Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00787/2013

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 22 October 2013	**On 15 November 2013**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HS

Respondent

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Mr A Duncan of Duncan Moghal Solicitors & Advocates

DETERMINATION AND REASONS

1. This appeal is subject to an anonymity order made by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind the order and I continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

2. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal (Judge N J Osborne and Ms S E Singer) which allowed HS's appeal against a decision taken by the Secretary of State that s.32(5) of the UK Borders Act 2007 applied and to make a deportation order on 16 April 2013.

3. For convenience, I will refer to the parties as they appeared before the First-tier Tribunal.

4. The appellant is a citizen of Somalia who was born on 28 August 1988. He arrived in the UK and claimed asylum on 17 September 2004. The Secretary of State refused the appellant's claim for asylum on 25 October 2004 but granted him discretionary leave until his eighteenth birthday on 27 August 2006. On 21 August 2006 the appellant applied for further leave to remain. On 16 July 2010 he claimed asylum and was interviewed on 3 August 2010.

5. Between May 2008 and February 2009 the appellant was convicted of ten offences including possession of Class C drugs, having a bladed article in a public place and using threatening behaviour with intent to cause distress. On 2 September 2009 the appellant was convicted at the Bristol Crown Court of possession of a Class A controlled drug, namely heroine with intent to supply and was sentenced to two years' imprisonment.

6. The appellant was released on licence in April 2011. Subsequent to his release, on 6 June 2012 the appellant was convicted of possession of a class B drug (cannabis) and sentenced to 2 months imprisonment; on 23 July 2012 he was convicted of possession of a controlled Class B drug, namely cannabis/cannabis resin for which he was fined £110; on 9 August 2012 he was convicted of failing to surrender to custody at an appointed time and fined £50; on 26 September 2012 he was convicted of possession of a Class B controlled drug (cannabis) and fined £50; and finally on 26 November 2012 he was convicted of possession of a controlled Class B drug (cannabis) and fined £110.

7. The appellant appealed to the First-tier Tribunal against the Secretary of State's decision to apply the automatic deportation provisions in the 2007 Act as a result of his conviction at the Bristol Crown Court in 2009 for possession with intent to supply a Class A drug, namely heroine with a term of imprisonment of 2 years.

8. The First-tier Tribunal (Judge N J Osborne and Ms S E Singer) allowed the appellant's appeal. First, the Tribunal accepted that the appellant was at risk on return to Somalia because of his minority clan membership. Secondly, the Tribunal concluded that the appellant had rebutted the presumption arising pursuant to s.72 of the Nationality, Immigration and Asylum Act 2002 that as a result of his conviction for a "particularly serious crime" he constituted "a danger to the community". Thirdly, applying the country guidance case of AMM and Others (Conflict; Humanitarian Crises; Returnees; FGM) Somalia CG [2011] UKUT 445 (IAC) the Tribunal concluded that on return to Southern Somalia the appellant would face a risk of serious harm arising from indiscriminate violence contrary to

Article 15(c) of the Qualification Directive (Council Directive 2004/83/EC). Finally, the Tribunal concluded that the appellant's deportation would breach Article 8 of the ECHR.

9. The Secretary of State lodged detailed grounds seeking permission to appeal to the Upper Tribunal. On 29 July 2013, The Upper Tribunal (UTJ Goldstein) granted the Secretary of State permission to appeal. Thus, the appeal came before me.

10. In his oral submissions on behalf of the Secretary of State, Mr Richards declined to rely on any of the drafted grounds which challenged the First-tier Tribunal's decision to allow the appeal under Article 8. He accepted that the approach of the Tribunal had to be seen in the light of the Court of Appeal's recent decision in MF (Nigeria) v SSHD [2013] EWCA Civ 1192. As I understood Mr Richards' submissions he did not seek to argue that the First-tier Tribunal erred in law in approaching Article 8 outside the Immigration Rules. He accepted that the First-tier Tribunal had only taken into account all relevant matters and had excluded irrelevant matters. He accepted that in respect of Article 8, the First-tier Tribunal had not erred in law in allowing the appellant's appeal.

11. In the light of that concession, I need say no more about the grounds and their challenge to the First-tier Tribunal's decision under Article 8. Its decision to allow the appeal under Article 8 stands.

12. Instead, Mr Richards directed his submissions to the Tribunal's consideration of s.72 of the 2002 Act. He accepted that the Tribunal had been entitled to find that the appellant was at risk on return to Somalia. However, he submitted that the First-tier Tribunal had been wrong to find that the presumption that the appellant "constitute[d] a danger to the community of the United Kingdom" had been rebutted. He submitted that the First-tier Tribunal had wrongly downplayed the appellant's post-conviction offending – essentially consisting of offences of possession of Class B drugs, namely cannabis – on the basis that that behaviour did not adversely affect any member of the community. Mr Richards submitted that there was always potential for harm to the community by those who were taking illegal drugs. Mr Richards invited me to find that the Tribunal had erred in law and to reverse the decision rejecting the certification under s.72 of the 2002 Act.

13. Mr Duncan, on behalf of the appellant, submitted that the Tribunal was fully entitled to find that the appellant's post-conviction offending rebutted the presumption that he was a danger to the community. He submitted that the Tribunal had assessed the risk to the community and any potential risk was merely hypothetical. He submitted that Mr Richards' position could, in principle, apply to any criminal offence which would give rise to a hypothetical risk of impact on the community whether financial or otherwise. That, Mr Duncan submitted, removed the possibility of an individual ever rebutting the presumption that he was a "danger to the community" under s.72.

14. Article 33(1) of the Refugee Convention sets out the prohibition against "expulsion or return" ('refoulement') of a refugee. That prohibition on refoulement is removed in the circumstances set out in Article 33(2) which provides a follows:

> "The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."

15. Section 72 of the 2002 Act "applies for the purpose of the construction and application of Article 33(2) of the Refugee Convention".

16. For present purposes the relevant provision is in s.72(2) which provides:

> A person shall be presumed to have been convicted by a final judgement 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."

17. Section 72(9) permits the Secretary of State to issue a certificate that the presumptions, inter alia, in sub-section 2 apply.

18. Section 72(10) sets out the procedure before the First-tier Tribunal where such a certificate is issued as follows:

> "The Tribunal…hearing the appeal –
>
> (a) must be given substantive deliberation on the appeal by considering the certificate; and
>
> (b) if in agreement that presumptions under sub-section (2)…apply (having given the appellant an opportunity for rebuttal) must dismiss the appeal in so far as it relies on the grounds specified in sub-section (9)(a). "

19. The grounds specified in sub-section (9)(a) is that the individual's removal would breach the Refugee Convention.

20. The same procedure applies when the Upper Tribunal is remaking a decision under s.12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007 (see, s.72(10A)).

21. In this appeal, the Secretary of State issued a certificate under s.72(9) that as a result of the appellant's conviction and imprisonment for two years he had been convicted of a "particularly serious crime" and was a "danger to the community".

22. There is no doubt that the appellant was convicted of a "particularly serious crime" and he made no attempt before the First-tier Tribunal to rebut that presumption. However, as regards whether he was a "danger to the community", the appellant did seek to rebut that presumption on the basis of his post-conviction behaviour. At

paras 11 and 12 of its determination, the Tribunal dealt with this issue and, having set out the appellant's conviction after the index offence, said this at para 12.

> "12. None of those matters involved a member of the public. None of those matters are anywhere near as serious as the index offence. None of those offences involve behaviour which has adversely affected any member of the community in any way. As the Appellant has been living in the community for in excess of two years following his release and as the Respondent has no evidence of the Appellant having been a danger to the community in that period, we find that the Appellant has rebutted the presumption that he is a danger to the community."

23. It is clear that the two issues of whether an individual has been convicted of a "particularly serious crime" and is a "danger to the community" are separate issues for determination (see IH (s.72; 'Particularly Serious Crime') Eritrea [2009] UKAIT 00012 at [75]). The issue of 'dangerousness' requires a consideration of all the circumstances, including the individual's past offending and post-conviction behaviour (see, SB (Cessation and Exclusion) Haiti [2005] UKIAT 0036 at [68]).

24. In this case, the Tribunal did consider the appellant's circumstances in the round. The appellant had been released on licence for more than two years by the date of the First-tier Tribunal's hearing. The Tribunal took into account the nature of the offences he had committed in that time. In determining whether the presumption that the appellant remained a "danger to the community" on the basis of his conviction for possession with intent to supply Class A drugs, the Tribunal was entitled to take into account that, although he had committed a number of offences, these were offences which did not directly affect any member of the community. Mr Richards did not suggest otherwise. The convictions were for possession of Class B drugs – and not the more serious offence possession with intent to supply. That the convictions were not for the latter offence is reflected in the sentences, all but one was by way of a fine. In my judgment, the Tribunal was entitled to take the view that these offences arose out of the appellant's personal use of cannabis and were not linked to any risk of future supply to the general public. I do not accept Mr Richards' submission that, in effect, any offence involving illegal drugs demonstrates a potential harm to the community. Such a danger would, obviously, be demonstrated by dealers or suppliers in illegal drugs. The "danger" to the community must be real or tangible. I accept Mr Duncan's submission that hypothetical or speculative risk to the public alone will not suffice. Here, for a two year period the appellant's offending created no risk to the public. That is, of course, not to seek to trivialise his offending after the index offence. It merely recognises that the requirement of a "danger to the community" requires there to be a "danger" to the community demonstrated by "proof of the particular serious offence and the risk of its reoccurrence or of the reoccurrence of a similar offence or other offence which will endanger the public (see, EN (Serbia) v SSHD [2009] EWCA Civ 630 at [46]).

25. In my judgement, the First-tier Tribunal's finding in paragraph 12 that the appellant had rebutted the presumption that he is a danger to the community was one

properly open to it on the evidence. The Tribunal did not misdirect itself and its finding cannot be characterised as irrational or perverse. I did not understand Mr Richards' submissions to entail any other challenge to the First-tier Tribunal's decision that the s.72 presumption was rebutted.

26. For these reasons, therefore, the First-tier Tribunal did not err in law in finding that the appellant had rebutted the presumption in s.72(2) of the 2002 Act so that the prohibition against his removal as a refugee in Article 33(1) of the Refugee Convention applied.

27. One final point concerns the First-tier Tribunal finding in para 27 of its determination that the appellant's removal to Somalia would be contrary to Article 15(c) of the Qualification Directive.

28. Given that the Tribunal had found that the appellant qualified as a refugee (which he did even if he could be returned because of Article 33(2) of the Refugee Convention), the appellant was not entitled to humanitarian protection under paragraph 339C of the Immigration Rules or subsidiary protection under Article 15 of the Qualification Directive. The two forms of international protection are alternatives.

29. Para 339C(ii) sets out as one of the requirements to a grant of humanitarian protection that the individual

> "does not qualify as a refugee as defined in regulation 2 of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006" (emphasis added).

30. Regulation 2 of the 2006 Regulations states that a "refugee" means

> "a person who falls within Article 1(A) of the Geneva Convention and to whom regulation 7 does not apply".

Regulation 7 excludes from refugee protection individuals who falls within Articles 1D, 1E or 1F of the Refugee Convention.

31. Likewise the Qualification Directive in Article 2(e) defines a "person eligible for subsidiary protection" to mean "a third country national…who does not qualify as a refugee" but, to summarise, can demonstrate a real risk of suffering serious harm as defined in Article 15 (emphasis added).

32. In this appeal, the appellant, on the Tribunal's (now unchallenged) finding fell within the definition of a refugee in Article 1A of the Refugee Convention. The appellant did "qualify as a refugee" (whatever the application of Art 33(2) of the Refugee Convention and s.72 of the 2002 Act) and thus was not entitled, on any view, to humanitarian protection under Article 15(c). (There is also a corresponding exclusion from humanitarian protection of any individual who is a "danger to the community" (para 339D(iii) of the Rules).) It may well be that the First-tier Tribunal in finding in the appellant's favour under Article 15(c) was engaged in a 'belt and

braces' exercise as the Tribunal did not, in fact, formally allow the appeal on humanitarian protection grounds.

Decision

33. The Secretary of State's appeal to the Upper Tribunal is dismissed.

34. The First-tier Tribunal's decision to allow the appellant's appeal under Article 8 of the ECHR and on the basis that his deportation would breach the Refugee Convention stand.

Signed

A Grubb
Judge of the Upper Tribunal

Date: