Casenote – IH (Section 72; 'particularly serious crimes') Eritrea [2009] UKAIT 00012

IH (Eritrea) is an important determination in which an AIT Panel (Deputy President Ockelton and SIJs Grubb and Lane) have considered the compatibility of section 72 of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act'), and the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004 ('the 2004 Order') with the autonomous meaning of Article 33(2) of the 1951 UN Convention, as preserved by section 2 of the Asylum and Immigration Act 1993 and Articles 14 and 21 of the Qualification Directive (2004/83/EC). Section 72 and the 2004 Order *inter alia* controversially seek to domestically redefine the meaning of 'particularly serious crime' and 'danger to the community' within Article 33(2) so as to cover the commission of relatively minor offences and those for which an appellant has been sentenced to two years or more of imprisonment.

At first instance, the Asylum and Immigration Tribunal dismissed the Appellant's appeal against the decision of the Secretary of State to deport him from the UK. Deportation action had been initiated by the Secretary of State ('SSHD') following the Appellant's conviction for sexual assault for which he had been sentenced to a period of 21 months. As part of the decision to deport the SSHD provided reasons for refusing to grant the Appellant asylum and certified his crime under section 72 as one listed within the 2004 Order.

At first instance it was argued, in addition to the Appellant not being a danger to the community, that either the 2004 Order was *ultra vires* under domestic administrative law or Section 72 of the 2002 Act (from which the 2004 Order emanated) was incompatible with EU law, specifically Article 21 of the Qualification Directive which reads:

"*Protection from refoulement*

1. Member States shall respect the principle of non-refoulement in accordance with their international obligations.
2. Where not prohibited by the international obligations mentioned in paragraph 1, Member States may refoule a refugee, whether formally recognised or not, when:

   a) There are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or

b) He or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that member state."

It was submitted that due to the direct effect of EU law, Section 72 and the 2004 Order must be disapplied, such as to enable the Immigration Judge to find that the crime in question was not 'particularly serious' under Article 33(2).

The Immigration Judge rejected this argument holding that he was required to apply section 72 and the 2004 Order. In addition the Immigration Judge did not find the Appellant credible and dismissed his account in its entirety.

At a first stage reconsideration hearing the AIT Panel had a number of different and important issues to decide which can be broken down into i) the autonomous international meaning of 'particularly serious crime'; ii) the compatibility of the 2004 Order and s.72 with Art 33(2); iii) whether the AIT had the power to declare the 2004 Order *ultra vires*; iv) whether Art 21 of the Qualification Directive had direct effect and incorporated the autonomous meaning of Art 33(2); and v) the adverse credibility finding.

Autonomous international meaning of 'particularly serious crime'

The Tribunal rejected the SSHD's argument that the definition of 'a particularly serious crime' has no international autonomous meaning and that it is a matter for contracting states to define, as 'hopeless'.

After considering (and in the main controversially rejecting) material from the UNHCR, the Joint Committee on Human Rights, academic literature and overseas and domestic case law the Tribunal endorsed the approach taken by the Australian Federal Court in the case of Betkoshabeh -v- Minister for Immigration and Multicultural Affairs (1998) 157 ALR 95.

In this case, an Appellant who was suffering from severe paranoid delusions, entered an interpreter's house armed with two knives and hid in a cupboard, believing that she was responsible for his earlier detention and involved in a conspiracy to deport him. He subsequently pleaded guilty and received a community sentence. However, notwithstanding the same he again forced his way into the interpreter's house with a knife and threatened to kill her. The Appellant was convicted of one count of aggravated burglary and five counts of threats to kill for which he was sentenced to three years and six months imprisonment. Relying upon

Article 33(2), the Australian Authorities decided to deport him on the basis that a ‘threat to kill’ was a ‘particularly serious crime’ within Article 33(2), which was upheld by the Administrative Appeals Tribunal. The Appellant appealed to the Federal Court which quashed the decision, with Finkelstein J holding :

> ‘On its proper construction, Article 33(2) does not contemplate that a crime will be characterised as particularly serious or not particularly serious merely by reference to the nature of the crime that has been committed although this may suffice in some cases. The reason is that there are very many crimes where it is just not possible to determine whether they are particularly serious without regard to the circumstances surrounding their commission ...
>
> There will be occasions when a threat to kill cannot be treated as a particularly serious crime. It all depends upon the circumstances. While it is true that rape is a serious crime there will be occasions, rare though they may be, when a rape could not be treated as a particularly serious crime. Again, it all depends upon the circumstances’

The Tribunal adopt these principles holding that Art 33(2) requires ‘an interpretative approach that recognises that, in applying Art 33(2) to a specific individual, consideration must be taken of the individual circumstances of the commission of the offence’ (para 73).

Compatibility of 2004 Order and s.72 with Art 33(2)

Although recording at para 13 that ‘*it was not disputed before us that the Secretary of State bears the burden of proof in respect of matters relied upon to bring an individual within Art 33(2)*’, the Tribunal seemingly irrationally go on to reject the argument that the presumptions introduced by Section 72 which reverse the burden of proof from the Respondent to the Appellant ‘would offend the Refugee Convention’ (para 78).

The Tribunal however accepted that Section 72 introduced an ‘irrebuttable presumption’ as to whether an offence was ‘a particularly serious crime’ and that this *did* offend the Refugee Convention.

Whether the Tribunal had the power to declare the 2004 Order *ultra vires*

It was first argued that the 2004 Order was *ultra vires* and that the AIT had the jurisdiction to make such a declaration. After an analysis of the relevant case law, in particular the House of Lords judgment in Foster v Chief adjudication Officer [1993] AC 794, the Tribunal concluded at para 112:

"as a result of Foster that if a decision-maker (or lower tribunal) in the social security context errs in law by applying "law" derived from an *ultra vires* statutory instrument, so too, it would seem, the decision-maker acts "not in accordance with the law" in applying *ultra vires* "law" in the immigration or asylum context. We recognise the significance of this if correct. It would not, however, be our view unless we were driven to reach it by Foster."

However no final decision was reached on this issue as the Tribunal found that the 2004 Order was not in fact *ultra vires* the enabling primary legislation which was Section 72 of the 2002 Act. The Tribunal felt able to come to this conclusion as, they did not agree that the Refugee Convention had been incorporated into domestic legislation beyond the 'impact upon the content of immigration rules or any wider policy' of Section 2 of the Asylum and Immigration Act 1993 (see para 124). Although the Tribunal relied on R v Asfaw [2008] UKHL 31 in coming to this conclusion, that case did not concern the interpretation of the Immigration Rules and instead concerned the application of domestic criminal law. The Tribunal fail to properly address the Appellant's argument that the 2004 Order impermissibly undermines the 1993 Act, by seeking to redefine the meaning of Rule 334 of the Immigration Rules in a manner contrary to Art 33(2).

Whether Art 21 of the Qualification Directive has direct effect and incorporated the autonomous meaning of Art 33(2)

The SSHD accepted that the Qualification Directive has direct effect in UK law and incorporated the autonomous meaning of Art 33(2).

As a consequence the Tribunal accepted that Section 72 had to be read compatibly with EU law and therefore allow an Appellant to rebut the presumption that a crime was 'particularly serious' (either due to the length of the sentence imposed or because it is a crime listed in the 2004 Order) as 'otherwise, short of disapplying s.72 (and the 2004 Order), we see no other way of giving effect to the EU obligation founded in Art 21.2 of the Qualification Directive' (para 135).

In this case however, it was found that the Appellant's crime did nonetheless meet the threshold of a 'particularly serious crime' upon considering all the circumstances of it. However it seems impossible to reconcile this conclusion with that reached by the IAT in the earlier case of SB (cessation and exclusion) Haiti [2005] UKIAT 00036, in which it was held that a crime of wounding attracting a sentence of 3 years was not sufficient on its own to meet the threshold of a particularly serious crime.

Credibility

Finally it is worth noting the approach of the Tribunal to the issue of determining whether there had been a material error of law in respect of the Appellant's credibility in this matter. The Tribunal accepted that the Tribunal had erred in law in respect of its assessment of numerous aspects of the Appellant's account, but nonetheless found that such errors were not material due to the disbelief of the remainder of the Appellant's account, in particular, his contention that he had left Eritrea illegally. This is arguably inconsistent with Court of Appeal case law holding that '*an error of law is material if the Adjudicator might have come to a different conclusion*' (see *inter alia* IA (Somalia) [2007] Imm AR 685 CA at [15])

Both sides have applied to the Tribunal for permission to appeal to the Court of Appeal.

Paul Draycott
Garden Court North Chambers
Mark Lilley
Paragon Law
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