Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02562/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 September 2014	**On 28 November 2014**

Before

UPPER TRIBUNAL JUDGE PERKINS
UPPER TRIBUNAL JUDGE C LANE

Between

R- Z-
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms J Kelly, Counsel instructed by Lawrence Lupin Solicitors
For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 we make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. Breach of this order can be punished as a contempt of court. Mindful of the legitimate public interest in deportation cases we have hesitated before making this order but claims for international protection are usually best kept private if for no other reason than eliminating the irony of a person becoming a refugee solely by reason of his case attracting publicity.

2. The appellant is a citizen of Côte d'Ivoire who was born on 1987 and so is now 27 years old. He appealed a decision of the respondent on 25 November 2013 that section 32(5) of the UK Borders Act 2007 applies to his circumstances. He claimed that he should not be subject to automatic deportation. He said that he is a refugee or otherwise entitled to international protection and that removing him would breach the United Kingdom's obligations under the European Convention on Human Rights, particularly with regard to Article 8.

3. His appeal was dismissed on all grounds by the First-tier Tribunal in a determination promulgated on 4 June 2014. The judge giving permission to appeal expressly refused permission to appeal the decision to dismiss the appeal with reference to Article 8 of the European Convention on Human Rights but found it arguable that the First-tier Tribunal had given insufficient reasons for rejecting the evidence of Professor Aguilar who said that the appellant still needed international protection. Permission to appeal was also given because it was arguable that the Tribunal was wrong in concluding that the appellant was excluded from the protection of the Refugee Convention by reason of section 72 of the Nationality, Immigration and Asylum Act 2002. It was his case that his circumstances did not come within the terms of the section.

4. The papers show that the appellant entered the United Kingdom on 30 March 2001 with permission with a view to settlement. He was then almost 14 years old.

5. The appellant has frequently behaved badly. Between May 2004 and June 2006 he was convicted on five occasions for offences including the possession of prescribed drugs and robbery. His sentences included 90 days' detention at a young offenders institute in October 2005 and twelve months' detention at a young offenders institute in December 2005 for robbery. In 2007 he was cautioned for beating his former partner.

6. On 8 August 2008 at the Crown Court sitting at Sheffield he was sentenced to a total of four and a half years imprisonment. He was sentenced to two concurrent terms of two years for possessing class A controlled drugs with intent to supply and to consecutive terms of two and a half years for similar offences. He was also sentenced to concurrent terms for possessing cannabis and possessing a lock knife.

7. In November 2008 he was notified of his alleged liability to automatic deportation and a deportation order was served in July 2009. He made a belated attempt to appeal that decision and then applied, unsuccessfully, for it to be revoked. He appealed the refusal to revoke. The appeal was heard on 10 February 2012 and allowed with reference to Article 3 of the European Convention on Human Rights. The tribunal was satisfied that there was a real risk of the appellant being ill-treated because he is a member of the Bété tribe. He was found not to be entitled to asylum because of the provisions of section 72 of the Nationality, Immigration and Asylum Act 2002.

8. For convenience I describe the First-tier Tribunal that decided the appeal in 2012 as the "first tribunal" and its determination allowing the appeal after the hearing in February as the "first determination".

9. The appellant continued to misbehave. He was involved in further drugs offences. On 19 September 2012 he was convicted with five others at the Crown Court sitting at Woolwich on four counts of supplying class A drugs. He was sentenced on 19 February 2013 to a total of twenty months' imprisonment. It was that sentence of imprisonment which prompted his being served with a notice of liability to deportation to which he responded with a claim for asylum. It was the Secretary of State's position that the appellant *had* to be made the subject of a deportation order by reason of his being sentenced to more than twelve months' imprisonment unless one of the exceptions under section 33 of the UK Borders Act 2007 applied which, in her view, they did not.

10. The Secretary of State did not accept that the appellant was a refugee for two reasons. Firstly she did not accept that the appellant needed protection. Although it had been established that there was a time when members of the Bété tribe, or some of them, would be at risk in the event of their return to Côte d'Ivoire it was the Secretary of State's contention that those days were over and the appellant could now return safely to the country of which he is a national.

11. It was the Secretary of State's further contention that if she was wrong about the appellant not needing protection he was not entitled to refugee status and was not entitled to humanitarian protection by reason of his bad behaviour.

12. His appeal was dismissed by the First-tier Tribunal in a determination promulgated on 4 June 2014. We describe that as the "second determination" and the division of the tribunal that decided is at the "second tribunal". It is the appeal against the second determination that is before us.

13. The second tribunal did not accept that the appellant would be at risk in the event of his return.

14. It began, appropriately, by considering the findings of the first tribunal. The first tribunal had discounted the contention that the appellant would be suspected of witchcraft and the second tribunal found no reason to go behind that decision. The first tribunal was satisfied that the appellant was at risk because of his Bété ethnicity. That view was supported by expert evidence but the second tribunal found that country conditions had changed since February 2012. The second tribunal noted that following President Gbagbo's attempts to remain in power after he lost the presidential elections 2010 violence was targeted against people of Bété ethnicity because they were assumed to be supporters of the former president.

15. The first tribunal had an expert from Professor Mario I Aguilar dated 25 January 2012. It was his view then that the appellant was at risk. Apart from his ethnicity the appellant would attract additional suspicion by reason of his coming from abroad.

16. In his supplementary report of 21 May 2014 Professor Aguilar said that it remained his view that the appellant was as at risk.

17. The second tribunal did not agree. It looked at the Human Rights Watch Report of January 2014 showing how in 2013 progress was made and security force abuses decreased from the previous year. Although there were still numerous human rights violations the peace process was ongoing. The country's security situation had improved although land conflicts simmered in the Western part of the country. Disarmament proceeded slowly and land rights were still violated.

18. The Amnesty International Report of 20 May 2013 confirmed that ethnic Bétés and Guérés were assumed to be supporters of the former president and were targeted as a consequence. However, most attacks were in the West of the country where Dozos were reported to be preventing internally displaced people from accessing their land or were imposing arbitrary payments.

19. The second tribunal was not satisfied that the appellant would be at risk just by reason of his being Bété. He would not be involved in land disputes because he had no land.

20. The second tribunal explained that it did not accept that the appellant had lost contact with his family in Côte d'Ivoire. Certainly in 2012 the appellant's father (who lives in the United Kingdom) made a statement saying that he had contact with his brother, the appellant's uncle, in Côte d'Ivoire. In the absence of any persuasive explanation to support a contrary conclusion the second tribunal did not accept that the appellant had lost the means to contact his uncle in 2014.

21. The second tribunal found that the appellant could reasonably be expected to be reunited with his aunt although the Tribunal did accept that he had lost contact because of failure in telephone communications. The Tribunal did not accept the appellant risked being trafficked or facing forced conscription because he had relatives in Côte d'Ivoire who could help him.

22. It was the appellant's case that he had left Côte d'Ivoire when he was aged about 14. The Tribunal did not accept that he would face any risk of being thought to have been involved with the previous administration.

23. We begin by considering the challenge to these findings because the appellant's need for international protection, if any, impacts on the whole approach to determining this appeal.

24. We have read Professor Aguilar's supplementary report of 21 May 2014 and, like the First-tier Tribunal, struggle to understand how he reaches the conclusion that he does. Certainly there are reports that there have been attacks on refugees and that prison conditions for those awaiting trial give cause for concern. Professor Aguilar speculated that things would get worse in the run up to the election but they are not due until 2015.

25. The report also explained helpfully the nature of the "Dozo". These are described as:

> "an ancient brotherhood of traditional hunters found mainly in Côte d'Ivoire, Burkina Faso, Guinea, Mali and Sierra Leone. Ordinarily, members carry small calibre hunting rifles and are bedecked with amulets said to render them invincible. They are also believed to have mystical powers."

26. Clearly the Dozo are an identifiable group who are accused of racketeering. We cannot see anything that shows their behaviour, or behaviour attributed to them, creates a *real* risk for this appellant. A dangerous encounter with them is a possibility but no more.

27. Nevertheless at paragraph 15 Professor Aguilar said:

> "It is still my expert opinion that if returned to the Ivory Coast R- Z- would be at risk of arrest and interrogation by the Ivorian Army and the Ivorian Police, particularly as he is returning from abroad and because of the past persecution of his ethnic group by the current Ivorian government. The risks faced by Mr Z- arise out of his ethnicity that of the previous president, and a general financial and social vulnerability as outlined in my previous report at paragraph 30, i.e. forced conscription, forced labour and possible human trafficking. The reasons I gave in my previous report for risk to his life remain in place in 2014 Ivory Coast."

28. The first tribunal's reasons for allowing the appeal in 2012 are summed up at paragraph 33 of its determination. The Tribunal said:

> "There seems to be no dispute in this case that this appellant is a member of the Bété tribe. His father gave evidence to that effect and indeed, so it appears, his father is well aware of the political situation in the Ivory Coast. He even knew the date that the former president faces trial in the War Crimes Tribunal. The appellant's father notes that his son would be readily discernible as a member of the Bété merely by his surname. However, we have to look at the evidence of Professor Aguilar. He speaks of members of the Bété tribe being in a position of political and social vulnerability and were currently targeted for revenge killings because of their ethnicity and allegiance to the former president. However, more significantly, he concludes that this appellant would be subject to a number of extra risk factors including suspicion by the authorities and other people due to his having lived abroad, his financial and social vulnerability, his lack of family and his age and that he was at a very high risk of being arrested and killed by the authorities or the anti-Bété guerrilla groups still roaming the country".

29. This is plainly a finding based very closely on paragraph 30 of Professor Aguilar's report prepared for the First-tier Tribunal and which paragraph Professor Aguilar says stands in 2014.

30. In reaching its decision in 2012 the first tribunal made it plain that it hoped that any problems for the Bété tribe in the Ivory Coast would be short-lived.

31. Whilst Professor Aguilar has repeated his earlier opinion we see nothing in the supplementary report that supports its contention that Bété people *generally* are at risk now. The second tribunal in 2014 recognised that some Bété people were

at risk but this appellant is not in detention and was not politically involved in the days of the old regime and is not involved in land disputes. Professor Aguilar did not produce any evidence to suggest that members of the Bété tribe are at risk per se.

32. The Tribunal expressly recognised evidence in the Amnesty International Report of 2013 that:

> "members of ethnic groups (including Bétés and Guérés) who were generally accused of being supporters of former President Gbagbo were targeted on ethnic grounds, notably in the West of the country where Dozos reportedly prevented returning internally displaced people from accessing their land or imposed arbitrary payments."

33. The appellant's father's evidence was that his family originally came from the West of the country and there may be difficulties if the appellant had to return to the West of the country but we see no reason why he would be required to do that. On the contrary the second tribunal assumed that he would be able to establish himself in a part of the country where his experience of life in the United Kingdom and undoubted linguistic skills would be an advantage.

34. We do not accept that there is any error of law in the second tribunal's approach to assessing the risk facing the appellant in the event of his return now.

35. It began, correctly, with the findings of the first tribunal and looked carefully at the evidence before it. It understood Professor Aguilar's opinion but looked at the evidence behind it and found that any real risk to ethnic Bétés now appears to be to those already in custody or possibly those seeking to return to their traditional homelands and re-establish themselves. The first tribunal's decision in 2012 was made at a time of extreme hostility towards Bétés and the first tribunal acting responsibly and cautiously, properly applying the low standard of proof.

36. We particularly note paragraph 64 of the determination where the Tribunal found that the appellant had lived in Abidjan before removing to the United Kingdom. That it is in the South East of the country. It is ethnically varied and is somewhere where the appellant could reasonably be expected to return if he did not risk going to the Bété-dominated area where some troubles remain.

37. We are quite satisfied that the second tribunal in 2014 was aware of the previous decisions and handled them correctly in law but was entitled to conclude as it did that the risk identified then does not exist now.

38. Given that finding, arguments based on what kind of protection if any he would have been given in the event of his being entitled to protection become somewhat sterile. Nevertheless they have been raised and we must deal with them.

39. We find no error here. It is the appellant's contention that he is not excluded from the protection of the Refugee Convention because the offence with which he was most recently convicted did not attract two years' imprisonment. It must be remembered that this section 72(2) of the Nationality, Immigration and Asylum

Act 2002 creates a presumption. It does not establish a fact. Clearly there will be many cases where the passage of time will make it very easy to rebut the presumption that a person who has been convicted of a particularly serious crime constitutes a danger to the community but we see nothing objectionable or inconsistent with the plain meaning of the section in deciding that once a person has been convicted and sentenced to more than two years' imprisonment the *presumption* that that person has been convicted of a particularly serious crime and constitutes a danger to the community of the United Kingdom stands for all time. Convictions that are spent might require particular consideration but that is a point to address if and when it arises.

40. We are unconcerned that the second tribunal did not show that it distinguished between the two presumptions created by section 72. Clearly there are two presumptions but this is a case where the first tribunal in 2012 found, and it appeared to have been accepted, that the appellant had been convicted of a particularly serious crime. Nothing turns on this apparent failure to recognise the need for two presumptions.

41. We have found it difficult to follow the appellant's argument that Article 14 of the Qualification Directive somehow restricts the application of section 72 of the 2002 Act. Article 14(4)(b) permits the refusal of refugee status when a person, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State."

42. We agree that this means that for "danger" to be a relevant consideration it must exist at the time that the decision is made. We do not agree that this article eliminates a presumption created by section 72. As indicated above, the presumption may be made easy to rebut by the passage of time or will be rebutted by the operation of the principles set out in **Devaseelan** [2002] UKIAT 00702; [2003] Imm AR 1 but the presumption of law continues to apply.

43. We note that at paragraph 33 of its determination the second tribunal indicated that if (in fact it made no such finding) the:

> "previous panel found that the appellant had rebutted the presumption then a further conviction where the sentence was for less than two years would not resurrect the presumption".

44. We do not agree. Whilst it is probably the case that a finding that a person had not been convicted of a particularly serious crime would stand, a finding that a person was not a danger to the community is one that could be illuminated by subsequent events including further criminal activity that attracted less than 2 years imprisonment as punishment.

45. We do not agree with the criticism in ground 3 that the Tribunal erred in its appreciation of the OASys Report. It is plainly right that the report did *not* say in terms that the appellant constituted a "medium risk of serious harm to the public". The report undoubtedly concluded that the appellant presented a medium risk of reoffending. The phrase "medium risk" can be found at page 60

and 66 of the bundle in the OASys Report. Page 70 of the report gives the predictor scores as a percentage and identifies as risk category. There was a 31% chance of reoffending in the first year and 48% in the second year. Overall there is a low probability of further re-offending but a medium probability of any further offending being violent and a like chance of it being non-violent.

46. These phrases, despite their use of numbers, cannot be an actuarial assessment because the necessary data, as far as we are aware, is not available. The second tribunal's conclusion that the appellant had not rebutted the statutory presumption takes account of all the factors listed under the heading of "findings" from paragraph 32 to paragraph 39. The second tribunal was clearly concerned by the appellant committing two offences in June 2012 which attracted the prison sentences that led to these proceedings. The second tribunal did have regard to the fact that the appellant had undertaken courses in drug misuse and had been drug-free for a time. We see nothing irrational in the second tribunal going on to say that the appellant had not done enough to rebut the presumption created by the convictions in 2004.

47. There is some laxity of expression in paragraph 38 of the second tribunal's determination where the second tribunal refers to the appellant being "at medium risk of serious harm to the public" and Ms Kelly, as she is perfectly entitled to do, seized upon it. We find on reflection that this phrase, read in context, is not a material error of law. The second tribunal did not find that the appellant had failed to rebut the presumption of law that he was a danger to the community because it misread the OASys report but because the appellant was convicted of supplying class A drugs in 2012.

48. In any event the second tribunal's decision that the appellant was not a refugee cannot be materially wrong as the second tribunal found that he did not need protection.

49. The Tribunal was clearly aware of the warnings in **Maslov v Austria App no.1683/03 [2008] ECHR 546**, about the need for "serious reasons" to justify the expulsion of a person who had spent the major part of his childhood and youth in the host country. The fact is the appellant's time in the United Kingdom has been very unhappy. He started offending within two years of arriving and of the thirteen years he had spent in the United Kingdom a considerable portion of it has been spent in prison. The second tribunal thought it as much as half of the time. We are not sure that is right but the suggestion was not criticised before us. Certainly the appellant was not able to rely on any of the strong elements in a private and family life which occasionally, usually for the sake of people other than the person to be removed, can make a difference.

50. This is a sad story of a young man who has been involved in a variety of serious criminal acts which has resulted in his spending prolonged periods of his life in custody. He has not established strong links in the United Kingdom and has continued to offend. Points have been made properly on his behalf. He has made efforts to get away from his addition to drugs which addiction has clearly caused

him so much trouble but the fact remains that he is a foreign criminal within the meaning of the Act who is eligible for deportation.

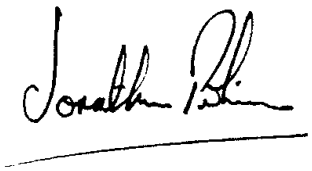
51. The second tribunal has decided rationally although he would quite recently have risked persecution because of his tribal origin that risk has subsided and he can not be returned safely.

52. That decision is sufficient to dispose of the appeal and we are satisfied that it is a decision reached for lawful reasons in the determination before us.

53. We make it plain that the Tribunal was entitled to conclude that the appellant is not a refugee because he is disentitled to refugee protection by reason of his behaviour and he has not dislodged the presumption of law which says that he has committed a really serious criminal offence and is a danger to the community. Save for a slightly unfortunate phrase in dealing with the OASys evidence we see nothing objectionable in this determination and the error identified when set in context was not material.

54. It follows therefore that we find there is no error of law and we dismiss the appellant's appeal.

Signed



Jonathan Perkins

Judge of the Upper Tribunal

Dated 27 November 2014