



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/00927/2013

THE IMMIGRATION ACTS

Heard at Columbus House, Newport

On 1 August 2014

Determination

Promulgated

On 27 August 2014

Before

**MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE GRUBB**

Between

TENDAI ABRAHAM GOREMANO

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A MacKenzie instructed by Kesar & Co., Solicitors

For the Respondent: Mr I Richards, Home Office Presenting Officer

DECISION AND REMITTAL

Introduction

1. The appellant is a citizen of Zimbabwe who was born on 25 August 1990. On 16 May 2012, he was convicted at the Canterbury Crown Court of unlawful wounding and burglary. On 2 July 2012, he was sentenced to a term of 32 months' imprisonment for the unlawful wounding and a consecutive term of nine months' imprisonment for the offence of burglary, making a total term of three years and five months' imprisonment. As a consequence of that conviction, the appellant was

liable to automatic deportation under the provisions of the UK Borders Act 2007. On 23 August 2012, he was informed of his liability to deportation unless one of the exceptions in s.33 of the 2007 Act applied. In response, the appellant claimed asylum.

2. On 28 January 2013, the Secretary of State informed the appellant in writing that she considered that s.72 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") applied on the basis that he had been convicted of a "particularly serious crime" (having been sentenced to imprisonment of at least two years) and that he constituted a "danger to the community" such that his deportation would not breach Art 33 of the Refugee Convention. The appellant was invited to make representations to rebut the presumptions that his crime was particularly serious and that he constituted a danger to the community.
3. It would appear that the appellant made no representations. In any event, on 30 April 2013, the Secretary of State refused the appellant's claim for asylum and under Arts 3 and 8 of the ECHR. Consequently, the Secretary of State decided that s.32(5) of the 2007 Act applied as the appellant could not establish an exception under s.33. The Secretary of State also considered that the appellant had not rebutted the presumptions under s.72 of the 2002 Act and issued a certificate under s.72(9)(b) of the 2002 Act that the presumptions applied.
4. On 26 April 2013, the Secretary of State made a deportation order against the appellant pursuant to s.32 of the 2007 Act and s.5(1) of the Immigration Act 1991.

The Appeal

5. The appellant appealed against the decision that s.32(5) of the 2007 Act applied pursuant to s.82(3A) of the 2002 Act.
6. The First-tier Tribunal (Judge Trevaskis and Dr J O De Barros) dismissed the appellant's appeal on asylum grounds having concluded that, as a result of s.72 of the 2002 Act, the appellant had been convicted of a particularly serious offence and constituted a danger to the community. However, the First-tier Tribunal ("FtT") went on to allow the appellant's appeal under Art 8 of the ECHR.
7. The appellant sought permission to appeal to the Upper Tribunal on two grounds. The first is that the FtT failed properly to consider whether the appellant had rebutted the presumption that his offence was "particularly serious" and that he was a "danger to the community". Secondly, the FtT erred in law by failing to consider at all whether the appellant was at risk of serious ill-treatment contrary to Art 3 of the ECHR as a result of his claimed association with the MDC.
8. In addition, the Secretary of State sought permission to appeal against the FtT's decision to allow the appellant's appeal under Art 8 of the ECHR.

First, the grounds argue that the FtT erred in law by failing to consider whether the appellant could succeed under the relevant Immigration Rules (HC 395 as amended), namely paras 399 and 399A. Secondly, the grounds argue that the FtT failed properly to consider the public interest and therefore failed properly to carry out the balancing exercise under Art 8.2.

9. On 22 April 2014, the First-tier Tribunal (Judge Saffer) granted both the appellant and respondent permission to appeal on all grounds. Thus, the appeal came before us.

Discussion

The Appellant's Appeal

10. Article 33(1) of the Refugee Convention prevents the return or refoulement of a refugee to a place where he has a well-founded fear of persecution for a Convention reason. However, Art 33(2) provides an exception to that prohibition on return or refoulement in the following circumstances:

“The benefit of the present provision may not, however, be claimed by a refugee who, having been convicted by a final judgment of a particularly serious kind, constitutes a danger to the community of that country.”

11. Section 72(1) of the 2002 Act provides that:

“This section applies to the purpose of the construction and application of Art 33(2) of the Refugee Convention (exclusion from protection).”

12. The relevant provision in s.72 for the purposes of this appeal is s.72(2) which provides as follows:

“A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is –

- (a) convicted in the United Kingdom of an offence, and
- (b) sentenced to a period of imprisonment of at least two years.”

13. Section 72(6) states that:

“A presumption under sub-section (2) that a person constitutes a danger to the community is rebuttable by that person.”

14. Although s.72 does not, on its face, provide for the rebuttal of the presumption that the conviction of an offence in the UK with a sentence of at least two years amounts to a “particularly serious crime”, in EN (Serbia) v SSHD [2010] QB 633 the Court of Appeal interpreted s.72 as also creating a rebuttable presumption as to whether the conviction of an offence with a term of imprisonment of two years was a “particularly serious crime”.

15. The FtT dealt with the certification under s.72 at paras 44-46 of its determination as follows:

“44. We begin by considering the certification of the appellant’s case under s.72 of the Nationality, Immigration and Asylum Act 2002. The Appellant was sentenced to more than 2 years’ imprisonment for a single offence. We find that the offence of wounding for which he received that sentence was a particularly serious offence. The sentencing remarks included the following:

‘you struck ... in the face with the bottle you were holding. You caused him very serious injury indeed to his face, chest and head. He received 21 stitches to his chest, 7 stitches to his head and the wound to his face required surgery because it full through the thickness of the skin. I am told that he may well require a skin graft.

I take the view that wounding falls into the most serious category under the Sentencing Guidelines but there is a higher culpability because a weapon was used by you and there is greater harm because there is long term permanent injury to your victim.’

45. With regard to the danger which he represents to the community, we note that he was assessed as presenting a medium risk of causing serious harm, based on the nature and seriousness of the index offence. The appellant has only been out of prison since November 2013, and so there has been little time to assess his commitment to rehabilitation. Therefore we must be guided by the risk assessment, which we find leads us to conclude that he still represents a danger to the community.
 46. We therefore find that the Respondent’s certification has not been rebutted, and therefore Article 33(2) of the Geneva Convention applies to the Appellant and he does not qualify for a grant of asylum under paragraph 334 of the Immigration Rules. Accordingly we have not considered his asylum claim in the context of this appeal.”
16. Whilst it is clear to us that the FtT did consider that the presumption that his offending meant that he constituted a “danger to the community”, it is not clear to us that the FtT appreciated that the presumption that his offence amounted to a “particularly serious offence” could be rebutted. Although the FtT set out the sentencing judge’s remarks, the phraseology of para 44 of the determination leads us to conclude that the FtT considered that, by virtue of having been convicted of an offence for which the appellant received a sentence of at least two years’ imprisonment, it had been established that the appellant had been convicted of a “particularly serious offence”. There was no consideration of whether the circumstances warranted a different conclusion.
 17. Whether the appellant had rebutted the presumption in s.72(2) required, in our judgment, an assessment of all the circumstances, including the circumstances of the offence and also of the appellant’s history of offending (see SB (Cessation and exclusion) Haiti [2005] UKIAT 00036 at [72]-[73]). Whilst the circumstances of the appellant’s offence are set out from the sentencing judge’s remarks at para 44 of the FtT’s determination, we are unable to say that it was inevitable that the FtT would conclude

that the presumption in s.72(2) had not been rebutted. As Stanley Burnton LJ noted in EN (Serbia) at [69]:

“A sentence of two years’ imprisonment is not necessarily indicative of a particularly serious crime.”

18. The FtT’s misapprehension as to the effect of s.72(2) of the 2002 Act was, in our judgment, a material error of law in reaching its finding to uphold the certification under s.72(9)(b) of the 2002 Act.
19. Further, it is clear that the FtT erred in law in failing to consider the appellant’s claim under Art 3 of the ECHR. The FtT made no findings in relation to the appellant’s evidence and that of his other witnesses concerning his (and his family’s) claimed MDC associations and any consequent risk of serious ill-treatment falling within Art 3 of the ECHR if he returned to Zimbabwe. Even if it had been correct to uphold the certification under s.72(9)(b) of the 2002 Act, that had no effect upon the appellant’s claim under Art 3 based upon his (and his family’s) claimed political association with the MDC. The certification only affected the appellant’s asylum claim which, if the certificate was upheld, required the FtT to dismiss his appeal on asylum grounds without determining the merits of those grounds. On behalf of the Secretary of State, Mr Richards accepted that this was an error of law. That aspect of the appellant’s claim remains undetermined by the First-tier Tribunal.
20. Given these two errors of law, it is apparent to us that the appellant’s appeal should be remitted to the First-tier Tribunal for a *de novo* rehearing of the appellant’s asylum claim (including the application of s.72 of the 2002 Act) and under Art 3 of the ECHR.
21. We do not consider that any of the FtT’s findings in respect of Art 33 of the Refugee Convention and s.72(2) of the 2002 Act should stand. In relation to the FtT’s finding that the appellant had not rebutted the presumption that he was a danger to the community, that finding will, by the time of a rehearing, be more aged. In addition, it was, as the FtT noted in para 45, made only four months after the appellant was released from prison in November 2013. It would, in our judgment, be wholly artificial and wrong to reconsider the appellant’s claim for asylum and the application of s.72 at some future point without also considering afresh whether the appellant has rebutted the presumption that he is a danger to the community.

The Respondent’s Appeal

22. As regards the Secretary of State’s appeal in relation to the FtT’s decision to allow the appeal under Art 8, Mr MacKenzie, who represented the appellant, accepted that the FtT had failed to consider first whether the appellant met the requirements of the Immigration Rules, in particular para 398(b) read with para 399A. Nevertheless, he submitted that was immaterial as the appellant met the requirements of para 399A(b) and

therefore his deportation was clearly disproportionate. Paragraph 399A(b) provides as follows:

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

....

- (b) the person is aged under 25 years, he has spent at least half of his lifetime 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.”

23. Mr MacKenzie submitted that the appellant had established that he had “no ties” with Zimbabwe and he did not accept that his political connection with Zimbabwe through his MDC membership meant that he could not show that he had “no ties” with Zimbabwe.
24. In assessing whether the appellant’s deportation was a breach of Art 8, the case law makes clear that the decision maker must consider first whether the appellant meets the requirements of the Immigration Rules which, for these purposes, include para 399A(b). If they do not apply then an individual can only succeed in a deportation appeal under para 398 if he establishes that there are “exceptional circumstances” such that the public interest is “outweighed by other factors” (see MF (Nigeria) v SSHD [2013] EWCA Civ 1192).
25. Here, the FtT did not consider whether the appellant met the requirement in para 399A(b) and had established that he had “no ties” with Zimbabwe. Whilst the FtT did find at para 63 that he has no family support in Zimbabwe, the FtT made no reference to that in the context of the “no ties” issue under para 399A(b) and did not consider whether, despite having no family in Zimbabwe, nevertheless his political affiliations with the MDC amounted to a continuing connection with Zimbabwe and, therefore, amounted to a “tie” of a “cultural” or other kind.
26. In our judgment, the FtT failed properly to consider the application of Art 8 and, in particular, the issue of proportionality by failing to consider whether the appellant’s claim succeeded under para 399A(b) and, if it did not, whether there were “exceptional circumstances” such that the public interest in deportation was outweighed. For these reasons, therefore, the FtT erred in law in allowing the appellant’s appeal under Art 8 of the ECHR.

Decision and Disposal

27. The First-tier Tribunal’s decision to dismiss the appellant’s appeal on asylum grounds involved the making of an error of law.
28. Further, the First-tier Tribunal’s decision to allow the appellant’s appeal under Art 8 involved the making of an error of law.

29. For the reasons we have given, the First-tier Tribunal's determination cannot stand and is set aside. The appeal is remitted to the First-tier Tribunal in order to remake *de novo* the decision on asylum grounds and under Arts 3 and 8 of the ECHR.

Signed

A Grubb
Judge of the Upper Tribunal