited understanding of the practical difficulties applicants face, and over-relies on assertions by the SSHD that they will assist the applicant. The need to apply for a nationality before requesting determination as a stateless person obviously raises the possibility that the person is stateless.

Following this decision, in April 2019, the *Immigration Rules* were amended. In order to obtain a grant of leave to remain as a stateless person, following recognition of statelessness, the applicant must have 'sought and failed to obtain

---

51 *Hoti* (n 5) [138].

52 [2013] UKSC 62 ('*Al-Jedda*'). Deprivation decisions are made under powers in the British Nationality Act 1981. Statelessness is not defined in the Act. The Upper Tribunal of the Immigration and Asylum Chamber, in the unreported decision of *The Secretary of State for the Home Department v GS, HK and AK* (HU/00490/2019, HU/00507/2019, HU/00498/2019, 8 August 2019) prefers the Supreme Court interpretation of art 1(1) of the *1954 Convention* in *Al-Jedda*, to that of the Court of Appeal in *AS (Guinea)* (n 1).

53 *Pham* (n 47).

54 ibid; *Al-Jedda* (n 52). In order to nullify the effect of these decisions, the government amended the deprivation legislation so that persons who may be eligible for a nationality are effectively not deemed to be stateless: *British Nationality Act 1981*, s 40(4A)(c).

55 [2015] UKSC 19 [28].

56 [2018] EWCA Civ. The unregistered child of a Zimbabwean national, who could in the future be registered, was recognised as stateless. The government amended the statelessness *Immigration Rules* (n 2) in April 2019 to require evidence of an attempt to register: see at [403](f), as amended by *Statement of Changes in Immigration Rules 2019* (UK) HC 1919 s 14.3 ('*2019 Statement of Changes*').

57 *Hoti* (n 5) [131].

or re-establish their nationality with the appropriate authorities of the relevant country'.[58] This language is unclear and not used in international instruments regarding statelessness.

Those seeking protection in the UK as stateless persons do not have a right of appeal against refusal of a residence permit. They have extremely limited access to free legal aid. If the SSHD erroneously finds that they could, on the balance of probabilities, acquire a nationality, they are likely to face conditions amounting to inhuman and degrading treatment with no resources to obtain evidence to meet the high standard of proof.[59]

58 *Immigration Rules* (n 2) [403](e), as amended by *2019 Statement of Changes* (n 58) s 14.3.

59 See (n 46). On 1 November 2019 the SSHD released a third version of the guidance to decision-makers in the residence permit application procedure, which cites, at 14, the decision in *AS (Guinea)* as confirmation of the correct standard of proof. See *Stateless Leave: Version 3.0* (Guidance, UK Secretary of State for the Home Department 30 October 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/843704/stateless-leave-guidance-v3.0ext.pdf >.