First-tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00073/2014

THE IMMIGRATION ACTS

Heard at North Shields	**Decision & Reasons Promulgated**
On 13 November 2014	**On 27 November 2014**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR GAVIN EVENS SEWEDOR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms N Wilkins, Counsel, instructed by Luqmani Thomson Solicitors
For the Respondent: Mr P Mangion, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant's appeals with permission against the determination of First-tier Tribunal Judge Cope promulgated on 8 September 2014, dismissing his appeal against the decision of the Secretary of State made on 3 December 2013 to refuse to revoke a deportation order made against him.

2. The appellant is a citizen of Sierra Leone born on 18 December 1983. He entered the United Kingdom on 16 June 1999 using a Nigerian passport to which he was not entitled and claimed asylum. That application was refused on 2 July 2001 but he was granted exceptional leave to remain until 11 July 2005.

3. On 26 April 2005 the appellant was convicted of rape of a girl under 13 contrary to Section 5 of the Sexual Offences Act 2003. He was sentenced to two years' imprisonment and required to sign the Sex Offenders Register for ten years. On 21 May 2005 he made representations in response to a notice of liability to deportation and in that claimed a fear of return to Sierra Leone.

4. On 18 September 2007 the appellant was issued with a letter pursuant to Section 72 of the Nationality, Immigration and Asylum Act 2002 inviting him to rebut the presumption that he constituted a danger to the community given that he had been sentenced to an offence for which he was sentenced to two years in prison. Further notices of liability to deportation were issued on 27 February 2009 and 24 October 2012.

5. Finally, on 5 December 2012 the respondent made a decision to make a deportation order, that decision being accompanied by a certificate produced by the Secretary of State pursuant to Section 72 of the 2002 Act stating that he is a person to whom Article 33(2) of the Refugee Convention applies.

6. The appellant did not appeal against that decision and the respondent proceeded on 4 January 2013 to sign a deportation order against him. On 28 October 2013 the Appellant's then representatives made submissions that the deportation order should be revoked. That application was refused for the reasons set out in the refusal letter dated 3 December 2013 and it is against that decision which this appeal lies.

7. While the main thrust of the appellant's case as to why the deportation order should be revoked relates to the fact that he is the father of a British citizen child, with his mother he had been in a relation, and with whom he had continuing contact, he also brought the appeal on asylum grounds claiming that his life would be at risk on return to Sierra Leone. That is clear both from the grounds of appeal and the detailed letter in support of the grounds.

8. When the matter came before Judge Cope the Appellant was not represented. He heard evidence and submissions from the Appellant and submissions from the Presenting Officer. Judge Cope found that:-

    i) the Appellant had not rebutted the statutory presumption against him that he had been convicted of a particularly serious

crime [54] and had not discharged the burden on him to rebut the statutory presumption he constituted a danger to the community [51] taking into account his offending history; and,

ii) accordingly, the appeal on asylum grounds was dismissed pursuant to Section 72(10)(b) of the 2002 Act;

iii) he was solely concerned with an appeal based on human rights grounds, that is, the right to respect for family, private life and Article 8 of the Human Convention of Human Rights [56];

iv) although he however was enjoined to take into account Section 117 of the 2002 Act as amended [101], the changes brought into the Immigration Rules by HC532, mirroring those provisions, did not apply as a decision to refuse asylum was made before the commencement date of 28 July 2014 [102];

v) the exceptions set out in Section 117C did not apply to the appellant and that the public interest requires deportation [122].

On that basis the appeal was dismissed.

9. The appellant sought leave to appeal on the grounds that:-

i) Judge Cope had failed to consider the Appellant's claim for protection pursuant to Article 3 which had to be considered whether or not the appellant had committed any crime;

ii) Judge Cope's assessment of the seriousness of the Appellant's conviction was flawed in that it failed to take into account all the circumstances of the offence including those set out in the sentencing remarks and failure to take into account his history as a child soldier and subsequent diagnosis with PTSD;

iii) Judge Cope had erred in the weight attached to the public interest in deportation, which is not immutable and had erred in his approach to Section 117 of the 2002 Act.

10. I heard submissions from both representatives. Mr Mangion accepted that the judge had erred in failing to make any assessment of the dangers that the appellant says he faces on return to Sierra Leone which may engage Article 3, even if he falls to be excluded from the Refugee Convention.

11. Ms Wilkins submitted that the judge erred in reaching the conclusion that the appellant had not rebutted the presumption arising from his conviction in that he had failed to deal with the two aspects – whether he had committed a particularly serious crime – and whether he constituted a risk to the public – as separate issues.

12. In reply, Mr Mangion submitted that the judge had given adequate reasons for upholding the certificate.

13. The grounds of appeal do not challenge in any detail the judge's decision to uphold the certificate under Section 72. Whilst they do challenge the judge's finding assessment of the seriousness of the offence, that is in terms of the Article 8 analysis and it is stated at Paragraph [15];

> "Given the nature of the appeal (deportation), the assessment of the index offence is crucial and this area is therefore material, especially because A has been unable to rebut the Section 17 presumption that he has been convicted of "particularly serious crime," and barred from fully venting his asylum claim."

14. There is no indication here that there is an attempt to challenge that certificate.

15. Further and in any event I find no merit in the submission that the judge erred in concluding that the Appellant had not rebutted the certificate. Ms Wilkins made no attempt to seek to amend the grounds of appeal to that effect. I have, nonetheless, considered her submissions on this issue.

16. As was noted in **EN (Serbia) v SSHD** [2009] EWCA Civ 630 at [40] per Stanley Burnton LJ, the expression "particularly serious crime" within Article 15 must be applied to what is a crime under the domestic law for members of state when the question of refoulement arises. He held [46] and [47]:

> 46. The Appellants submitted that Article 33(2) requires that the danger to the community must be causally connected to the particularly serious crime of which the person has been convicted. I would accept that normally the danger is demonstrated by proof of the particularly serious offence and the risk of its recurrence, or of the recurrence of a similar offence. I would also accept that the wording of Article 33(2) reflects that expectation. But it does not expressly require a causal connection, and I do not think that one is to be implied. By way of example, I do not see why a person who has been convicted of a particularly serious offence of violence and who the State can establish is a significant drug dealer should not be liable to refouled under Article 33(2). In any event, it seems to me that a disregard for the law, demonstrated by the conviction, would be sufficient to establish a causal connection between the conviction and the danger. If so, the suggested added requirement of a causal connection has little if any practical consequence.
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> 47. I would add that I have no doubt that particularly serious crimes are not restricted to offences against the person. Frauds, thefts and offences against property, for example, are capable of being particularly serious crimes, as may drug offences, particularly those involving class A drugs. In addition, matters such as frequent

repetition or a sophisticated system or the participation of a number of offenders may aggravate the seriousness of an offence.

17. I note also from paragraph 69:

> 69. I do not think that every crime that is punished with a sentence of 2 years imprisonment is particularly serious. One only has to appreciate that determinate sentences may be many times longer than 2 years for it to be obvious that a sentence of 2 years' imprisonment is not necessarily indicative of a particularly serious crime. If, therefore, section 72 requires conviction and sentence to 2 years imprisonment to result in irrebuttable presumptions that the requirement of both Article 33(2) of the Convention and of Article 14.4(b) of the Directive of conviction for such a crime have been satisfied, it is incompatible with one or both. On the other hand, if the presumptions are rebuttable, I would hold that there is no incompatibility.

18. I consider that Judge Cope was entitled to conclude that the conviction of the rape of a child under 13 was a particularly serious offence. Whilst it is said that the sentence of two years imprisonment is low, nonetheless it is a sentence of two years imprisonment. There is no evidence before me that there were any relevant sentencing guidelines in place.

19. The seriousness of the offence is compounded by the fact that as the judge found, [48] the Appellant was unable or unwilling to accept responsibility for his actions and for the serious offence which he was convicted. I consider also that the judge was entitled to take this into account as showing that the Appellant constitutes a danger to the community of the United Kingdom.

20. Whilst, as Ms Wilkins submitted, the further offences that the Appellant has committed in the succeeding years are not of sexual offences, they are nonetheless offences one of which resulted in a term of imprisonment. Bearing in mind the comments of Stanley Burnton LJ set out above, it is simply unarguable that the judge erred in his conclusion that the presumption that the Appellant presents a danger to the community had been made out.

21. I am satisfied that the judge erred in failing to consider the asylum claim and on that basis alone his decision did involve the making of an error of law. As no relevant findings were made this was clearly capable of affecting the outcome.

22. Further, it is unclear whether any findings regarding the situation that the Appellant faces on return to Sierra Leone were found and these, whilst not determinative of any findings pursuant to Article 8, were matters that would need to be taken into consideration for a proper lawful consideration of those issues. In addition, given the decision of the Court of Appeal in **YM (Uganda) v SSHD** [2014] EWCA Civ 1292 which was not before Judge Cope, it is clear that the

new provisions of the Immigration Rules in effect from 28 July 2014 should have been applied to this case.

23. Accordingly, for the reasons set out above I am satisfied that the decision of Judge Cope did involve the making of an error of law and it is set aside. I am satisfied that given the absence of any relevant findings pursuant to action to Article 3 and circumstances which the Appellant will find himself on return to Sierra Leone that it will be necessary for a substantial judicial fact finding exercise to be undertaken. It would in my view be artificial to preserve the findings in respect of Article 8 given that in particular the observations made in **YM (Uganda)**. For that reason, I remit the matter to the First-tier. I make it clear that none of the findings of fact are preserved save for the finding that the Appellant has not rebutted the presumptions that he has been convicted of a particularly serious crime and constitutes a danger to the community.

Summary of Conclusion

1. The determination of First-tier Tribunal Judge Cope did involve the making of an error of law and I set it aside.

2. I remit the appeal to the First-tier Tribunal for a fresh findings of fact on all issues save for the finding that the Section 72 certificate has been upheld.

Signed Date: 26 November 2014

Upper Tribunal Judge Rintoul