Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01016/2012

THE IMMIGRATION ACTS

Heard at : Victoria Law Courts	**Decision & Directions sent**
On : 6th June 2013	11th June 2013
Heard at : Manchester Crown Court	**Determination promulgated**
On : 19th August 2013	**On : 29 August 2013**

Before

Upper Tribunal Judge McKee

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

K. H. L.
(anonymity direction continued)

Respondent

Representation:

For the Appellant: Mr Neville Smart and Mr Darren Regan, Senior Presenting Officers
For the Respondent: Ms Satbachan Kaur Bahia and Mr Shiva Misra of Crown Solicitors

DETERMINATION

This determination falls into two parts. The first hearing, in June 2013, dealt with the 'error of law' challenge to the First-tier determination, but also set out much of the background to the case. The resulting 'Decision & Directions' is reproduced here in

full. The second hearing, in August 2013, was for the purpose of re-making the decision on the appeal, and forms the second part of this determination.

DECISION & DIRECTIONS

1. The respondent, Mr L (whom I shall call 'the claimant'), is now 25 years old, and has been in the United Kingdom since January 2005, when he claimed asylum. The basis of the claim was that Mr L, a member of the disadvantaged minority Jarer folk, had been brought up in Bossasso, the principal town of Puntland, by his aunt, who had now gone to Ethiopia after providing for his passage to the United Kingdom. He would now have nothing to go back to in Puntland, where he had experienced one (or perhaps two) incidents of discriminatory ill-treatment at the hands of Darod clansmen. By the end of May 2005 Mr L's claim had been rejected, his appeal had been dismissed by the AIT, and he had become 'appeal rights exhausted'. At this point, the 'immigration decision' to remove Mr L as an illegal entrant could have been enforced. It was not, but because he was no longer entitled to NASS support, Mr L was told to quit the accommodation which had been provided for him in Manchester. He took to sleeping rough, and felt so upset about the way he had been treated that he bought petrol and a toy gun, and tried to burn down the premises of the company which had provided the accommodation.

2. In consequence, the claimant was charged with criminal damage, making a threat to kill, possession of an imitation firearm, and arson being reckless as to whether life would be endangered. On 24th May 2006 he was sentenced to detention for public safety at a young offender institution, and it was in a psychiatric report and a pre-sentence report in connection with the trial that the claimant first brought to the attention of the authorities that he and his aunt were Christians. That assertion was made to the Home Secretary in August 2007, when Mr L was advised that he was being considered for deportation. It was not believed, and when a deportation order was finally signed on 2nd November 2012, the renewed asylum claim, based on the claimant's religion, was certified under section 72 of the Nationality, Immigration and Asylum Act 2002. When the appeal came before the First-tier Tribunal on 13th February 2013, a panel comprising Judge Forrester and Mr Bremmer agreed that the claimant had been convicted of a particularly serious crime, but did not think that he constituted a danger to the community. He was "*not likely to pose a risk of harm to others upon release.*" The certificate was accordingly not upheld.

3. Turning to the asylum claim, the panel did believe that the claimant had been brought up as a Christian in Puntland and found that, even if it were possible to effect his removal thither (which appeared extremely unlikely), "*it would be impossible for the Appellant … to hide his Christian beliefs from those with whom he would come into contact*." The panel referred to "HJ Iran v SSHD EWCA Civ 172 (*sic*)", but what they must have meant was *HJ (Iran)* [2010] UKSC 31, in which Lord Rodger explained that a person should not be expected to conceal a fundamental part of his identity in order to avoid persecution, although if he wished to be discreet about it for other reasons, such as fear of ridicule or embarrassment, that would <u>not</u> give him a 'Convention reason' for seeking refugee status. In allowing the appeal on asylum grounds, the panel relied on "*the BBC reports to which the Rev Payne [*the Anglican

chaplain at HMYOI Swinfen Hall, who gave evidence at the hearing*] alluded which indicate the increasing and malevolent presence of Al Shabaab in Puntland*."

4. Permission to appeal to the Upper Tribunal was initially refused by Judge Saffer, but was granted on renewal by Judge Craig, both sets of grounds being drafted by Richard Hopkin of the Specialist Appeals Team. When the matter came before me, I gave my preliminary view that only one of the grounds appeared to have merit, but Mr Sharp very ably explained that this was not so. I now think that only the complaint about allowing the appeal in the alternative under Articles 2 and 3 of the ECHR is unjustified. This alternative was only included on an 'even if' basis, i.e. even if the claimant was not protected from *refoulement* under the Refugee Convention, he would still be at real risk of serious harm interdicted by the European Convention. There was no need for the panel to give any further reasons, in addition to those they had given in connexion with the asylum claim.

5. In disagreeing with the Secretary of State's certificate, the panel relied on passages from the OASys Report of April 2012 showing that the claimant had made excellent progress since HHJ Thomas made very adverse sentencing remarks in 2006 and the Parole Board indicated in 2010 that the risk of harm remained "*too high either for release or for transfer to open conditions*." Mr Sharp took me through the OASys Report of April 2012 and pointed out passages where the risk of serious harm to the public was assessed as still 'high', where there was a risk of serious harm simply to 'others', and where the Supervisor's comments were that the claimant "*could be managed in the community though [he] would remain a High Risk of serious harm until he had spent some time in the community proving his ability to manage his responses to adversity under less restrictive circumstances*." There was another passage which the panel had actually cited themselves earlier in the determination :

> "The capacity for harm is identified but there appears to be less imminence. The risk of serious harm is retained at HIGH but tending towards MEDIUM, in that more protective insights are seen as having been developed via O[ffending] B[ehaviour] engagement in prison at long last!!"

6. The more positive extracts from the OASys Report which were relied on by the panel needed to be balanced explicitly against the much more cautious tenor of the extracts highlighted by Mr Sharp. It might still have been rationally open to the panel to prefer the more optimistic prognosis in the passages quoted at paragraph 15 of the determination, but their failure to take account expressly of the warning that the risk of serious harm to others remained high renders the panel's rejection of the certificate open to the charge of legal error.

7. Whether or not the asylum claim should be certified under section 72 will be irrelevant if the claimant can actually return to Puntland without a real risk of serious harm befalling him. At paragraph 19 of the determination, the panel refer to BBC reports indicating the increasing and malevolent presence of Al Shabaab in Puntland. But having carefully gone through all the background material available to the First-tier Tribunal, I can see no evidence of this at all. There are plenty of reports of Al Shabaab killing Christians in the parts of Somalia which they used to, or still do, control, such as Mogadishu, Gedo and Bakool, but none at all in Puntland. Miss Bahia submits that, having been driven from their previous strongholds, Al Shabaab

may be infiltrating into Puntland. But without any evidence, that is pure speculation. The only example I could find of a Christian being harmed in Puntland comes in Virginia Luling's expert report, where a lady in Galkayo was killed by Muslims not belonging to Al Shabaab. That isolated killing would not be enough to establish a real risk to Christians in Puntland, where their religion is officially tolerated by the authorities.

8. Mr Sharp also made the valid submission that Mr L's reticence about his Christianity while living in Bossasso need not have been through fear of persecution. He did not mention it as part of his original asylum claim, and even when he was sent to prison in 2006, he gave his religion as Moslem. The panel should have considered that, when dealing with the *HJ (Iran)* point.

9. There is another flaw in the determination at paragraph 16, where the panel say that they must uphold the decision to deport the claimant, because he meets the definition of a 'foreign criminal' at section 32 of the UK Borders Act 2007. Of course, if he requires international protection, as the panel found, then he comes within Exception 1 at section 33. Miss Bahia thinks that the practical difficulty of removing her client to Puntland should play a part in the appeal, but an appeal on asylum and Article 3 grounds must answer the hypothetical question whether the claimant would be at risk if he were returned.

10. For the above reasons, the First-tier determination must be set aside as flawed by legal error, and the decision on the appeal will be re-made by the Upper Tribunal. There has been no challenge, however, to the finding that the claimant is and always has been a Christian, so the re-making of the decision will proceed on that basis.

RE-HEARING OF APPEAL

1. The foregoing 'Decision & Directions' should be read with, and indeed forms part of, this Determination, in which the decision on the appeal is re-made by the Upper Tribunal on the basis that Mr H. L., 'the claimant', is and always has been a Christian. His hearing today was attended by the Rev. Robert Payne, who has rendered him a great deal of moral and practical support, while I was greatly assisted by the very able submissions of the two representatives, on this occasion Mr Misra and Mr Regan. Because the hearing proceeded by way of submissions only, there was no need to hear oral evidence from Mr L himself.

2. It was agreed that there were three questions to be answered today. First, was the certificate under section 72 of the 2002 Act to be upheld, so that the claimant would not be eligible for asylum? Secondly, would the claimant (even if not entitled to refugee status) be at real risk of serious harm if returned to Puntland? Thirdly, if the claimant is not at real risk on return, does he none the less have private life ties to the United Kingdom, in terms of Article 8 of the European Convention, which outweigh the public interest in deportation?

3. As regards the first question, Mr Misra argued that neither requirement for certification under section 72 has been met in the present case, i.e. the claimant has not been

"*sentenced to a period of imprisonment of at least two years*", and does not "*constitute a danger to the community of the United Kingdom*." His Honour Judge Thomas, in handing down a sentence for public protection, calculated that Mr L would have received four years on a guilty plea, but because the period had to be specified which he would serve before the Parole Board considered his position, the judge felt that he "*must*" halve the four-year sentence, thus coming to two years. From the two-year period the judge then deducted the 158 days which Mr L had spent on remand, which meant that Mr L would have to spend another one year and 207 days in custody before the Parole Board would consider his position. That period in custody, said Mr Misra, was obviously less than two years.

3. Mr Regan's rejoinder was that Judge Thomas actually specified a period of two years, from which he deducted the time already spent on remand. This was analogous to the judge passing a determinate sentence of two years, but deducting from the time to be served in custody the period which the prisoner had already spent on remand. I find that analogy persuasive. Mr Misra describes the period of one year and 207 days as the "tariff", but if that is the appropriate term, I do not think that it resolves the issue. A judge passing a life sentence will specify the tariff which the prisoner must serve before he can be considered for release, but that does not make the sentence passed anything but a life sentence. An indeterminate sentence, of course, is just that. No period of time is specified as part of the sentence.

4. In the absence of any authority to the contrary, I think one would have to fall back on the normal rules of statutory construction. The statute lays down that the asylum seeker must have been "*sentenced to a period of imprisonment of at least two years*", but Mr KHL has not been sentenced to any specific period of imprisonment at all. If there was nothing else to go on, Mr Misra would succeed on this point.

5. In any event, he also gets home on the alternative point that the claimant does not constitute a danger to the community. While Mr Regan pointed out that the OASys Report of April 2012 assesses the risk posed by the claimant as still HIGH, Mr Misra handed up the print-out of an e-mail from the claimant's Probation Officer, Liz Wastell, who explains that Mr L has only retained the designation of HIGH risk to the community because this is necessary in order to retain an Approved Premises bed-place. In reality, he poses only a MEDIUM risk of harm.

6. Of course, a medium risk, as Mr Regan emphasizes, is not a low risk. But Mr Misra points to other indications that the claimant is not a danger to the community. He has been moved to open conditions as a Category C prisoner at HMP Kirkham, and will begin Release on Temporary Licence (not 'Town Leave') from 27th October this year for 'town visits' to the hostel where he will have a bed if he is released by the Parole Board after the next review in March 2014. Then there is the updated report of 28th February 2013 from a forensic psychologist, Sarah Pancholi, who says this at 5.3 :

> "Despite the immigration case being unresolved, I would still support Mr [HL's] release into the community. Mr [HL] has matured from an adolescent into a remarkably well-balanced young man whilst in prison. The only remaining grounds for deportation, as I understand it, is if he is considered to be a danger to the public. I think that with a release plan that would enable him to engage positively with his faith group, and offer accommodation from which to springboard his community integration, there is no evidence to suggest that this would be the case. He is keen to make links, and has a

> strong relationship with his Offender Manager with whom he has engaged positively for some years."

7. These more recent developments were not before the First-tier panel when they heard the appeal, and suffice to show, I think, that Mr L no longer constitutes a danger to the community, although Dr Jonathan Hellewell, the psychiatrist whose report on the claimant was issued on 28th March 2006, had concerns "*about the possibility of further irresponsible and impulsive behaviour*." So like the First-tier panel, but in the light of evidence which was not available to them, I find that the presumption that the claimant represents a danger to the community has been rebutted.

8. I have now noticed something which was overlooked at the hearing, namely section 72(11)(b)(iii) of the 2002 Act, which specifies that "a reference to a person who is sentenced to a period of imprisonment of at least two years –

> (iii) includes a reference to a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period (provided that it may last for two years)."

9. So there is after all a statutory definition of how an indeterminate sentence can constitute a sentence of at least two years' imprisonment. I am not quite sure, however, what is meant by an indeterminate period that "may" last for two years. Perhaps it means the period specified by the judge that must elapse before the Parole Board considers the prisoner's position. In that case, there could be an indeterminate period that lasts for less than two years, which revamps the previous argument into one about whether the claimant's period in prison could be said to "last" for two years or for the "*tariff*" of one year and 207 days. But there is no need to go into this further, as the claimant no longer constitutes a danger to the public.

10. The claimant will therefore be entitled to international protection under the Refugee Convention, as well as under the European Convention, if he will be at real risk of serious harm on return to Puntland by reason of his religion. Mr Misra relies on a letter e-mailed by the Rt Rev. Dr Grant LeMarquand, Area Bishop for the Horn of Africa, on 11th June 2013. In this he asseverates that "*anyone deported to any part of Somalia who is known to be a Christian will be in danger of persecution*." That was not the experience of this claimant. As he told Clarke Matthew, the Probation Officer who compiled the Pre-Sentence Report on 28th April 2006, "*he and his aunt were subject to some discrimination being a Christian in a largely Muslim country*." The claimant must have been "known to be a Christian" in order to be discriminated against for that reason. But he suffered nothing more than discrimination, and it was not bad enough to be included in his original asylum claim, which was about discriminatory ill-treatment by the majority Darod clan against the minority Jarer.

11. Bishop LeMarquand has very little evidence to back up his bold assertion. He cites the very same incident in 2009 as appears in Virginia Luling's report, about the lady in Galkayo (he misspells it 'Galmayo') who was reported by a Christian source to have been killed by extremists for refusing to wear a veil. His only other evidence is a third-hand report. The bishop met two Somalis who told him that a friend of theirs had gone from Mogadishu to Puntland, hoping it would be safer up there, only to find that it was not, so he moved on to Somaliland. No detail whatever has been provided as to what happened to this person, and the hearsay in this instance can carry no evidential weight. Mr Regan

expresses surprise that Bishop LeMarquand has divulged even this, given that in his e-mail of 20th November 2012 he said that "*due to the nature of the persecuted church and believers that face persecution, we are not able to give you details of anyone in this area.*"

12. None of the other documents about Christians in Somalia included in the recent bundle from Crown Solicitors have anything to say about Christians in Puntland. The only other recent document adduced for today's hearing is a response by the Country of Origin Information Service to a query about Christians in Puntland. This makes it clear that Christianity is officially tolerated, although evangelisation of Muslims is strictly forbidden. There is societal discrimination based on religious affiliation, belief and practice, while non-Muslims who practise their religion openly may be harassed. None of this goes to show that Christians in Puntland are at real risk of serious ill-treatment amounting to persecution or breach of Articles 2 or 3 of the ECHR. There has been one reported incident in 2009 of a Christian lady being killed in Galkayo, but that isolated incident does not indicate a general risk. Given the absence of real risk to Christians, the *HJ (Iran)* argument in the present case simply does not get off the ground.

13. I come now to the third issue which must be resolved by the Upper Tribunal, namely whether the claimant can resist 'automatic' deportation under one of the other exceptions, namely Article 8 of the European Convention. Mr Misra emphasizes the stress and anxiety which the claimant would have suffered after arriving in a strange country at the age of 17, and then being thrown out of his accommodation and being left to fend for himself when he had lost his asylum appeal. What he did with the can of petrol was an act of desperation, a cry for help. That may be so, says Mr Regan, but what the claimant did nonetheless constitutes a very serious offence, and in that circumstance Article 8 will only rescue a man from deportation if, as Lord Justice Laws put it in *SS (Nigeria)* [2013] EWCA Civ 550, he has "*a very strong claim indeed*."

14. Mr Misra insists that his client does indeed have such a claim, having lived in this country for over eight years and having no one to go back to in Puntland. His aunt, who had gone to Ethiopia, is now dead, whereas Mr L has a network of support in the United Kingdom, not least from the Reverend Bob Payne and other Christians who have befriended him. The problem for the appellant, however, is that he has had a restricted opportunity to build up the private life ties which eight years' residence in the United Kingdom will often establish. That is because most of those eight years have been spent in prison. In truth, Mr L should have gone back to Puntland after losing his asylum appeal. He was an illegal entrant, and had no other basis for staying in the United Kingdom. He told Dr Hellewell that a man whom he met in the Piccadilly Gardens advised him that the only way to get food and shelter was to commit a crime, as these would then be provided for him in prison. These have now been provided for him for over seven years, and he has still not reached the end of his indeterminate sentence.

15. Mr Misra is no doubt right in submitting that his client is unlikely to re-offend, but on the contrary is likely – having learnt English and undertaken various courses while in prison – to integrate well into British society if he is allowed to stay here. But it is only through being in prison here that Mr L has built up any sort of private life for the purposes of Article 8. In those circumstances, I simply do not see how his right to private life can outweigh in the proportionality balance the public interest considerations which the Court of Appeal has repeatedly emphasized, culminating in *SS (Nigeria)*.

DECISION

The determination of the First-tier Tribunal having been set aside, the decision on the appeal against deportation is re-made by the Upper Tribunal.

The appeal is dismissed.

Richard McKee
Judge of the Upper Tribunal

25th August 2013