Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07856/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 November 2019	**On 10 December 2019**

Before

UPPER TRIBUNAL JUDGE CANAVAN
UPPER TRIBUNAL JUDGE KEITH

Between

A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Anonymity was granted at an earlier stage of the proceedings because the case involves protection issues. We find that it is appropriate to continue the order. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent.

Representation:
For the appellant: Ms C. Robinson, instructed by Bindmans LLP
For the respondent: Mr D. Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This decision considers the relevance of a historic conviction for the purpose of assessing whether an appellant has rebutted the presumption that he constitutes a danger to the community with reference to section 72(6) of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002").

Background

2. The appellant entered the UK illegally on 13 March 1995 and claimed asylum in a false name claiming to be a Kenyan national (MM). He was convicted of smuggling class A drugs on 05 February 1996. He was sentenced to seven years' imprisonment and recommended for deportation. He was served with a signed deportation order under the name of MM on 10 February 1997. The protection claim was refused on 11 April 1997. After his real nationality was determined, he was deported to Uganda on 04 July 1999. He remained there for a matter of days before returning to the UK on a false passport, and in breach of the deportation order, on 23 July 1999.

3. On 20 March 2003 the appellant applied for leave to remain on human rights grounds. It is unclear whether the application was made in his own name. The application was refused. On 23 March 2005 he applied for leave under the Family Indefinite Leave to Remain exercise but was deemed ineligible. On 07 August 2006 he was encountered by immigration officials and was notified of his liability to removal. Further submissions were refused with a right of appeal. Immigration Judge Keane dismissed the appeal on Refugee Convention and human rights grounds in a decision promulgated on 12 October 2006.

4. It is unclear whether the appellant was required to report or was listed as an absconder after his appeal rights became exhausted. No action appears to have been taken to remove him pursuant to the deportation order. He came to the attention of the authorities again on 18 July 2010 when he was arrested for shop lifting. The appellant was recorded as having several different aliases. On 18 July 2010 he was served with illegal entry papers under the alias of MM. A series of subsequent events led to a decision dated 10 February 2011 to refuse to revoke a deportation order and to refuse a further protection claim. A panel of the First-tier Tribunal dismissed the appeal on Refugee Convention and human rights grounds in a decision promulgated on 24 June 2011. Subsequent attempts to appeal the decision were unsuccessful. The summary of the appellant's immigration history indicates that the respondent attempted to remove the appellant in 2011 and 2012. Several applications were made for judicial review during that period although the subject matter and the outcome of those applications are unclear.

5. During an attempted removal on 24 December 2011 the appellant claimed that he was assaulted by staff and suffered injuries. Some years later, a

High Court judge found that he suffered trespass to the person and awarded a large sum in damages.

6. No further attempts to remove him are recorded after 2012. It seems that the appellant made a series of further submissions to the respondent who declined to treat them as fresh protection and human rights claims. Further submissions were made on 20 July 2015 on the ground that the appellant had developed a public profile as a result of the publicity surrounding the civil claim which was likely to bring him to the attention of the Ugandan authorities.

7. No action appeared to be taken in response to those submissions until 22 March 2016 when the respondent wrote to the appellant asking him to complete a Statement of Reasons under section 120 NIAA 2002. The respondent referred to section 72 of the same Act and provided an opportunity for the appellant to rebut the presumption that he was a danger to the community. A further asylum interview process took place during 2016.

8. In a decision dated 07 August 2017 the respondent refused to revoke the deportation order, refused the protection and human rights claims and certified the protection claim under section 72 NIAA 2002. The decision is the subject of the current appeal.

9. First-tier Tribunal Judge Ross ("the judge") dismissed the appeal in so far as it relied on the ground that his removal would breach the United Kingdom's obligations under the Refugee Convention but allowed the appeal on human rights grounds in a decision promulgated on 26 February 2019. The judge heard evidence from the appellant and other witnesses. He also considered the expert medical evidence. The judge began his consideration of the protection claim by considering section 72 NIAA 2002. He found that the appellant had been convicted in the United Kingdom of an offence and was sentenced to a period of imprisonment of at least two years. He had regard to the Court of Appeal decision in *EN (Serbia) v SSHD* [2009] EWCA Civ 630. In considering whether the appellant had rebutted the presumption that he was a danger to the community for the purpose of section 72(6) he made the following findings:

> "39. The appellant was convicted of a very serious criminal offence which was reflected in the long sentence he received. Whilst the appellant, since his conviction in 1995, has not been subsequently convicted of similar serious offences, he has been convicted of other criminal matters. Of concern to the Tribunal is that having returned to the UK in breach of his deportation order, rather than keeping his head down, the appellant continued to commit criminal offences. Between 1996 and 2015, the appellant has received 6 convictions for 11 offences. The offences committed subsequent to the index offence includes an offence of violence, namely common assault for which [he] was given a two-year conditional discharge in December 2013. There is no OASYS or other report which measures the appellant's risk to the community or of reoffending.

> 40. It is for the appellant to rebut the presumption that he is a danger to the community. Given his continued commission of criminal offences after his return to the UK, albeit that [he has] not been convicted of any matter since September 2015, I find that the appellant has not rebutted the presumption that he is a danger to the community."

10. Having dismissed the appeal in so far as it relied on grounds relating to the Refugee Convention the judge went on to consider whether the appellant was at real risk of serious harm for the purpose of Article 3 if he was removed to Uganda. The judge gave sustainable reasons to explain why he accepted the appellant's claim that he is an openly gay man who would be at risk if returned to Uganda. He concluded that the appellant would be at risk of serious harm amounting to a breach of Article 3 of the European Convention. The respondent did not apply for permission to appeal the First-tier Tribunal decision relating Article 3 of the European Convention. Those findings shall stand.

11. The appellant seeks to appeal the First-tier Tribunal decision relating to the Refugee Convention on the following grounds:

    (i) The First-tier Tribunal failed to identify and apply the material distinction between more and less serious crime: failing to direct itself to the requirement that future offences must pass a particular threshold of seriousness before they amount to such a danger as to remove a person from the protection of the Refugee Convention; alternatively

    (ii) The First-tier Tribunal failed to determine the question of whether offences which the appellant was likely to commit were sufficiently serious to amount to "a danger to the community" in the meaning of Article 33(2) of the Refugee Convention; and

    (iii) Expressly or impliedly required that the appellant submit positive evidence about the risk of reoffending in order to rebut the presumption; and

    (iv) Reached a conclusion that was outside a range of reasonable responses to the evidence.

Decision and reasons

12. The Refugee Convention provides surrogate international protection to a person who has a well-founded fear of persecution for one of the five reasons outlined in Article 1A(2). A protection claim is assessed with reference to a low standard of proof because of the serious nature of the potential harm that a person might face.

13. The prohibition of *refoulement* contained in Article 33(1) of the Refugee Convention is a cornerstone of the international system of protection. No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

14. Article 33(2) provides an exception to the principle of *non-refoulement*. Where the Contracting State considers that there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country, it may remove a person even though they are a refugee. Because of the serious consequences of such action, the nature of the threat posed to the host state by the refugee must reach a minimum level of seriousness in order to justify permitted *refoulement*.

15. A similar provision is contained in Article 21 of the Qualification Directive (2004/83/EC), but the two provisions contrast in effect.

16. Article 33(2) of the Refugee Convention does not exclude a person from recognition as a refugee. There is no principle of revocation of 'Convention status'. A person remains a refugee, but the host state is permitted to remove them if they constitute a danger to the host state.

17. Article 21 of the Qualification Directive states that a Member State can revoke, refuse to renew or to grant a residence permit recognising 'European refugee status' under the Directive if a person poses a danger to the host Member State. A grant of European refugee status comes to an end and a person becomes liable to removal. But because of the declaratory nature of Convention status, as opposed to the status granted by a Member State under the Qualification Directive, a person might retain Convention status even though European refugee status has been revoked: see *Essa (Revocation of protection status)* [2018] UKUT 244. In such circumstances, a Convention refugee may still be subject to permitted *refoulement* under Article 33(2) of the Refugee Convention.

18. The overall burden of proof is on the host state to justify permitted *refoulement*.

19. Section 72 NIAA 2002 is said to reflect the principles outlined in Article 33(2) of the Refugee Convention. It was introduced before the Qualification Directive came into effect. It provides a statutory mechanism by which the Secretary of State seeks to define a 'particularly serious crime' for the purpose of Article 33(2), which then gives rise to a rebuttable presumption that the person is a 'danger to the community'. A court or tribunal considering an appeal against the refusal of a protection claim must begin by considering whether the person has rebutted the presumption that he is a danger to the community. If the court or tribunal considers that the person has failed to rebut the presumption, then it must dismiss the appeal in so far as it relies on Refugee Convention grounds.

20. Despite the inaccurate description of section 72 as "exclusion from protection", when there is no such principle with reference to Article 33(2), the reason why the appeal must be dismissed if a person fails to rebut the presumption that they are a danger to the community, is because a person's removal would not amount to a breach of the United Kingdom's

obligations under the Refugee Convention if *refoulement* is permitted under Article 33(2).

21. In *EN (Serbia) v SSHD* [2009] INLR 459 the Court of Appeal conducted a detailed analysis of section 72. The court emphasised that the provision must be read to comply with Article 33(2) of the Refugee Convention [75]. In so far as section 72 relates to similar wording in the Qualification Directive, it should also be read to conform with European law [80].

22. If a state wishes to remove a refugee it must demonstrate both elements of the test i.e. that the person has been convicted of a particularly serious crime and that they constitute a danger to the community [39]. Both presumptions are rebuttable [80].

23. The court found that there is no need to place a gloss on the express words of Article 33(2). The words 'particularly serious crime' are clear, and themselves restrict drastically the types of offences that might justify permitted *refoulement*. So far as 'danger to the community' is concerned, the danger must be real. If a person is convicted of a particularly serious crime, and there is a real risk of its repetition, then they are likely to constitute a danger to the community [45]. The court recognised that the danger would normally be demonstrated by proof of a particularly serious offence, and the risk of its recurrence, or of the recurrence of a similar offence, but it was not a requirement for there to be a causal connection between the two elements [46].

24. The statutory scheme presumes that the fact of conviction for a particularly serious crime is likely to demonstrate that the person constitutes a danger to the community. The assumption is that the two elements are likely to be close in time and that the conviction itself is enough to make out the second element of the test in order to justify permitted *refoulement*.

25. But what happens in a case such as this, where a period of 23 years elapsed between the appellant's conviction for a particularly serious crime and the date the First-tier Tribunal assessed whether he continued to pose a danger to the community? It is not disputed that the relevant date for assessment of section 72 was the date of the hearing.

26. At that date, the overall burden of proof remained on the Secretary of State to show that the appellant still constituted a danger to the community. The fact of his earlier conviction for an indisputably serious crime gave rise to a presumption that he was a danger to the community under the statutory mechanism, but after such a long period of time, what did the appellant need to produce to discharge the evidential burden to show that he no longer constituted a danger to the community?

27. We learn from *EN (Serbia)* that the risk posed by a person must be real. In practice, a person must still pose a risk of reoffending in a similarly serious way. The assessment under Article 33(2) is <u>not</u> to be approached in the

same way as public interest considerations under Article 8 of the European Convention, where the public interest may still justify deportation even if a person no longer poses a risk of reoffending. Because of the potentially serious consequences of *refouling* a refugee, the danger a person poses under section 72, which must be read to comply with Article 33(2), must reach a minimum level of seriousness before *refoulement* is permitted.

28. It is not disputed that the appellant committed a particularly serious crime. In addition to that, he returned to the UK in breach of the deportation order, which is also an offence. Although it was open to the judge to note that the appellant was convicted of further offences, he recognised that they were not of the same character as the earlier offence. He also noted that the appellant had no further convictions for a period of at least three years preceding the date of the hearing.

29. None of the more recent convictions attracted a custodial sentence and did not come close to showing a repetition of the earlier serious offence. Since 2015 the appellant had not even been convicted of a petty offence. At the date of the hearing, there was no evidence to suggest, and had not been for many years, that the appellant was likely to reoffend in the same way as he had done in 1996. In such circumstances, it was unreasonable to expect the appellant to produce a risk assessment in the form of an OASys report when none of his more recent convictions would have attracted such an assessment by the National Probation Service. Although it was open to the judge to observe that the further convictions showed a disregard for the law, that was not the test he was required to consider. It was only if the appellant continued to constitute a danger to the community of the required level of seriousness that section 72 could apply to justify permitted *refoulement*.

30. We conclude that the First-tier Tribunal applied too high a standard of proof in requiring the appellant to produce further evidence in the form of a formal risk assessment to rebut the presumption that he still constituted a danger to the community. The fact that he had shown a disregard for the law by committing further minor offences was insufficient reason to justify a finding that he constituted a danger to the community given the stringent threshold required to justify permitted *refoulement* under Article 33(2). Insufficient weight was placed on the fact that he had not been convicted of any further offences since September 2015. The serious nature of the initial offence gave rise to a presumption that he posed a danger to the community, but the long passage of time between that offence and the date of the hearing demonstrated that the presumption that he was likely to reoffend in a similar manner was illusory. There was, as a matter of fact, no evidence to show that the appellant still posed a risk of reoffending in a sufficiently serious way to engage the operation of Article 33(2). In our assessment, the facts spoke for themselves and were enough to discharge the appellant’s evidential burden in the unusual circumstances of this case.

31. We set aside the First-tier Tribunal's findings relating to section 72. In the absence of any up to date evidence from the respondent, who bears the overall burden of proving that *refoulement* would be justified under Article 33(2), we find that the factual circumstances, taken alone, are enough for the appellant to rebut the presumption that he constitutes a danger to the community at the date of the hearing.

32. The First-tier Tribunal found that the appellant is an openly gay man who would be at real risk of serious harm for the purpose of Article 3 if returned to Uganda. This finding is sufficient to show that the appellant also has a well-founded fear of ill-treatment amounting to persecution for the purpose of the Refugee Convention. It is not disputed that his well-founded fear of persecution would be for reasons of his membership of a particular social group.

33. For these reasons, we conclude that the appellant has rebutted the presumption that he constitutes a danger to the community for the purpose of section 72(6) NIAA 2002. The appellant's removal in consequence of the decision would breach the United Kingdom's obligations under the Refugee Convention.

DECISION

The First-tier Tribunal decision involved the making of an error of law

The decision is remade and the appeal ALLOWED on Refugee Convention grounds

Signed  Date 05 December 2019
Upper Tribunal Judge Canavan