Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/17317/2008

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 23 February 2012	**On 16 March 2012**

Before

UPPER TRIBUNAL WARR
UPPER TRIBUNAL JUDGE PERKINS

Between

SANI ADIL ALI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Draycott, Counsel, instructed by Paragon Law
For the Respondent: Ms A Holmes, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This case has an unfortunate history. The appellant was born on 7 October 1983 and so is now 28 years old. He appeals a decision of the respondent on 14 June 2008 to make him the subject of a deportation order under Section 5(1) of the Immigration Act. His appeal was dismissed by a division of the Asylum and Immigration Tribunal (Senior Immigration Judge Gleeson with Mr M L James, non-legal member) in a determination promulgated on 9 July 2009. The appeal against this decision came before us on 12 November 2009. Regrettably, promulgation was delayed and, in what proved to be a misguided attempt to save time and ensure that the determination was finally promulgated correctly, the Tribunal attempted to hold a further hearing lest there had been any relevant change of circumstance since the case came before us. Sadly, although attempts were made to list the case on earlier occasions, it did not come back before us until 23 February 2012. We do not think it helpful to analyse here in great detail

why the appeal took so long to come back to the list. Suffice it to say that lessons have been learned.

2. It is, however, very important to emphasise that progress was made at the hearing on 12 November 2009. The appellant has been in the United Kingdom since 12 October 2003 and was recognised as a refugee on 17 February 2005. He is a citizen of Sudan. Before us, on 12 November 2009, Ms R Ashraf, who then represented the respondent, accepted that the appeal had to be allowed on human rights grounds. There had been no material change in the circumstances that had led to his being recognised as a refugee and the appellant could not be returned to Sudan even if by reason of his misbehaviour he was deprived of the protection of the Refugee Convention. It would be contrary to his rights under Article 3 of the European Convention on Human Rights to remove him and for that reason the appeal had to be allowed.

3. We note that the appellant was found to be from the Zaghawa tribe and there is now clear country guidance in **AA (Non-Arab Darfuris – relocation) Sudan CG [2009] UKAIT 00056** stating unequivocally that "all non-Arab Darfuris are at risk of persecution in Darfur and cannot reasonably be expected to relocate elsewhere in Sudan". Ms Ashraf's concession was no doubt considered and well informed because it is wholly in accordance with the later decision in **AA**.

4. We announced at that hearing that we would allow the appeal on Article 3 grounds and the unintended discourtesy in the delay in promulgating the final determination is to some extent mitigated by the fact that both parties knew that we were going to allow the appeal.

5. The first Tribunal had originally promulgated a decision allowing the appeal on human rights grounds with reference to Article 3 but then issued a correction under the slip rule saying unequivocally that the appeal was dismissed on human rights grounds.

6. One of the reasons given for ordering reconsideration was that the clear amendment of the determination to show that the appeal was dismissed on human rights grounds did not fit in well with the substance of the determination.

7. Mr Draycott had prepared very extensive amended grounds in support of the application for review or reconsideration and these served as his skeleton argument. There he contended that the decision to dismiss the appeal on human rights grounds could not be reconciled with the established findings about the appellant's history in Sudan and the existing country guidance. We agree with the thrust of these points and, as indicated above, we allow the appeal on human rights grounds.

8. Nevertheless, as the appellant made clear on the earlier occasion, he wished to challenge the decision to make him the subject of a deportation order. He said he could not be deported because he was a refugee and the contentious point in this appeal is whether the appellant has lost his entitlement to international protection as a refugee by reason of his criminal behaviour. It is the respondent's case that the appellant has lost protection because his conduct has brought him within the scope of Article 33(2) of the Refugee Convention.

9. We set out below the terms of Article 33(2) of the 1951 Convention Relating to the Status of Refugees. It says:

> "The benefit of the present provision [permitting expulsion] 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 judgment of a particularly serious crime, constitutes a danger to the community of that country."

10. This phrase is closely echoed in Article 14(4) of Council Directive 2004/83/EC which provides:

> "Member States may revoke, end or refuse to renew the status granted to a refugee by a governmental, administrative, judicial or quasi-judicial body, when:
>
> (a) [irrelevant]
>
> (b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State."

11. The appellant maintained that he had not been convicted of a "particularly serious crime" but even if he had he was not a "danger to the community" of the United Kingdom. The Tribunal, the appellant said, should not have concluded otherwise. It was the respondent's case that the appellant had committed a "particularly serious crime" and did constitute a "danger to the community" and that the Tribunal had been entitled to so find but if, contrary to the contention of the respondent, the Tribunal had not reached a lawful conclusion, then the same decision should have been reached on the evidence before it.

12. As far as we are aware the key phrases "particularly serious crime" and "danger to the community" are not the subject of statutory or other binding definition. However, although not defined, by reason of section 72 of the Nationality, Immigration and Asylum Act 2002, a person is presumed to have been convicted by a final judgement of a particularly serious crime and to be a danger to the community of the United Kingdom if he is convicted in the United Kingdom of an offence and sentenced to a period of imprisonment of at least two years. Plainly this presumption applies in this case. However in **IH (S72: "particularly serious crime") Eritrea [2009] UKAIT 00012** the Tribunal concluded that, in order to ensure that the Nationality, Immigration and Asylum Act 2002 was consistent with Article 21.2 of the EU Qualification Directive (Council Directive 2004/83/EC) the presumptions in Section 72 must be read as being rebuttable. Although it still remains on the respondent to prove that the appellant is outside the protection of the Convention or Qualification Directive the appellant bears an evidential burden of proving that his conduct does not exclude him. In other words, he must raise the issue and give some credible evidence to support it before it has to be considered.

13. We wish to emphasis that we are considering here if the appellant's conduct comes within the meaning of words used in a very particular sense in a Directive of the European Parliament. Whether or not the appellant's behaviour is described properly as a "particularly serious crime" within the meaning of the Directive, it is plain that the appellant has been convicted of a truly appalling crime because, on 26 October 2005 at the Crown Court sitting at Sheffield, H.H.

Judge Murphy QC sentenced the appellant to three years imprisonment for his part in the rape of a 12 year old girl.

14. The learned sentencing judge drew a sharp distinction between this appellant's criminal activities and that of his co-accused. Indeed, in the case of the co-accused the sentencing judge said "These were particularly serious offences". Mr Draycott was thus able to argue that the sentencing judge did not regard this appellant's conduct as "particularly serious". As a matter of linguistic construction the argument is appealing but we are not persuaded that Judge Murphy had Article 33(2) in his mind and so it does not follow that he was making the distinction relied upon by Mr Draycott.

15. The mitigating points noted for this appellant were his guilty plea, so that he was not party to making his victim relive her experiences in court under public scrutiny and legal challenge, and the fact that he had not taken part in any coercion. The victim had had a very troubled life and had been corrupted by others before her dealings with the appellant. Nevertheless, Judge Murphy said:

> "I regard each of you as a potential danger to young girls and so each of you will be banned for the rest of your life from ever taking up a job which involves working with children under 16. Also because of the offences of which you have been convicted -- or in your case, Ali, pleaded guilty to -- and in the light of the sentences that I am bound to pass on you, you will each be subject to the requirements to comply with the Sex Offenders Register for the rest of your lives or as long as you live in this country."

16. We understand the requirement to sign the Sex Offenders' Register to be a statutory obligation that follows when a sentence exceeds a certain length and does not indicate any act of discretion or additional disapproval on the part of the trial judge. We do not find that it adds to the statutory presumption that this appellant has committed a serious crime and is a danger. The view that the appellant is a "potential danger to young girls" is a considered view and is something that we have to consider expressly.

17. Mr Draycott relied particularly on the decisions in **Betkhoshabeh v Minister for Immigration and Multicultural Affairs [1998]** and **Minister for Immigration and Multicultural Affairs v Betkhoshabeh [1999] FCA 980 (20 July 1999)**. We do not think it necessary to consider these cases in great detail because we do not find the principle advanced by Mr Draycott to be controversial. There are very few crimes that are always "particularly serious" within the meaning of the Directive. Possible exceptions are crimes against humanity but not the kind of offence alleged here. Although the name of the offence is a pointer to its severity each case must be looked at on its own facts before deciding if the appellant did commit a "particularly serious crime".

18. Mr Draycott showed us extracts from "Archbold: Criminal Pleading, Evidence and Practice" showing that that the normal starting point for determining the sentence for an offence of rape of child was ten years imprisonment. This, of course, was the sentence imposed on the appellant's co-accused. Even allowing for the usual one third reduction for remorse shown by a guilty plea, the trial judge regarded this appellant's criminality as deserving less than half the punishment imposed on his co-accused. We regard the sentence of three years'

imprisonment as surprisingly light for raping a minor. However, there are remedies which can be used by the Attorney General if the sentencing judge is unduly lenient. We are confident that we would have been told if there had been any successful attempt to challenge the sentence. If we may respectfully say so, sentencing people for offences of this kind is within the common experience of judges in the Crown Court. They can be expected to do it responsibly and in accordance with established guidelines. We proceed on the basis that the appellant's sentence was just punishment for his crime. It is plain that this appellant's conduct was found by the appropriate Tribunal to be not as bad as that of his co-accused.

19. Mr Draycott's first substantial challenge to the determination was that the Tribunal had not shown that it was prepared to entertain the possibility that a conviction for rape of a child was not a "particularly serious crime" within the specialised and particular meaning of that phrase in the relevant instruments. He said that the Tribunal had not anywhere acknowledged the jurisprudence pointing out that no offences or few offences are "particularly serious" per se. Not without some hesitation we find we agree with Mr Draycott on this point. The determination does read as though it were assumed that the appellant had committed a "particularly serious crime". It was said that Mr Draycott had conceded before the Tribunal that rape was defined in a statutory incident as a "serious offence" but we can find no express consideration of the factors that elevate this offence from being a serious offence to being a particularly serious offence. We think the Tribunal erred by not dealing with this point expressly.

20. However, we say immediately that although we find the reasoning insufficient and so set aside the finding of the Tribunal that the appellant committed a particularly serious crime, we have no hesitation at all in concluding ourselves that this appellant did commit a particularly serious crime. Ms Holmes made a particularly effective submission on this point. She said that the appellant had been unfairly advantaged by the company that he kept. Although there is a clear distinction to be made between his criminality and that of his co-accused, there is no escaping the fact that this appellant took advantage of a vulnerable and damaged child in a particularly reprehensible way.

21. As indicated above, we do not find that the sentencing judge decided that this appellant has not committed a "particularly serious crime" within the meaning of the phrase in the Directive before he began explaining the sentence of the co-accused with the words "these were particularly serious offences". Much as we recognise that the considerations necessary for the just sentencing of criminal behaviour is within the ordinary experience of the Crown Court, we find that considering the operation of Council Directive of 29 April 2004 (2004/8s/EC) (Refugee Status) is not within the ordinary experience of the Crown Court and, in the absence of anything in the sentencing remarks to suggest that the judge had in mind the terms of the Directive we do not accept that the judge intended to distinguish the offender in the way suggested by Mr Draycott.

22. In an area that appears to be free of any kind of objective definition, even though we remind ourselves that the most serious sounding offences are not always anywhere near as grave as they sound, we are persuaded that this appellant's

criminal behaviour should be described properly as "particularly serious" such as to exclude him from international protection and we so find.

23. However, that is not the end of the matter. Before the appellant is excluded from protection, he must also be shown to be a "danger to the community". It is the appellant's case that he has rebutted the presumption that he is a danger to the community by reason of his attitude to his offence as shown by his response to courses and programmes whilst in custody.

24. It is here that we respectfully find the Tribunal's decision particularly hard to follow. The Tribunal looked at the evidence about the appellant's attitude towards his offences and treatment in prison and participation in various programmes scrupulously. The picture emerges of a young man who did all that was required of him. He faced up to his responsibilities and indicated an intention to behave himself in the future. It does not concern us unduly that Probation Officers found the appellant presented some risk to young people. In our experience it would be unusual for a Probation Officer to say that a convicted defendant presented no risk of re-offending whatever that offence might be. We accept that a person with a proclivity for raping children would be likely to be a danger to the community. We do not see how such a finding can be made against a person with one relevant conviction who has taken advantage of guidance intended to prevent re-offending.

25. We accept that the appellant committed the offence when heavily under the influence of alcohol. The Tribunal noted at paragraph 34 that the Offender Assessment completed on 14 September 2007 showed the appellant not to have problems with alcohol. He was willing to take part in programmes that were suitable for him to address his offending. At paragraph 34 the Tribunal said:

> "The risk of reconviction was now considered to have reduced while the appellant was on licence from 43 out of a possible 168 to just 9."

26. We do not see how it can be deduced properly from this evidence that the appellant presents a danger to the community. Rather the evidence points to someone who having had his first experience of custody has faced up to his responsibilities and taken advantage of the opportunities presented by society to help him live industriously and decently. We cannot see how the Tribunal concluded rationally that the theoretical possibility of the appellant committing offences against children or at all can, in his case, be elevated to the point that be becomes a danger to the community.

27. We remind ourselves that the sentencing judge prohibited this appellant from ever working with children because he is a potential danger to young girls. The key word is "potential". The judge made an order because of extreme caution on is part. We can only find that the appellant is not entitled to be a refugee if we conclude that he is a danger. We find this must mean more than finding that he might offend again and, on the evidence before us, we find it unlikely that he will offend again.

28. We do note that on 21 October 2010 directions were sent out inviting the parties to serve further material. We think the respondent in this case is probably in a better position than anyone else in the United Kingdom other than the appellant

to know if he has in fact got into further trouble and no evidence to this effect was produced.

29. We think that it requires considerable justification to take away a person's status as a refugee. It is trite law that a state cannot deport its own citizens and it should not be surprising that a state cannot lightly take away its protection from a person who has shown that he is entitled to the protection of that state when he cannot obtain protection in his own country. He does not put himself outside the scope of the Directive just because he commits a criminal offence, even a serious criminal offence. To lose protection he must be shown to have committed a "particularly serious offence" (which this appellant has) *and* to be a danger to the community. The fact that the appellant might be more likely than the average person to commit offences against children, and therefore not quite a safe as the average man, does not, of itself, make him a danger to the community. The evidence suggests that this appellant is unlikely to repeat the behaviour that led to his imprisonment. He is not a danger to the community and the Tribunal should not have found otherwise.

30. It follows that in all the circumstances we allow this appeal on asylum as well as human rights grounds.

Decision

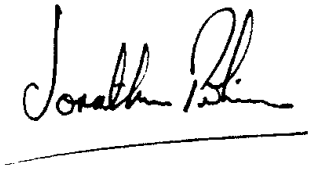
The original tribunal erred in law.

We set aside the decision of the first Tribunal.

We find that the appellant is still entitled to the protection or the Refugee Convention and the Qualification Directive. In any event removing him would be contrary to the United Kingdom's obligations under the European Convention on Human Rights.

We allow his appeal.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 1 March 2012