Upper Tribunal
(Immigration and Asylum Chamber)

Ruhumuliza (Article 1F and "undesirable") [2016] UKUT 00284 (IAC)

THE IMMIGRATION ACTS

Heard at Stoke	**Promulgated on**
28 January 2016	
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Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE MARTIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JONATHAN RUHUMULIZA

Respondent

Representation:

For the Appellant: Mr T Wilding, Senior Home Office Presenting Officer.
For the Respondent: Mr A Pipe, instructed by Rashid & Co Solicitors

The fact that a person is excluded from the Refugee Convention does not of itself mean that his presence in the UK is undesirable within the meaning of the Immigration Rules.

DECISION AND REASONS

1. The respondent to this appeal, whom we shall call "the claimant", is a national of Rwanda. He is an Anglican Bishop. He was Bishop Co-Adjutor in the Kigali Diocese in 1994, and subsequently Diocese and Bishop from 1995 to 1997. He has also served in the United Kingdom as an assistant Bishop in the Diocese of Worcester.

2. The claimant came to the United Kingdom in 2004. He had entry clearance as a student and was granted further leave to remain as a student and subsequently as a Minister of Religion. That leave expired on 30 September 2006. No application for its renewal was made in time, but there was an out-of-time application on 4 October 2006 and leave was granted from 3 November 2006 to 31 January 2007. Towards the end of that period of leave he made an application for further leave, but that prompted an investigation into his history in Rwanda, and on 24 June 2008 the application was refused on the ground that his character, conduct or associations made it undesirable for him to have further leave. He appealed against that decision and the decision was withdrawn at a case management review hearing. That left his application outstanding. On 5 March 2009 he applied for asylum. He was interviewed a number of times and further consideration was given to his record in Rwanda. On 10 March 2011 a decision was taken that he was not entitled to refugee status, because he was excluded by the provisions of article 1F(a) of the Refugee Convention. He was granted six months leave to remain solely on the basis that, if returned to Rwanda, he would not receive a fair trial and that such return would accordingly breach his rights under article 6 of the European Convention on Human Rights.

3. During the course of that leave he applied for further leave under article 8. That application was refused on 20 March 2014. It is the appeal against that decision which is now pending before us. 17 January 2014 was the tenth anniversary of the claimant's first arrival in the United Kingdom, and the claimant's response to a s 120 Notice was that he is entitled to leave to remain under paragraph 276B of the Statement of Changes in Immigration Rules, HC 395 (as amended), on the ground of ten years' residence.

4. Article 1F(a) of the Refugee Convention provides that:

> "The provisions of this convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to a provision in respect of such crimes; …".

5. The decision of 10 March 2011 refusing him asylum was motivated by a conclusion that his acts and omissions during the period of the Rwandan genocide gave serious reasons for considering that he was guilty of the crime of genocide. The decision refusing him further leave was based on the same evidence, this time evaluated under paragraph S-LTR.1.6 of Appendix FM to the Immigration Rules. As we have said, by the time of that decision and the appeal against it, he further claimed entitlement on the basis of long residence. It is convenient to set out the relevant provisions together:

> "Requirements for indefinite leave to remain on the ground of long residence in the United Kingdom

276B. The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:

(i) (a) [sic] he has had at least 10 years continuous lawful residence in the United Kingdom.

(ii) having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his:

(a) age; and
(b) strength of connections in the United Kingdom; and
(c) personal history, including character, conduct, associations and employment record; and
(d) domestic circumstances; and
(e) compassionate circumstances; and
(f) any representations received on the person's behalf; and

(iii) the applicant does not fall for refusal under the general grounds for refusal.

(iv) the applicant has demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, in accordance with Appendix KoLL.

(v) the applicant must not be in the UK in breach of immigration laws except that any period of overstaying for a period of 28 days or less will be disregarded, as will any period of overstaying between periods of entry clearance, leave to enter or leave to remain of up to 28 days and any period of overstaying pending the determination of an application made within that 28 day period."

6. Section S-LTR of Appendix FM reads, so far as relevant, as follows:

"S-LTR.1.1. The applicant will be refused limited leave to remain on grounds of suitability if any of paragraphs S-LTR.1.2. to 1.7. apply.

…

S-LTR.1.6. The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK."

7. The claimant does not fall within any of the general grounds for refusal to which reference is made in paragraph 276B(iii). In considering the claimant's application under article 8 outside the rules, the Secretary of State expressly took into account the provisions of paragraph S-LTR.1.6; and it appears to us as it appeared to the First-tier Tribunal that those provisions are the same as those which might serve to exclude the claimant from consideration under paragraph 276B(ii)(c). By the time the matter came before the First-tier Tribunal, the claimant accepted that he did not qualify for asylum or humanitarian protection. That Tribunal therefore immediately proceeded to consider whether he could satisfy the requirements of paragraph 276B(ii) and (iii) and paragraph S-LTR.1.6. Its determination is directed to that issue. Although the principal submissions before it were in relation to the claimant's conduct in Rwanda during and immediately after the genocide, the Tribunal's conclusion was that it was content for the purposes of determining the appeal before it to take the respondent's case at its highest, that is to say assuming the allegations of the respondent to be

factually correct. That assumption is made at paragraph 5 of its determination. At paragraph 9 the First-tier Tribunal indicates that it is therefore determining the appeal before it on the basis that article 1F(a) of the Refugee Convention applies to the claimant. The latter conclusion is of itself sufficient to exclude the claimant from asylum and humanitarian protection. The former conclusion goes rather further, because it accepts not merely that there are serious grounds for considering that the claimant to be guilty of genocide but that the assertions made on behalf of the Secretary of State, which go well beyond what would be necessary to establish serious grounds, are factually accurate. We shall call this "the starting assumption".

8. The First-tier Tribunal went on to note that whereas in terms of the Refugee Convention article 1F is absolute, the provisions in the Immigration Rules require an applicant's history to be considered as a whole:

> "What the appellant has done since 1994 is relevant and carries weight. It is not necessarily the case that somebody involved in a crime against humanity in 1994 is an undesirable immigrant in 2015".

9. The Tribunal then proceeded to consider those factors and concluded that:

> "There are no reasons why it would be undesirable for the appellant to be given indefinite leave to remain on the grounds of long residence",

and that paragraph S-LTR.1.6 does not apply to him either.

10. Although the First-tier Tribunal did not specifically refer to it, there is a problem in relation to the claimant's claim to be entitled to leave to remain under paragraph 276B. That problem is that, as indicated in the chronology we set out, he had no leave to remain between 1 October and 3 November 2006: on the latter date his out-of-time application of 4 October was granted. That is a period of over 28 days, which does not fall for condonation under paragraph 276B(v). There is, however, a published policy allowing short gaps in lawful residence "through making previous applications out-of-time by no more than 28 calendar days" to be condoned when a person meets all the other requirements for lawful residence. Despite the First-tier Tribunal's conclusions on paragraph 276B(ii), therefore, that was not sufficient to determine the appeal substantively in the claimant's favour. The conclusion reached by the Tribunal was that the Secretary of State's decision was not in accordance with the law, because she should have considered the exercise of her discretion outside of the rules but in line with paragraph 276B to condone the short period of presence without leave and grant indefinite leave to remain on the ground that the claimant met all the other requirements of paragraph 276B.

11. Permission was granted by Upper Tribunal Judge Martin on the ground that it was arguable that the First-tier Tribunal might have erred in concluding that the claimant's exclusion from the Refugee Convention was not determinative of the issue raised by paragraph 276B(ii) of the Immigration Rules. That was a response to wide-ranging grounds of appeal, asserting amongst other things that compliance with that

sub-paragraph was a matter for the discretion of the Secretary of State; that the Tribunal had failed to give reasons for differing from the Secretary of State's view that the claimant's presence in the United Kingdom was undesirable; that the Tribunal had acted unfairly in considering the issues under paragraph 276B(ii) and Appendix FM and that the Tribunal had failed to appreciate that the Secretary of State had considered the claimant's presence undesirable for a considerable period of time. Mr Wilding perhaps alluded to those grounds, on which permission was not specifically granted, in opening his submissions to us by asserting that the First-tier Tribunal "had got it all wrong" in their assessment of the public interest. We are, however, entirely satisfied that the First-tier Tribunal did focus on the correct question. The appeal before the Tribunal was not about the refusal of the refugee status, which was not by then contested. The appeal was essentially about whether the claimant's character, conduct or associations rendered him unsuitable or ineligible for further leave. We agree also that those tests involve a consideration that goes beyond looking at the past. Other provisions of the immigration rules deal with the case where a person has been convicted of offences, and in some cases provide that such conviction is of itself sufficient to require a person's exclusion or prevent his entry. This, however, is not a case that falls under one of those provisions.

12. We also reject Mr Wilding's submission that the Tribunal had failed to take into account the Secretary of State's case. Although the decision letter sets out the facts in great detail, it is clear at paragraphs 7 and 39 to 42 that the decisions in relation to leave are based on the claimant's exclusion from the Refugee Convention rather than on any additional factors. At paragraph 7, not surprisingly, the claimant's exclusion from the Refugee Convention leads to the conclusion that he is not entitled to status as a refugee. Paragraphs 39-42 are as follows:

> "39. It is considered that your previous conduct in Rwanda leading to your exclusion from the Refugee Convention makes it undesirable to allow you to remain in the UK. Your application to be granted limited leave to remain in the UK on Article 8 grounds is refused under paragraph S-LTR.
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> 40. I have also considered whether your application raises or contains any exceptional circumstances which, consistent with the right to respect for family life and private life contained in Article 8 of the ECHR, might warrant consideration by the Secretary of State of a grant of leave to enter/remain in the United Kingdom. Your circumstances have been assessed but you have not raised any factors that would be considered as exceptional that warrant a grant of leave in the United Kingdom.
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> 41. As already indicated above you have been excluded from the protection of the Refugee Convention under Article 1Fa. In order to protect the wider public interest, it is vital for the UK to maintain effective immigration control, more so in respect of individuals who have committee acts deemed as being undesirable. In pursuit of that aim and having weighed up your interests, it is believed that any interference with your family and/or private life would be legitimate, necessary and proportionate and in accordance with law. It is not accepted that Article 8 would be breached by your removal from the United Kingdom.

42. Therefore you do not qualify for Discretionary Leave."

13. Although paragraph 39 refers to "your previous conduct" there is no assessment of it other than its result in terms of the Refugee Convention. Indeed, as both paragraph 41 of the letter and Judge Martin's grant of leave indicate, and as Mr Wilding's submissions underlined, the real question is whether it can ever be right to say that a person who is excluded from the Refugee Convention by article 1F(a) can obtain a grant of leave to remain in the United Kingdom. The First-tier Tribunal tested the proposition to its utmost by the starting assumption that the claimant was not merely properly excluded, but had indeed committed the acts alleged. Against that background it considered his character, conduct and associations as a whole.

14. The Tribunal noted that the claimant himself had, in the years immediately following the genocide, returned to Rwanda in order to help with reconciliation, had resigned his See in the hope that that would assist further, had taken part in memorial events and had issued a statement acknowledging his failings and apologising. Despite the starting assumption, he had not at any time been regarded by the Rwandan government as a perpetrator of genocide, had never been indicted, did not appear on any of the lists of those wanted for genocide and was indeed looked upon by the Rwandan government as one of its leading expatriate citizens. He has had a number of important international posts, and whilst he has been in the United Kingdom has attended, by invitation, significant diplomatic events including official meetings with the president of Rwanda. All these events have taken place against a background of disclosure of, and concern about, the claimant's activities during the period of genocide. Given the level at which the claimant's status and position has been recognised, it seems to us that it was amply open to the First-tier Tribunal to conclude as they did that, despite his history, he was at the present time not a person whose character, conduct and associations make it undesirable to grant him indefinite leave. That was a question that had to be assessed in the light of all the facts and it appears to us that the First-tier Tribunal did assess it in the light of all the facts.

15. We reject the submission that the wording of paragraph 276B(ii) imports a discretion. The wording is not that of discretion: it is that of assessment. The question before the First-tier Tribunal was (or at one stage was thought to be) whether the claimant met the requirements of paragraph 276B. In order to determine that question (which had not previously been considered by the Secretary of State) the Tribunal had to make its own assessment. It committed no error of law in doing so.

16. We appreciate that the result was not a foregone conclusion. A different Tribunal might have reached a different result. We should say in addition that we do not endorse the concept of "redemption" which the First-tier Tribunal introduced into its discussion. Its doing so did not, however, import any error: its findings of fact and assessment in relation to the claimant's history as a whole were amply sufficient to support the conclusion that it reached. The fact (if it be a fact) that a different

Tribunal might have reached a different conclusion is not of itself sufficient to establish error.

17. Our final point is to note that the Tribunal did not allow the appeal outright: the position is that, following the decision of this Tribunal endorsing that of the First-tier Tribunal in relation to paragraph 276B(ii), it is for the Secretary of State to consider whether to apply the policy of condoning the short period without leave in 2006. We very much doubt whether it would be right to allow considerations of conduct to enter into that consideration, because the decision that the other requirements of paragraph 276B are met has now been made judicially.

18. For the foregoing reasons the Secretary of State's appeal is dismissed.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 29 March 2016