

ASYLUM AND IMMIGRATION TRIBUNAL

Appeal number: IA/02279/2006

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice
On 23 January 2007

Determination Promulgated:
On 1 March 2007

Before

**Mr Justice Hodge, President
Senior Immigration Judge Drabu
Ms C St Clair (Non-Legal Member)**

Between

[]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Ukwnowa, of Charles Hill & Co. Solicitors
For the Respondent: Mr P Deller, Home Office Presenting Officer

DETERMINATION AND REASONS

1. In a decision letter issued on 16th March 2006, the respondent concluded that it was appropriate to deport the appellant to Sierra Leone. His appeal against that decision was heard on 14th August 2006 by Immigration Judge Harrison. She allowed his appeal under the Immigration Rules and under article 8 of the European Convention on Human Rights. The respondent applied for a reconsideration which was ordered by a senior immigration judge on 11th September 2006.

2. The appellant is a citizen of Sierra Leone and was born on 22nd October 1986 so is now 20 years of age. A decision to deport him from the United Kingdom was made pursuant to section 3(5)(a) Immigration 1971 and paragraph 364 of the Immigration Rules (HC395 as amended). The respondent has deemed the deportation of the appellant to be conducive to the public good as the appellant has been convicted of serious criminality. It was agreed between the parties and by the Tribunal that this appeal should be considered under the terms of paragraph 364 of the Immigration Rules as it was prior to the amendment which was effected on the 19th July 2006.

The Appellant's Background

3. The appellant lived in Sierra Leone until he was six years old and for the latter period with his grandmother. He then joined his parents who had come to the UK. They have three other children all born here who live with the parents. He kept some contact by telephone with his grandmother until his early teens. He spent some time in local authority care. His family made citizenship applications in 2000. This was granted for the appellant's parents and siblings but not for him.
4. The appellant has committed a number of offences which are summarised at paragraph 14 and 15 of the Immigration Judge's determination.

"The appellant has a history of offending and in particular of serious sexual assault. The list of convictions with which I have been provided shows that he appeared at Camberwell Youth Court in March 2002 charged with a series of vehicle-related offences and failures to surrender to custody at the appointed time, many of them committed whilst on bail, as well as one count of burglary and theft. He received an 18-month supervision order. Three months later he appeared at Croydon Juvenile Court and received a further 6-months supervision order for being carried in a motor vehicle taken without consent. Three months later, in September, he appeared at Inner London Crown Court on burglary and theft charges and received an 8 month' detention and training order and at Southwark Juvenile Court in October 2002 received a further 12 months' detention and training order for a Theft Act offence. On 23 January, 2003 he pleaded guilty to six charge of indecent assault on a female and received a two year supervision order. He was released on 27th February, 2003 from detention which he had served in respect of the burglary. A week after his release, on 6th March, he committed a serious indecent assault on a woman, and on 5th April, 2003 committed a further sexual assault on a woman in her own home. It appears from the case summary in respect of this latter offence that by the time he was interviewed in respect of this assault, the appellant was again a serving prisoner, this time at Huntercombe prison, for a series of robberies. On 14th February 2005 he appeared at the Central Criminal Court at the Old Bailey. He was sentenced to four years in a Young Offenders institution with an extension period of two years and to be placed on the Sex Offenders Register indefinitely.

Whilst he has been in prison in respect of these latter offences, the appellant has spoken of having in fact sexually assaulted 11 females in total. He spoke of having started to smoke weed when he was thirteen and getting into serious trouble, of having gone to prison for the first time when he was fifteen, of having burgled houses and of having started his own group of boys."

5. In prison he has attended a sex offender treatment programme. Various reports were considered by the immigration judge but the appellant has been assessed as showing a "high risk of reoffending". He has been refused parole.
6. The Judge also noted that the appellant has "a very poor emotional relationship with his parents though he is saying now that he now wishes to put this right and try to re-establish his relations within the family." His probation officer has said that he should not return home if released but some arrangements have been made for him to live with an uncle in Bristol should he remain the United Kingdom. His parents do not want him to".

The respondent's position

7. In his decision letter dated 16th March 2006 the respondent said he "regards as particularly serious those offences involving violence, sex, arson and drugs". The appellant has committed a number of sexual offences and has a conviction for robbery. The decision of the Secretary of State followed the conviction for two indecent assaults on females for which he was sentenced to four years in prison at the Central Criminal Court on 24th January 2005. When sentencing the judge said:

"[], you are now 18. You committed a number of serious offences up to the end of 2002 but in January 2003 you pleaded guilty to no fewer than six offences of indecent assault on women going about their lawful business in the street or parks of London. Then you were placed under supervision for two years. On 27th February, 2003 you were released from a custodial sentence for burglary. On 6th March of that year, one week after your release, you committed a very serious indecent assault on a lady as she ran in Burgess Park. You tore her clothes down you punched her, you touched her private parts, you terrified her. With immense courage she fought you off but you left her with long term damage which I do hope she will be able to put behind her. You were arrested for that but because she could not pick you out from the identification parade you committed a further very serious offence of indecent assault, this time entering the lady's home. Having exposed yourself to her through a window you gained entry to her house. You grabbed her and again tried to interfere with her private parts. Again, with great courage the lady tried to fight you off and luckily you were disturbed by a noise from the upstairs flat and you ran off. One can only imagine what would have happened to both of those women had they not shown that physical courage. Now you have pleaded guilty to these charges. After legal submissions by your counsel which I am bound to say, however, well argued they were, had little chance of success. I note your age, you are still young but I also

note the number and seriousness of your previous convictions. My primary duty is to protect the public from serious assaults such as those you have committed. These offences are so serious that only custodial sentence can be justified.

8. "The Secretary of State in the letter further noted that the appellant had been in the UK since he was about six but a great number of the years he had spent under supervision or detention training orders. The appellant had no record of any employment. Regard was had to the effect deportation would have on the appellant, his family members and the wider community as well as the disruption to his own family life. When weighed against the seriousness of the offences committed between 2002 and 2005 the Secretary of State concluded that the appellant's removal from the UK was "necessary in a democratic society for the prevention of disorder and crime and for the protection of health and morals." Consideration was given to the appellant's rights under article 8 of the ECHR but it was concluded that deportation would not place the UK in breach of those rights.
9. In the grounds for reconsideration the respondent submitted that the immigration judge had made material misdirection of law and failed to give adequate reasons for her findings on material matters. In particular the immigration judge appears not to have had regard to the guidance given in deportation cases by the Court of Appeal in *N (Kenya) v The Secretary of State for the Home Department* (2004) EWCA Civ.1094. In particular the immigration judge was said to have erred in law as she had not given proper weight to the public interest element of the appeal before her. There was challenge to the view of the judge that the length of stay in the country meant the appellant succeeded. Criticism was also made of the immigration judge's approach to the article 8 decision.

The Appellant's Case

10. The appellant's case was, sadly, poorly prepared and presented. Reference was made to some decisions of the European Court of Human Rights for which neither copies of the decisions or references for them were provided. The short submission was the immigration judge made no error of law and that her decision should be upheld.

The immigration judge's decision

11. The Judge properly directed herself as to the burden of standard of proof set out the background to the appeal, considered the issues in dispute and the issue of deportation under the 1971 Act. Between paragraphs 36 and 42 of her decision she gave an analysis of her views on this matter and between paragraphs 45 and 46 she summarised her position on article 8 ECHR as follows:-

- “36. *I consider that in balancing the issues in this case I must give the greatest possible weight to the need to protect the public and to the respondent’s belief that it would be conducive to the public good to deport the appellant.*
37. *The appellant has been convicted of extremely serious offences. I believe he poses a grave risk to unsuspecting young women. I take into account the fact that he has set himself on a course of offending from the age of 13. He has had no adult life, or even adolescent life, in the United Kingdom which has been free from crime. I accept that he hopes to be able to rectify this, if he is allowed to remain, but that he cannot be sure he will succeed. I also accept the evidence of those involved in the appellant’s SOTP course that there is a high degree of risk that he will in fact re-offend.*
38. *I do not consider that the appellant has meaningful relationships with family members in the United Kingdom. I consider it probable that he wishes to rectify this. I think it will be very difficult for him to do so.*
39. *On the other hand, I consider the facts that the appellant has been in the United Kingdom from the age of six and that he has effectively no existing ties in Sierra Leone, or any knowledge of the country, to be powerful factors in this particular case. I also take into account the fact that he has not received any education in Sierra Leone as far as I am aware, and that his knowledge of the country was as it slid into civil war. The country is now only just emerging from the after-effects of that war and its social and family structures have been greatly dislocated. I consider it will be difficult for the appellant to relocate to Sierra Leone and very difficult for him to establish any sort of life there.*
40. *Notwithstanding the seriousness of the offences which the appellant has committed, I consider this to be an extremely finely balanced case. I have considered whether, in light of the fact that I must give very great weight to the need to protect the public it would be right for me to let other factors lead me to a conclusion that it would not be right to deport this appellant. Paragraph 364 of the Rules plainly affords the decision maker a discretion. Even where the respondent considers that deportation would be conducive to the public good, he and I must take all the factors specified in paragraph 364 into account, before arriving at a decision. Parliament has plainly accepted that there are situations where, whatever the seriousness of an appellant’s offending, deportation would not be the right course on the merits.*
41. *I have come to the conclusion that this is one of those very few exceptional cases where it would not be right to deport. Although the appellant has been denied British citizenship, he is in many way “one of us”. He came here at such a young age that it would be wrong, in my judgement, to treat him as though he had an affiliation to any other country.*
42. *In the circumstances I propose to allow the appeal under the Rules...*
- ...

45. *The appellant's deportation would interfere with his family and private life, but would be lawful and justified under article 8(2) if necessary in a democratic society for the prevention of disorder or crime or for the protection of the rights and freedoms of others.*
46. *Paragraph 364 of the Rules purports to set out the factors to be weighed in any analysis of an applicant's case against deportation and the appellant's arguments under the ECHR are effectively analogous with those under the Rules."*

Public Interest and Compassionate Circumstances

12. No notice had been given prior to this reconsideration hearing of any wish that the tribunal consider evidence which was not submitted on any previous occasion, see regulation 32(2) (Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI2005 No. 230). Nor was any such application made to at the hearing. We asked the parties, if we considered there had been a material error of law whether they regarded the tribunal as having all the relevant information on which to substitute a determination and both agreed that we had.
13. Paragraph 380 Immigration Rules sets the context for deportation orders which "will not be made against any person if his removal in pursuance of the order would be contrary to the United Kingdom's obligations under the Convention and Protocol relating to the Status of Refugees or the Human Rights Convention." These conventions must always be considered in deportation cases. It has never been submitted that the appellant is entitled to refugee status. The appellant's article 8 Rights under the European Convention on Human Rights have throughout been considered. There was some suggestion made before us that the appellant's rights under article 3 of the ECHR might be engaged on any return to Sierra Leone. No evidence to support such a submission had appeared before the immigration judge. No notice of the intention to bring any such evidence had been given prior to this reconsideration hearing. Nothing was put before us providing any, still less any evidential basis to support such a submission and we discounted the claim.
14. A balancing act is required by the Secretary of State and this tribunal when reaching decisions under paragraph 364 Immigration Rules applicable here. The public interest must be balanced against any compassionate circumstances. The rule is as follows:

"Subject to paragraph 380 in considering whether deportation is the right course on the merits, the public interest will be balanced against any compassionate circumstances of the case. While each case will be considered in the light of the particular circumstances, the aim is an exercise of the power of deportation which is consistent and fair as between one person and another, although one case will

rarely be identical to another in all material respects. (In the cases detailed in paragraph 363(a) deportation will normally be the proper course where a person has failed to comply with or has contravened a condition or has remained without authority. Before a decision to deport is reached the Secretary of State will take into account the relevant factors known to him including:-

- (i) age
- (ii) length of residence in the United Kingdom
- (iii) strength of connections with the United Kingdom
- (iv) personal history, including character, conduct and employment record
- (iv) domestic circumstances
- (v) previous criminal record and the nature of any offence of which the person has been convicted
- (vi) compassionate circumstances
- (vii) any representations received on the person's behalf."

15. Guidance was given by the former Immigration Appeal Tribunal to the proper approach to the public interest in N (2004) UKIAT 0009. The tribunal said at paragraph 37.

"The public interests element in a deportation decision is constituted not only by the need to secure the safety of the citizens of this country from future criminal acts by the claimant himself: it consists also for the need for a decent society to express its revulsion of crimes of this sort and to make it clear that the full rigour of the law will be unleashed on those who commit them."

16. On appeal in that case in (N Kenya) The Court of Appeal gave further guidance. Lord Justice May said at paragraph 64:

"In a deportation appeal under section 63(1) of the 1999 Act, the adjudicator has an original statutory discretion as provided in paragraph 21 (1) of Schedule 4 of the 1999 Act. The discretion is to balance the public interest against the compassionate circumstances of the case taking account of all relevant factors including those specifically referred to in paragraph 364 of HC 395. Essentially the same balance is expressed as that between the appellant's right to respect for his private and family life on the one hand and the prevention of disorder or crime on the other. Where a person who is not a British citizen commits a number very serious crimes, the public interest side of the balance will include importantly although not exclusively, the public policy need to deter and to express society's revulsion at the seriousness of the criminality. It is for the adjudicator in the exercise of his discretion to weigh all relevant factors, but an individual adjudicator is no better able to judge the critical public interest factor than is the court. In the first instance, that is a matter for the Secretary of State. The adjudicator should then take proper account of the Secretary of State's public interest view."

17. Further at paragraph 83 Lord Justice Judge said:-

"The 'public good' and the 'public interest' are wide ranging but undefined concepts. In my judgement (whether expressly referred to in any decision letter or not) broad issues of social cohesion and public confidence in the administration of the system by which control is exercised over non-British citizens who enter

and remain in the United Kingdom are engaged. They include an element of deterrence, to non-British citizens who are already here, even if they are genuine refugees and to those minded to come, so as to ensure that they clearly understand that, whatever the circumstances, one of the consequences of serious crime may well be deportation. The Secretary of State has a primary responsibility for this system. His decisions have a public importance beyond the personal impact on the individual or individuals who would be directly affected by them. The adjudicator must form his own independent judgement. Provided he is satisfied that he would exercise the discretion of 'differently' to the Secretary of State, he must say so. Nevertheless, in every case he should at least address the Secretary of State's prime responsibility for the public interest and the public good, and the impact that these matters will properly have had on the exercise of his discretion. The adjudicator cannot decide that the discretion of the Secretary of State 'should have been exercised differently' without understanding and giving weight to matters which the Secretary of State was entitled or required to take into account when considering the public good."

Discussion and Conclusion

18. The Immigration Judge does refer to the public interest in her determination. She notes the balancing act required in paragraph 7. She again refers to the balancing act required in paragraph 25 and sets out the factors she considers to be relevant. These included the age of the appellant and that he appears not to have the social skills necessary to establish himself in the community and that he is dislocated from his family. She concluded that he could adapt to living in a different country but he had considerable connections with the UK. It was possible that the appellant's grandmother was alive in Sierra Leone but the UK is the only country he is known as an adult. She has noted that he has not played any effective part in the community but that if he returned to Sierra Leone there was a "high degree of likelihood that he would end up living on the streets". She went on to note the poor relationships with the immediate family and the lack of close emotional ties. She referred to the "dreadful" criminal record of the appellant and the fact that he has assaulted 11 women so far with "at least highly damaging and possibly long lasting effects on them and their families". She thought there was an unhappy history here and there were compassionate circumstances. At the core of immigration judge's conclusions was the fact that the appellant has been in the United Kingdom since the age of six and that in those circumstances he was as she actually put it "one of us" and should not be returned to Sierra Leone. He has, however, been refused citizenship. His character and conduct and previous criminal record are all against him.
19. We note that nowhere in her analysis does the judge refer to "the public policy need to deter and to express society's revulsion at the seriousness of the criminality". However that is neither surprising nor material given that she was not referred to the AIT decision in N Kenya and the general

tenor of her appraisal of evidence does not appear to suggest that she underplayed the seriousness of the appellant's criminality or the need to protect the society from him. We accept that there are strong compassionate circumstances in this case and we do not disagree too strongly with the description of the appellant by the Immigration Judge as being "in many ways one of us." Whilst his conduct and character is most revolting, he is nevertheless an "integrated alien", a "home grown criminal". The United Kingdom is the only country he has known. He has no known family or other support network in Sierra Leone. The whole of his immediate family is in the United Kingdom.

20. The Immigration Judge had before her the case summaries in relation to the sexual offences for which the appellant received a sentence of 4 years in prison. They make very disturbing reading. The Secretary of State had particular regard to the sentencing remarks of the judge of the Central Criminal Court and these are set out in his decision letter of 16th March 2006. The judge makes no reference to those remarks which themselves highlight the seriousness of the offences.
21. The Judge was, as we have already said not referred to *N (Kenya)* at the Appeal hearing in August 2006. As the decision was in the public domain at the time, the Immigration Judge should have been guided by the principles laid down therein. However mere failure to refer to a relevant decided case cannot be a material error of law. Failure to apply binding legal principles would undoubtedly be.
22. In deciding whether the decision of the Immigration Judge was consistent with the legal principles set out by the Court of Appeal in *N (Kenya)* we noted first that there are significant differences in the facts of this case and the facts in *N (Kenya)*. Whilst legal principles deriving from decisions of Courts must be followed, we have to bear in mind that legal principles of a binding nature are rarely handed down in the abstract. Case based legal principles are shaped by facts in the relevant case or cases. The decision in *N (Kenya)* cannot be read to mean that engagement in serious criminal activities of non-nationals must inevitably and in every case result in dismissal of challenges to the Secretary of State's order of deportation. *N (Kenya)* does not negate the requirement of balancing exercise. On the facts of that case the Court of Appeal held that the Immigration Appeal Tribunal had been right to overturn the decision of the Adjudicator who had allowed the appeal of *N*. As we stated in the beginning of this paragraph, the material facts in the two cases are quite different. *N* had come to the UK in 1994 as a mature adult of 20 years age and had then acquired refugee status. His length of stay in the United Kingdom had been significantly smaller than that of the appellant in this case. His criminal behaviour came to light the year after he entered the UK. His horrendous criminal conduct could

by no means be attributed to any failures in our system whereas arguably the appellant's can since he has lived here from the age of 6. The Immigration Judge considered this "an extremely finely balanced case". The respondent has identified no material evidence which the Immigration Judge has not considered in carrying out the balancing exercise. The Immigration Judge has taken account of the high risk of re-offending. As we understand it the basis of the request for reconsideration boils down to disagreement on the weight that the Immigration Judge has or has not given to particular items of evidence.

23. The Immigration Judge concluded, "*this is one of those very few exceptional cases where it would not be right to deport. Although the appellant has been denied British citizenship, he is in many ways "one of us". He came here at such a young age that it would be wrong, in my judgement, to treat him as though he had an affiliation to any other country.*" Having reviewed the determination carefully and closely, we are not convinced that the findings and conclusions of the Immigration Judge are either perverse or unreasonable. That is, in our view, the only basis upon which we can interfere with the decision in this case. Whilst we may ourselves not have reached the same conclusion that in itself is not a ground upon which we can lawfully conclude there to have been a material error of law. If we did so, we would, to use the words of Lord Justice Sedley in *N (Kenya)*, be "translating a legitimate disagreement with the adjudicator's (now Immigration Judge) conclusion into an illegitimate finding of perversity on his part."

Decision

24. For the reasons given, the Immigration Judge's decision was not in material error of law and her decision to allow the appeal under the Immigration Rules and under article 8 of the ECHR will stand.

**Mr Justice Hodge
President
30 October 2007**