Upper Tribunal
(Immigration and Asylum Chamber)

HAA (s.72: overseas conviction) Somalia [2012] UKUT 00366 (IAC)

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 27 September 2012	.....

Before

Mr C M G Ockelton, Vice President

Upper Tribunal Judge Grubb

Between

H A A

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Ms V Templeton instructed by Ty Arian Solicitors

For the Respondent: Mr K Hibbs, Senior Home Office Presenting Officer

In cases where s 72 of the Nationality, Immigration and Asylum Act 2002 is invoked, it is important to see that the specific requirements of that section have been complied with. In particular, if the conviction was outside the United Kingdom, there must be either proof of the offence and sentence (s 72(3)), or certification under s 72(4)(b). It does not appear that the statute requires certification to be in the letter of refusal.

DETERMINATION AND REASONS

1.
The appellant is a national of Somalia born on 3 March 1980. An anonymity order has been made in his case.

2.
The appellant appealed to the First-tier Tribunal against the decision of the respondent on 6 September 2011 to direct his removal to Somaliland, Somalia or Mexico, following refusal of his claim

for asylum. Immigration Judge Hart dismissed his appeal. The appellant has permission to appeal to this Tribunal.

3.
The appellant's history is of some complexity. He left his country of origin a long time ago. He has spent a considerable period of time in the United States of America and apparently some time in Mexico. He arrived in the United Kingdom in 2007. He has been convicted of criminal offences in the United States of America and in the United Kingdom. For that reason, the Secretary of State relied on the provisions of s.72 of the Nationality, Immigration and Asylum Act 2002, to which we make fuller reference below. The Secretary of State concluded that, even if the appellant is a refugee, he is, because of his criminality, not protected from removal from the United Kingdom; and that, in any event, although he is a member of a Somali minority clan, he is not at risk of persecution in Somaliland, from which he comes.

4.
When the matter came before Judge Hart in the First-tier Tribunal, he very properly recognised that he had to consider s.72 first, before going on to the appellant's substantive claim to be a refugee. He was required to do that, because the ground of appeal available to the appellant is that his removal would breach the Refugee Convention; and it would not breach the Refugee Convention if, despite being a refugee, he were not a person who could claim the benefit of Article 33 of that Convention. Section 72 is in mandatory terms and in a case such as the present, where the Secretary of State has certified that exclusion under s.72 applies, the Tribunal is required to begin with consideration of that issue.

5.
The Immigration Judge's discussion of exclusion is at paragraphs 21 to 43 of his determination. He then went on to consider the appellant's claim substantively, in particular because he also claims a fear of ill-treatment contrary to Article 3 of the European Convention on Human Rights.

6.
The Judge's conclusions on the facts were based on the material before him. It is clear that he regarded the appellant's evidence on his history and origins as not worthy of credit, in particular the recent evidence by which he sought to distance himself from Somaliland. On the other hand, the Judge appears to have concluded the appellant's evidence of his criminal history in the United States as worthy of credit, in particular the recent evidence in which he had given some details of the offences of which he was convicted. The Judge concluded that s.72 applied and excluded the appellant from the protection of the Refugee Convention, but that, even if s.72 had not applied, the appellant was not at any risk of ill-treatment. We have begun by pointing out those features of the determination, because they have influenced our view on the case as a whole. For reasons which we shall set out, we have come to the conclusion that material disclosed by the Secretary of State for the first time on 26 September 2012 shows that the hearing before Judge Hart was not fair.

7.
The material in question is information provided by the United States of America pursuant to a request made by the Secretary of State. There are two versions of it: we do not know why. At the time the decision-maker wrote the letter refusing the appellant's claim, he had a version of the information, which, we are told, became available to the Secretary of State on 15 August 2011. It is as follows:

"Subject is believed to have been in the US from March 1996 to September 2007.

Subject was convicted of selling cocaine in the US on 21/02/2002.

Subject was apprehended by US Immigration Enforcement Officers in San Francisco on 07/07/2004 when he was charged with aggravated felony, controlled substance trafficking, and having a possession of a controlled substance.

- Subject used the [appellant's name].

Subject was granted supervisor release on 23/03/2005 and reported periodically thereafter".

8.
Before the First-tier Tribunal, the appellant accepted that he had been convicted of some offences in the United States. The detail of the offences grew with the telling, and he eventually said that he had been sentenced to 5 years imprisonment. He also told the Judge that he had been recognised in the United States as a refugee. The Immigration Judge accepted the appellant's latest account of his conviction for the purposes of his examination of s.72, but said specifically at paragraph 72 of his determination, when setting out his reasons for disbelieving the appellant's account, that "he has not produced any documents to verify that he was at one time recognised by the United States as a Convention Refugee".

9.
Shortly after the refusal decision was made, in fact on 17 September 2011, further information became available; we do not know precisely what its source was. In the second version, the differences are emphasised by bold type. Instead of the first line the information now is:

"Subject entered the US as a refugee on 24/03/1995

- Subject was subsequently granted refugee status, and then applied for permanent residence status on 05/10/1998".

10.
A further paragraph is inserted above the last line of the original note, as follows:

"Subject was denied permanent residence status on 21/07/2004.

- Subject was subsequently denied refugee status on 13/09/2004."

11.
The reference to the refusal of refugee status appears to be a reference to the provisions of s.208 of the United States Immigration and Nationality Act. What is of prime interest, of course, is the information that the appellant had been granted refugee status in 1998. It is clear that the Secretary of State had that information by 17 September 2011 at the latest: we say "at the latest", because the form of the dates in the narrative shows that the information must have been redacted after receipt from the United States, before being incorporated in this document. If the information now available had been disclosed at the hearing before the First-tier Tribunal, it would clearly have had some impact on the Judge's reasoning.

12.
We do not attribute any blame to any individual officer of the UKBA for the failure to disclose at that stage: no doubt the original decision-maker had put the file away and those who prepared the case for hearing were not aware of the two versions of the document. We should say, however, that it is particularly unfortunate that, in response to a more recent disclosure request, the appellant's

representatives were given only the earlier version of the information, as recently as last month. But, wherever the fault lies, in our view the Secretary of State's failure to disclose this information, which helped to support the credibility of the appellant's case and, as it turned out, the absence of which influenced the Judge's reasoning, made the proceedings unfair.

13.
It might be said that because of the impact of s.72, the outcome of these proceedings would have been the same in any event. We have concluded, however, that the matter should be remitted to the First-tier Tribunal for a fresh hearing. There are two reasons for that conclusion. The first is that we do not think that it is at all easy to say that a judicial decision tainted by unfairness of the judicial procedure should be allowed to stand by being shown that the result would probably have been the same in any event. The second reason depends on an analysis of s.72 and its application to the present appeal, which we now undertake.

14.
The first four subsections of s.72 are as follows:

"72. Serious criminal

(1) This section applies for the purpose of the construction and application of Article 33(2) of the Refugee Convention (exclusion from protection).

(2) A person shall be presumed to have been convicted by a final judgement of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is –

(a) convicted in the United Kingdom of an offence, and

(b) sentenced to a period of imprisonment of at least two years.

(3) A person shall be presumed to have been convicted by a final judgement of a particularly serious crime and to constitute a danger to the community of the Untied Kingdom if –

(a) he is convicted outside the United Kingdom of an offence,

(b) he is sentenced to a period of imprisonment of at least two years, and

(c) he could have been sentenced to a period of imprisonment of at least two years had his conviction been a conviction in the United Kingdom of a similar offence.

(4) A person shall be presumed to have been convicted by a final judgement of a particularly serious crime and to constitute a danger to the community of the United Kingdom if –

(a) he is convicted of an offence specified by order of the Secretary of State, or

(b) he is convicted outside the United Kingdom of an offence and the Secretary of State certifies that in his opinion the offence is similar to an offence specified by order under paragraph (a)."

15.
On their face, subsections (2), (3) and (4) impose presumptions: the legality of those presumptions was successfully challenged in the Court of Appeal in EN (Serbia) v SSHD and SSHD v KC (South Africa) [2009] EWCA Civ 630 and it is now clear that, even when those sub-sections apply, there needs to be an investigation of the individual's actual criminality and the risk posed to the United Kingdom. But, in any event, the case must be one in which the facts justify the application of one of the three

subsections. So far as offences committed in the United Kingdom are concerned, s. 72(2) will apply if, on conviction, there was a sentence of at least two years; and s. 72(4) will apply if the conviction was of a specified offence. So far as convictions outside the United Kingdom are concerned, s. 72(3) applies if there was a sentence to a term of imprisonment of at least two years for an offence which could have carried such a sentence if the conviction had been in the United Kingdom; and s. 72(4) applies if the conviction is of an offence that the Secretary of State certifies is in his opinion similar to an offence that is specified. It follows that, for an overseas conviction to fall within s. 72, either there must have been a sentence of imprisonment for at least two years, or there must be certification of the kind required by s. 72(4).

16.
The decision letter in the present case, after setting out s. 72(4) (but not any preceding subsections), was worded as follows:

“46. The decision maker considers that the possession and supply of class A drugs (cocaine) in which you have been found guilty off [sic] and received a custodial sentence is a particularly serious crime. It was such a serious crime in the eyes of the US authorities that they sought to deport you from their country

[The next two paragraphs refer to IH (Eritrea) [2009] UKAIT 00012 and to the appellant’s own history.]

49. It is considered that you have been convicted of a particularly serious crime and that you constitute a danger to the community of the United Kingdom therefore you have been excluded from protection under section 72(4) Nationality Immigration and Asylum Act 2002”.

17.
Certification under s. 72(4) will, we think, necessarily be by reference to the similarity of the constituent elements of the relevant offences, not by reference to the particular circumstances of the case. In any event, there is no remotely clear indication that the decision-maker had taken into account the list of specified offences, and there is, to our eyes, nothing resembling the relevant certification. Further, it is apparent that the decision-maker relied solely on subsection (4), and not at all on sub-section (3).

18.
After considering the material before him, including the appellant’s evidence that he had been sentenced to a term of eight months imprisonment for “some offence relating to drugs”, and to a sentence of five years for robbery, the Judge wrote this:

“42. I have noted that section 72(3) in effect establishes a presumption upon the appellant being sentenced for at least two years, whereas section 72(4) refers to a list of comparable offences, which might not necessarily have attracted a term of imprisonment of two years.

43. I am satisfied, largely on the basis of the appellant’s own admission, that he has been convicted of an offence in the United States of the supply or offering to supply a controlled drug, namely crack cocaine, a Class A drug, and that such an offence would have been an offence under section 4 of the Misuse of Drugs Act 1971. Accordingly, on that basis, I uphold the respondent’s certificate.”

19.
It appears to us that the Judge fell into the trap set by the terms of the refusal letter. The appellant was not convicted of the supply of a controlled drug: that is merely the apparently equivalent notion

under the law of England and Wales. He was convicted of some drug offence in the United States of America, and there is no clear indication of what that was, and no relevant “certificate” for the Judge to “uphold”. In addition, as we have indicated, it appears that the Judge erred in his failure to appreciate the impact of the decision of the Court of Appeal in EN (Serbia) .

20.
For these reasons we consider that it is far from obvious that the appellant’s appeal is doomed to fail by reason of the application of s.72 to it. That, as we have said, is a further reason for requiring the proceedings on appeal to begin again with a full hearing in the First-tier Tribunal. Our formal decision is therefore that we find an error of law by the First-tier Tribunal. We set its decision aside. We remit the appellant’s appeal for a fresh hearing by the First-tier Tribunal.

21.
It appears to us that there is nothing in s.72 that requires any relevant consideration and certification by the Secretary of State to take place at any specified time: in particular, the consideration is not confined to the wording of the decision letter. We make the following direction to enable the Secretary of State to consider and clarify her position under s.72 in this case. We bear in mind that the Tribunal will have to consider whether the circumstances under which the United States offence or offences were committed, and the sentences imposed for them, are such as to lead to a conclusion that the appellant should now be regarded as a person who cannot claim the benefit of Article 33(2) of the Refugee Convention.

Directions

22.
The Secretary of State is to consider forthwith the application of s.72 to the appellant’s claim. An assertion that s. 72(3) applies must be accompanied by appropriate evidence of the level of the appellant’s sentence. An assertion that s. 72(4) applies must be accompanied by the appropriate certificate. Any information obtained as to the circumstances of the appellant’s conviction or convictions must be disclosed to the appellant and to the Tribunal, even if the Secretary of State considers that the information is not relevant for the purpose of s.72.

23.
This appeal will be listed before the First-tier Tribunal for a full hearing, probably in the week beginning 5 December 2012, and a Notice of Hearing will be sent out in the usual way.

24.
The Secretary of State’s time for complying with the direction above expires 14 days before the hearing of this appeal in the First-tier Tribunal. The First-tier Tribunal will not take into account, in the respondent’s favour, any evidence produced after that date.

C M G OCKELTON

VICE PRESIDENT OF THE UPPER TRIBUNAL IMMIGRATION AND ASYLUM CHAMBER

Date: 9 October 2012