Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08308/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 July 2019	**On 9 August 2019**

Before

UPPER TRIBUNAL JUDGE KEITH

Between

YANNICK OLIVIER DANBEL DANDOU-BIBIMBOU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms K Cronin of Counsel instructed by Wesley Gryk Solicitors
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. These are the approved record of the decision and reasons which were given ex tempore at the end of the hearing on 22 July 2019.

2. This is an appeal by the appellant against the decision (the 'Decision') of First-tier Tribunal Judge S Rodger (the 'FtT'), promulgated on 12 March 2019, by which she dismissed the appellant's appeal under article 3 of the European Convention on Human Rights ('ECHR') (the ground was made out but the respondent would not remove the appellant to Congo Brazzaville because of the potential risk of breach of article 3); dismissed

his appeal under article 8; and also dismissed his appeal against revocation of his refugee status pursuant to section 72(10) of the 2002 Act.

3. The appellant had been convicted on 24 October 2015 of possession with intent to supply crack cocaine, for which he was sentenced to 30 months' imprisonment. He had a previous conviction on 24 October 2008 for possession of a false identity document, for which he had been separately sentenced to fifteen months' imprisonment.

4. In essence, the appellant's claim involved the following issues: that he remained in need of international protection and that whilst his offence was serious, it was not 'particularly serious', and he was not a danger to the community for the purposes of section 72 of the 2002 Act. He claimed to have rebutted the presumption under section 72.

The FtT's Decision

5. It is clear that the FtT made a careful analysis of the evidence running from paragraphs [33] to [54] of the Decision. The FtT noted the remarks of the sentencing Judge at [25], including the description of the offence as a '*very serious offence'*. The FtT was not impressed by what appeared to be the appellant's lack of acceptance that he had not supplied for financial gain, at [40] to [41] of the Decision. The FtT also referred to the appellant's apparent lack of honesty in claiming a single person's council tax reduction at paragraph [42] of the Decision, although she described that matter as not one of great weight. The FtT concluded that the supply of crack cocaine, was a particularly serious offence, at paragraph [44] of the Decision, considering the well-known authority of **EN (Serbia) v Secretary of State for the Home Department [2009] EWCA Civ 630**. The FtT noted that the appellant had not reoffended, at paragraph [46], but noted the proximity that the appellant's release to the immigration hearing; and the limited weight she attached to a letter of a Lesley Lamptey, which did not appear to be in the format of an OASys Report. There was, for example, no attendance by the appellant at rehabilitation courses. The FtT noted that the appellant was in a relationship with an EEA national but he could continue to have a family life with his partner despite revocation of his refugee status.

The Grounds of Appeal and Grant of Permission

6. The appellant lodged grounds of appeal which are essentially:

   (a) there is an incongruity between Sections 72(10) and 84(3) of the 2002 Act, noting the authority of **Essa (Revocation of protection status appeals) [2018] UKUT 244 (IAC)**;

   (b) the FtT had erred in concluding that the most recent of the appellant's offending was particularly serious and that he was a danger to the community. The sentencing Judge had described the

appellant in a lesser role, meriting a sentence below the starting point of three years;

(c) the FtT had focused unduly on whether the appellant had committed the offence of financial gain, ignoring his repeated admission of his error and the evidence of his partner and his behaviour on release;

(d) the FtT erred in failing to consider that the appellant must constitute a real danger to the community, not making assumptions on what were termed 'reasonable grounds' of such danger; and

(e) it was unfair to criticise Ms Lamptey's correspondence because of concerns which it was said were only raised and addressed in closing submissions.

7. First-tier Tribunal Judge Robertson initially refused permission to appeal in the First-tier Tribunal but this was granted by Upper Tribunal Judge Eshun on 17 June 2019. Judge Eshun concluded that there were arguable errors of law in the Decision although these arguable errors were not identified. The grant of permission, however, was not limited in its scope.

The Hearing Before Me

The appellant's submissions

8. Ms Cronin, who also appeared before the FtT, indicated that it was not open to the FtT dismiss the appeal, following the more limited 'functional' jurisdiction, as a result of appeal rights being narrowed following the Immigration Act 2014. While the Vice President, Upper Tribunal Judge Ockelton had, in the well-known authority of **Essa,** found that the ground of appeal should succeed but at the same time the FtT was bound to dismiss the appeal, in fact the decision of the court in **Essa** should have been that it no longer had a power to dismiss an appeal in these circumstances, noting the incongruity between section 72 and sections 84 to 86 of the 2002 Act. I was referred in this regard to the authority of **EN (Serbia) v Secretary of State for the Home Department & Anor [2009] EWCA Civ 630**.

9. What the FtT should have considered was that somebody with refugee status should have that status left intact and indeed there were practical consequences of its failure to do so. For example, the respondent had given no indication of what consequences would follow the revocation of status; what leave would be granted; or what work or restrictions would be applied. For example, there may be the provision of a six-monthly 'rolling' leave to remain which did not provide the same security of protection as afforded by a full recognition of refugee status. There was also an open question about what happened in terms of restrictions to reside or undertake work, to claim benefits, or, for example, have access to a travel document and the working assumption had to be that this would be rescinded. At the very least I should consider that these issues had been raised at the FtT and had not been considered. It was said that I should therefore assume therefore that no leave would be granted.

10. The FtT also further failed with regard to its consideration of whether the appellant in this case had satisfied the requirements of section 72, in respect of which there were separate considerations. Ms Cronin began by suggesting that the statutory presumption was not on the appellant in these circumstances to rebut, but in fact was, by virtue of **EN (Serbia)** a burden that the respondent had to discharge. However, following further discussions with Ms Cronin, she accepted, particularly by reference to paragraph [80] of the **EN (Serbia)** decision, that in fact the concept of the statutory presumption was one that indeed remained and so that was a question that I needed to consider. It was said that the FtT had also fallen into error by assuming that by virtue of the period of imprisonment, the effect of that automatically meant that the offence in question was indeed particularly serious. I had to consider the authorities of **SSHD v TB (Jamaica) [2008] EWCA Civ 977** and also **Mugwagwa (s.72 – applying statutory presumptions) Zimbabwe [2011] UKUT 338**.

11. I needed to consider in particular the sentencing Judge's remarks. It is at this point worth repeating some of them. At paragraph [25] of the Decision, the sentencing Judge is referred to the appellant having pleaded not guilty. He was eventually convicted on DNA evidence. In his favour, the Judge noted he was an intelligent man, capable of better things and the Judge was sure that it was due to economic circumstances the appellant became involved. He also noted that the appellant did not have previous convictions to do with drugs. The Judge referred to the starting point for sentencing for street dealing in class A drug of three years, with a range of between two to four years. The sentencing Judge placed him below the starting point for two reasons highlighted: the absence of previous convictions relating to the drug offence, and the fact that this was a small quantity of crack cocaine, although the Judge bore in mind that in sentencing it was still a policy to deter drug dealers from dealing in the street which causes problems to innocent members of the public and is difficult to detect. The sentence on that basis was therefore 30 months. The Judge recounted it seemed highly unlikely that any Home Secretary or Minister of Justice would want a 'class A' drug dealer '*on the streets of this country'*. The Judge described it as '*a very serious offence and I warn you now in clear terms because of the sentence I have had to impose on you that you may well be deported at the conclusion of your sentence'*.

12. In essence, I was asked to note that the sentence had been below the starting point which reflected the fact that it was not, in this regard, a particularly serious crime. The FtT was also said to have erred in a second consideration of whether the appellant constituted a danger to the community of the UK. In this regard there was an apparent application of a test of 'reasonable grounds,' referred to at paragraphs [43], [44], [46], [48] and [51] where, for example, there was a reference to a lack of 'persuasive evidence'.

13. In terms of the prior offence involving a passport, I was referred to the criminal authority of **Attorney General Reference Nos 1 & 6 [2018] EWCA Crim 677** whereby those who had previously been refused

protection claims and were awaiting the outcome of a further submission on the point had relatively limited sentences where they had used false documentation and effectively needed some way to support themselves.

14. On the issue of credibility the appellant had been candid that he had been advised by his lawyers to put the Crown to strict proof of the drug offence and he gave a different story, asserting that he had not dealt in drugs at all, as opposed to buying them for a friend. The FtT had erred in focusing on the appellant's apparent refusal to accept that he had been dealing crack cocaine for financial gain, as opposed to his genuine remorse, ignoring evidence from the appellant's partner and his own statement and letters expressing remorse. The appellant was said to have broken friendships with drug users and I should also consider the context of his drug use, in particular the fact that his mother had sadly been killed by the Congolese authorities. There had also been no reference by the FtT to two statements of supporters who gave evidence as to the appellant's good character. The evidence of the partner had in particular been unchallenged. It was also suggested that the council tax statement at page [195] of the appellant's bundle, which referred to a single person's council tax discount was explicable by the fact that it was delivered to his home in December 2015, by which time he was in prison. Correspondence at page [233] of the appellant's bundle was testament to the difficulties which the appellant faced when trying to organise his financial affairs whilst he was in prison.

15. There was also, it was said, a clear misdirection in relation to the Probation Letter from Lesley Lamptey, which was on headed notepaper and at paragraph [46] of the Decision, the FtT had effectively discounted it entirely questioning whether it was genuine at all. In any event we now had a fuller letter from the Probation Service who had set out the basis on which there was a low risk of offending. I did explore with Ms Cronin why a fuller OASys Report had not been sought by reference to a Freedom of Information Act Request. It was suggested a copy had been asked for though she clarified, having taken instructions, that it had not in fact yet been requested under a Freedom of Information Act Request but was 'about to be requested'. In any event, the OASys findings were made clear in the summary document which was produced in the additional evidence which had been submitted to the Upper Tribunal. That clearly attested to the status and identity of the author of the original correspondence and indicating the appellant to have a low risk of reoffending.

The respondent's submissions

16. In response, the Senior Presenting Officer, Mr Tarlow, indicated that he would rely both on the Rule 24 reply and the initial refusal of the First-tier Tribunal Judge Robertson to grant permission. In reality this was a mere disagreement with the findings of the FtT. The FtT had given careful consideration to the appellant's convictions, recited the sentencing remarks at paragraph [39]. Those reasons were within the remit of the

FtT. She had also considered the question of the council tax at paragraph [42] which was also addressed at the document at page [454] of the appellant's bundle. The question was whether the appellant had rebutted the presumption and there was not sufficient evidence for that presumption to have been rebutted.

17. On the question of whether I should follow the authority of **Essa** it was contended that I should and therefore the FtT reasoning disclosed no error of law.

Decision on Error of Law

18. I conclude that there are no errors of law in the FtT's decision. My reasons for these conclusions are as follows.

19. First, it was suggested that the FtT did not have jurisdiction to dismiss the appeal in circumstances where there is a revocation such as this. It was said that the Vice President, Upper Tribunal Judge Ockelton, had not considered the limitation of the functional powers of the Upper Tribunal by virtue of the reduced appeal rights. The consequence was that a dismissal of the appeal under section 72 was no longer open to the FtT - all the FtT could do was uphold or dismiss the appeal on the ground under sections 82 to 84 of the 2002 Act. I do not accept the suggestion that Vice President had ignored or failed to consider the consequences of the narrowing of appeal rights and 'functional abilities', as Ms Cronin described them, to dismiss claims. Indeed, at paragraphs [17] to [18] of the decision in **Essa** he referred expressly to those and it is worth reciting elements of those.

> *"17. In the circumstances in which it applies Section 72(10) requires an appeal to be dismissed even though the ground of appeal is based on the Refugee Convention alone and even though the provisions of the Refugee Convention would require the appeal to be allowed. This perhaps surprising result is in fact consistent with the structure of Section 72 itself".*

He continues:

> *"An officer of the Secretary of State is entitled by Section 72 to presume that Article 33(2) applies to persons within the categories set out, and therefore to make a decision to remove him; and, likewise, a Tribunal considering the same question is required to come to a specific conclusion. Despite sub-Section (1), these are not assessments made by reference to the Refugee Convention in its single autonomous meaning in international law as the decision of the House of Lords in **SSHD v R (Adan)** **[2000] UKHL 67** would require: they are assessments made solely by reference to national law…..*

> 18. *That interpretation of section 72(10) allows it to stand with our preferred interpretation of Sections 82 and 84. To sum up: (1) an appeal under section 82(1)(c) is an appeal against revocation of the basis on which the leave referred to in 82(2)(c) was granted; (2) the appeal is to be determined by reference to the provisions of the Refugee Convention, as that is the only ground allowable under Section 84(3)(a); but (3) where section 72(10) applies, it requires the appeal to be dismissed even though the ground is made out.*
>
> 19. *We note in closing this discussion that even the last of the above propositions does not constitute a contradiction. The amendments under the 2014 Act also deleted those parts of Section 86 of the 2002 Act that required a Tribunal to allow or dismiss an appeal: the only requirement now is usually to determine any matter raised as a ground of appeal (section 86(2)(a)). Thus the way is open for a determination that the ground in section 84 is made out but a decision dismissing the appeal because of the mandatory requirement of section 72".*

20. Therefore, the essential challenge on the first ground, namely a claimed incongruity between sections 72 and 84 to 86 of the 2002 Act, is not born out by the analysis in **Essa**, and the decision upholding dismissal of the appeal under section 72 was unarguably open to the FtT to make, provided that the statutory presumption is not rebutted.

21. The second ground of appeal is in relation to the distinct elements of section 72, namely whether the appellant had rebutted the presumption of conviction of a particularly serious crime and whether he constitutes a danger to the community of the UK.

22. In essence, it was said that the FtT had ignored the sentencing remarks of the Judge who had placed the appellant's sentence below the starting point and therefore it was not a particularly serious crime. Whilst I accept that a sentence will not necessarily be determinative of the question of whether the offence is one of a particularly serious crime, and indeed that is why the presumption is rebuttable, nevertheless I regarded the FtT as aware of that fact and in doing so, she clearly considered the sentencing remarks which she quoted in detail at paragraph [25]. I conclude that she was unarguably entitled to conclude that by virtue of dealing even of a small amount of crack cocaine, that was a particularly serious crime. In doing so, she considered in detail, the circumstances of his conviction, to which she referred in the Decision. Her conclusion discloses no error or law and was adequately reasoned.

23. It was argued that the FtT erred in answering the second question of risk to the community, in focussing unduly on the appellant's apparent disavowal of any responsibility for dealing in drugs for financial gain, by asserting that he merely intended to pass them to a friend. It is fair to say

that that discussion took up some part of the Decision between paragraphs [40] to [42]. Nevertheless, it was unarguably open to the FtT to assess the appellant's continuing attempt to refuse responsibility for dealing for financial gain as relevant to the danger to the community of the UK, something which the sentencing Judge had clearly rejected. The FtT was also unarguably entitled to take into account the appellant's previous conviction for fraud, not on the question of past persistent offending, but more in relation to the question of the appellant's credibility, when assessing his claim not to intend to reoffend in the future, and indeed, it was in the credibility assessment that the FtT raised the issue.

24. I do not accept the reference at [42] of the Decision to the single person council tax reduction as undermining the overall findings in relation to the risk that the appellant poses to the community. The FtT made clear that she did not regard it as being a matter of any great weight.

25. Next was Ms Cronin's assertion that underlying the findings was a theme of a test of 'reasonable grounds' for regarding the appellant as a danger to the community, when the test should be whether he presented a real danger. However, that same assertion began in the context of Ms Cronin's abandoned assertion that the burden was on the respondent to prove a particularly serious crime and that the appellant was a danger to the community, without the application of a statutory presumption. Having reviewed the Decision, references made by Ms Cronin to the FtT not being satisfied that there was 'persuasive evidence,' such as at [47], cannot, when read as a whole, be taken to mean more that the appellant had not rebutted the statutory presumption, rather than the application of a higher, 'reasonable grounds' test.

26. The final element of the appeal relates to what is said to be the failure to consider evidence as to the danger posed by the appellant to the community, including an unfair criticism of the Probation Service correspondence, which the appellant says is bolstered by further submission of a more detailed letter to the Upper Tribunal; and failing to place weight on the evidence of the appellant's partner and supporters.

27. In relation to the Probation Service evidence, the FtT had indeed criticised the correspondence from Lesley Lamptey at [46]. The FtT noted that the letter was undated and the electronic signature appeared to be relatively illegible, with no evidence for the FtT to be satisfied that the document had been signed by the person claimed as its author. Further, the letter was very short and whilst it referred to the appellant having been assessed as posing a low risk of harm and there were no concerns that arose, nevertheless there was no detail as to who had assessed him as posing a low risk of that harm and on what information they had based that assessment on. For example, the FtT noted that in the absence of being provided a copy of the OASys assessment, it was difficult to know whether the assessment was based on the appellant accepting his guilt in street drug dealing for financial profit or whether it was based on the

appellant relying on the account that he has subsequently relied on as part of his immigration appeal, namely not for financial profit. This would clearly be relevant to any assessment in the level of danger he poses to the community. There was insufficient detail in the letter of Lesley Lamptey for the FtT to be able to find that the contents of that letter were sufficient, whether on their own or in conjunction with the appellant's lack of conviction since being on bail to make a finding that he is not a danger to the community. Further, the FtT noted the absence of reliable evidence that he has attended rehabilitation courses and was now remorseful of the impact that his offending has had on drug addicts and the wider UK community.

28. Whilst there is some force to the challenge that the FtT's doubt about the provenance of the letter was made without him having the chance to meet this concern, it is not enough to merit setting aside the Decision. The authenticity of the letter was only one discrete aspect of the FtT's analysis and her wider concerns, noting at [61], the brevity of the letter - referring to details of the appellant's imprisonment, being released on licence and being supervised by the author. The letter refer to the appellant wishing to be a personal trainer and engaging well; and an assessment of him as posing a low risk of harm and no concerns arising with regard to reoffending. However, the FtT was unarguably entitled to conclude that this did not even begin to amount to a full OASys report assessment, nor indeed did the subsequent correspondence that was provided to the Upper Tribunal, whilst more detailed, provide much more than conclusions, rather than explain the analysis by which those conclusions were reached, which the FtT might review, by reference to the acceptancy of dealing for financial gain and the risk factors (such as adequate financial means in the future). I take judicial notice of the fact that such full OASys reports are frequently lengthy and detailed and it is open to FtT Judges in these circumstances to review the analysis when asking whether the statutory presumption is rebutted. In simple terms, the FtT was unarguably entitled to place limited weight on a summary letter, in circumstances where even by the date of the Upper Tribunal hearing, and despite legal representation, it was open to him to ask for a full copy of that report under a Freedom of Information Act request, but he has not done so, without explanation. While the Probation Service documents are genuine, the FtT considered them on their face, regardless of her concerns about their provenance, and did not commit an error of law when placing limited weight on them in the absence of a full report.

29. On the issue of consideration of the wider evidence from the appellant's partner and supporters, as to the extent to which the appellant had sought to turn his life around, the FtT had specifically considered the relationship between the appellant and his partner and indeed, there was an active consideration of that in the context of article 8. There is no requirement to specifically refer to all of the evidence, particularly where, as here, the FtT has referred to considering all of the evidence and submissions at [30]. The FtT heard live evidence from the appellant's partner, but despite the partner's assurances as to the limited risk posed by the appellant, was

unarguably entitled to place limited weight on this, and the appellant's supporters, in light of the absence of objective evidence such as the OASys report.

30. In my view there are no errors of law in the Decision. The appellant's challenge fails and the Decision shall stand.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision of the First-tier Tribunal stands.

No anonymity direction is made.

Signed J Keith Date 30 July 2019

Upper Tribunal Judge Keith

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed J Keith Date 30 July 2019

Upper Tribunal Judge Keith