

Public / Human rights

The exclusion net

Joe Middleton on recent exclusions under the Refugee Convention

IN BRIEF

- Exclusion provisions under the Refugee Convention have an autonomous meaning and must be narrowly construed.

The Refugee Convention (the Convention) recognises that those who are guilty of very serious misconduct should not be entitled to surrogate protection, even if they have a genuine fear of persecution in their home countries.

Article 1(F) provides that the Convention does not apply if there are serious reasons for considering that a person has committed a crime against peace, a war crime or a crime against humanity (1F(a)), a serious non-political crime (1F(b)) or acts contrary to the purposes and principles of the United Nations (1F(c)). Moreover, Art 33 provides that the prohibition of refoulement, which is at the heart of states' obligations under the Convention, does not apply if the person in question constitutes a danger to the community of the host country having been convicted of a particularly serious crime.

Exclusion from the scope of the Convention does not, of course, imply that the UK will remove a person to a place where they face the risk of persecution. If the risk is sufficiently serious to warrant protection under the Human Rights Act 1998 (HRA 1998), the UK will continue to provide a refuge, at least for the time being. Many who would otherwise qualify as refugees would not, however, be entitled to resist removal under HRA 1998 and in any event, the benefits of recognition as a refugee are considerably greater. The scope of the exclusion categories is therefore of considerable importance and has been revisited in a number of recent cases.

IH (Eritrea)

Under s 72 of the Nationality, Immigration and Asylum Act 2002, a person is presumed to have been convicted of a particularly serious crime and to be a danger to the community of the UK if his conviction is covered by that section. The appellant in *IH (Eritrea)* [2009] UKAIT 00012 was caught by s 72 because he had been convicted of an offence in a category deemed to be particularly serious irrespective of the sentence (sexual assault). Section 76(2) provides that the presumption that a person is a danger to the community is rebuttable. In this case the appellant sought to argue that the presumption that a crime is "particularly serious" was also rebuttable. The Asylum and Immigration Tribunal accepted that the words "particularly serious crime", like the other terms of the Convention, have an autonomous international meaning. It rejected the appellant's contention that the Convention itself had direct effect in domestic law but accepted that in order to give effect to Council Directive 2004/83/EC which does have direct effect, the presumption as to whether a crime was particularly serious must be rebuttable by reference to the facts of the particular case. On the facts of this case, however, the offence was sufficiently serious for the presumption to stand.

MH (Syria), DS (Afghanistan) v SSHD

The first appellant in *MH (Syria), DS (Afghanistan) v SSHD* [2009] EWCA Civ 226 had been excluded under Art 1F(c). She had been a member of the PKK, a proscribed organisation under the

Terrorism Act 2000, for 11 years. She had worked as a nurse and engaged in other non-violent activities during that time. The Court of Appeal had no hesitation in allowing her appeal. The tribunal had failed to apply the guidance in *Gurung* [2002] UKIAT 04870: mere membership of a proscribed terrorist organisation was not sufficient to justify exclusion unless the organisation was so extreme that voluntary membership could be presumed to amount to at least acquiescence amounting to complicity. There was no suggestion that the PKK fell at the extreme end of the continuum referred to in *R (on the application of Gurung)*. What the first appellant had done for the PKK had been relatively minor and fell well short of engaging Art 1F.

The secretary of state sought to exclude the second appellant under Art 1F(a). This was because various senior positions he had held in the intelligence service of the communist government in Afghanistan in the late 1980s, although it was not contended that he had personally participated in crimes against humanity. The immigration judge rejected this argument on the basis that the evidence did not establish that the intelligence service had committed widespread torture or killings directed at the civilian population. The Court of Appeal upheld this conclusion.

It also rejected an argument that the judge should have considered whether any of the other exclusion clauses applied, even though the secretary of state had not sought to rely on them, because it was not obvious that they applied.

Comment

These cases provide an important reminder that the exclusion provisions under the Convention must be narrowly construed and that its provisions have an autonomous meaning, notwithstanding what seem at times to be determined efforts by the Home Office to cast the exclusion net as wide as possible.

NLJ

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