Appeal Number: UI-2022-003271
(PA/04498/2017)

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

ON APPEAL FROM THE FIRST-TIER TRIBUNAL (IAC),
Judge Monson

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Issued**
On the 8 November 2022	**On the 30 November 2022**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

ML (NIGERIA)
(ANONYMITY ORDERED)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Allan Briddock, instructed by Camden Community Law Centre
For the Respondent: Toby Lindsay, Senior Presenting Officer

ORDER REGARDING ANONYMITY

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. I make this order because the appellant seeks international protection.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellant appeals, with permission granted by First-tier Tribunal Judge Murray, against the decision of First-tier Tribunal Judge Monson, dismissing his appeal on protection and human rights grounds.

2. The lengthy background to the appeal was set out in full detail at [10]-[19] of the FtT's decision. I do not propose to repeat all that is said there. It suffices for the purposes of this decision to note that: (i) the appellant is a foreign criminal who was convicted of cheating the public revenue and received a total sentence of four and a half years' imprisonment and (ii) he sought to resist deportation to Nigeria on the basis that (a) he would be at risk of persecution there on account of his bisexuality (and his faith, although that was not pursued before the FtT) and that (b) his removal would be in breach of his rights under Article 3 ECHR on account of his mental health problems.

The Appeal to the First-tier Tribunal

3. The appeal was dismissed by the judge in a detailed decision which runs to 100 paragraphs. His ultimate conclusions might nevertheless be stated shortly. The judge concluded that the appellant was not entitled to protection from *refoulement* to Nigeria because he had committed a particularly serious crime and continued to represent a danger to the community of the United Kingdom: [58]-[64]. For reasons he gave at [66]-97], the judge did not accept that the appellant was bisexual or that the account he had given of previous persecution on that account was true. At [98]-[99], he did not accept that the appellant's removal would be contrary to Article 3 ECHR because he did not accept that the appellant was suffering from PTSD or that he would be unable to access treatment in the event that his symptoms were real rather than feigned.

The Appeal to the Upper Tribunal

4. Permission to appeal was sought and granted, as I have said, by Judge Murray. She considered it arguable that the judge had given inadequate reasons for his conclusion that the appellant had not rebutted the presumption that he represented a danger to the community of the UK; that he had failed to apply the Presidential Guidance Note No 2 of 2010 to the assessment of the appellant's credibility; and that his approach to the expert evidence was contrary to the principle in Mibanga v SSHD [2005] EWCA Civ 367; [2005] INLR 377.

5. The respondent filed a rule 24 response in which she invited the Upper Tribunal to uphold the decision of the FtT. At the outset of the hearing, I asked Mr Lindsay whether he intended to maintain that stance. He indicated that he did and, given the clarity with which the grounds of appeal were expressed, I invited him to make submissions first.

Submissions

6. Mr Lindsay submitted that the judge had been entitled to conclude - for the reasons that he had given - that the appellant had failed to rebut the presumption in s72 of the Nationality, Immigration and Asylum Act 2002. The judge had been aware of the appellant's status as a vulnerable witness and had obviously borne it in mind throughout his assessment. It should not be assumed that the judge had omitted a step in his reasoning. The Court of Appeal and the Upper Tribunal had adopted a common sense approach to the principle in Mibanga in recent years, emphasising that judges were required to consider all of the evidence in a case before reaching a final conclusion but that their decisions necessarily had to consider evidence and issues individually as well as cumulatively.

7. Mr Briddock responded briefly, emphasising what he said was the absence of reasons in relation to the material part of the s72 assessment and the consideration of the appellant's evidence as that of a vulnerable witness.

8. I reserved my decision.

Analysis

9. The decision of the First-tier Tribunal is detailed and, in many respects, cogently reasoned. I remind myself of what was said by the House of Lords in SSHD v AH (Sudan) [2007] UKHL 49[2008] 1 AC 678 and by the Supreme Court in Perry v Raleys Solicitors [2019] UKSC 5; [2020] AC 352. The FtT is a specialist body, tasked with administering a complex area of law in challenging circumstances. It is likely that, in doing so, it will have understood and applied the law correctly. Appellate judges should not rush to find misdirections merely because the judge at first instance might have directed themselves more fully or given their reasons in greater detail. There is a real rationale for the deference which an appellate court will display towards a trial judge's findings of fact, and proper restraint must be exercised before deciding to interfere with such findings.

10. I consider the appellant's various grounds of appeal with those principles firmly in mind but I come to the clear conclusion that the judge erred in law in this case and that his decision to dismiss the appeal cannot stand. I reach that conclusion for two reasons.

11. The first concerns the judge's assessment under section 72 of the 2002 Act, which applies a legally permissible presumption to the assessment required by Article 33(2) of the Refugee Convention: EN & KC v SSHD [2009] EWCA Civ 630; [2010] 1 QB 633. As I have said, the judge's assessment of this question took place over the course of [58]-[64]. It was accepted (unsurprisingly) by Mr Briddock that the appellant's crime was particularly serious. The focus of the assessment was therefore on whether the appellant had rebutted the statutory presumption that he represented a danger to the community of the UK. The judge was plainly cognisant of the appellant's case in this regard, and took account of the various items of evidence which were said to show, firstly, that the circumstances in which the offences had taken

place had now passed and, secondly, that the appellant had learned from his errors and mended his ways. Then, at [64], the judge set out his conclusion in the following way:

> I accept that currently the Appellant is under no financial pressure in terms of being able to survive as he currently qualifies for NASS support. But he engaged in his offending between 2012 and 2013 notwithstanding the fact that he was being financially supported by his wife in Italy. I accept that the Appellant is not currently in a position to engage in the same or similar type of sophisticated financial fraud for which he was convicted in 2014, because he does not enjoy the same freedom of movement; his circumstances are considerably reduced in comparison to what they were in 2012 and 2013; and he is suffering from mental health problems. Nevertheless, on a holistic assessment of all the available evidence, I find that the Appellant has not rebutted the presumption that he continues to present a danger to the community.

12. The complaint made by the appellant is that the final sentence comes, in effect, out of nowhere. The judge considered a variety of evidence which militated in favour of the appellant having rebutted the presumption but then concluded that he had failed to do so. It is contended that there are no, or no adequate reasons, for that conclusion.

13. For the respondent, however, Mr Lindsay makes an equally simple submission, which was rightly acknowledged by Mr Briddock to have been made attractively. He submits that the default position is defined by statute; the appellant committed an offence for which he was sentenced to more than 2 years' imprisonment and the law therefore presumes that he continues to represent a danger to the community. Having considered all that was said to counter that presumption, the judge was required to do nothing more than to conclude that it did not suffice, in Mr Lindsay's submission.

14. As attractively as the submission was made, I am unable to accept it. The appellant's offending took place a decade ago and all the evidence cited by the judge tends to suggest that there is no reason to think that there is a risk of reoffending. The judge was best placed to assess that evidence and he was not bound to accept it but the final sentence of [64] does not enable the reader to understand *why* the judge concluded that the appellant had failed to rebut the presumption. The decision fails, in my judgment, to pass the test for adequacy of reasons set out at [13]-[16] of R (Iran) & Ors v SSHD [2005] EWCA Civ 982; [2005] Imm AR 535, as it does not identify the manner in which the judge resolved this critical issue.

15. I also find there to be merit in the appellant's criticism of the judge's assessment of the appellant's credibility. Again, in deference to the judge, I note that his assessment took place over several pages and that there were a number of cogent points which tended to suggest, frankly, that the appellant's version of events was a fabrication from first to last. As Mr Lindsay observed, that assessment also took place

in the context of the judge having noted at [21], [36] and [57] that the appellant was a vulnerable witness and was to be treated as such. It is apparent that the judge made proper allowance for that designation during the hearing, in that he gave the appellant a break during his evidence, for example. The difficulty with the judge's decision is that there is no point within it at which he undertakes the assessment required by [15] of the Joint Presidential Guidance Note No 2 of 2010, which is in the following terms:

> The decision should record whether the Tribunal has concluded the appellant (or a witness) is a child, vulnerable or sensitive, the effect the Tribunal considered the identified vulnerability had in assessing the evidence before it and thus whether the Tribunal was satisfied whether the appellant had established his or her case to the relevant standard of proof. In asylum appeals, weight should be given to objective indications of risk rather than necessarily to a state of mind.

16. Mr Lindsay accepted that there was evidence before the judge, which was accepted by him when he decided to treat the appellant as a vulnerable witness, which suggested that the appellant had PTSD and other mental health problems. I need not set out the contents of that evidence in any detail. Mr Lindsay also accepted, as he was bound to, that there was no point in the decision that the judge undertook the exercise required by [15] of the Presidential Guidance.

17. Mr Lindsay nevertheless made two submissions in defence of the judge's decision. By the first, he invoked two of the three principles set out by Lord Hamblen at [72] of SSHD v HA (Iraq) & Anor [2022] UKSC 22; [2022] 1 WLR 3784: "[w]here a relevant point is not expressly mentioned by the tribunal, the court should be slow to infer that it has not been taken into account" and "[w]hen it comes to the reasons given by the tribunal, the court should exercise judicial restraint and should not assume that the tribunal misdirected itself just because not every step in its reasoning is fully set out".

18. I am unable to accept that recourse to these principles suffices to bridge the obvious gap in the judge's reasoning process. The importance of [15] of the Guidance has been underscored in authority of the Upper Tribunal and the Court of Appeal. A judge who has conducted a hearing impeccably, by making appropriate adjustments to the hearing to ameliorate the difficulties caused by the vulnerability in question, might nevertheless err fundamentally if he then fails to consider the evidence through the prism of that individual's specific vulnerability. Here, it was necessarily incumbent upon the judge to consider whether the many difficulties with the appellant's evidence might be attributable, in whole or in part, to his PTSD and other such complaints. I cannot merely assume that the judge took account of those matters and rejected them, which is what Mr Lindsay must be taken to have invited me to conclude.

19. Undaunted by that difficulty, Mr Lindsay submitted, secondly, that the difficulties with the appellant's account, as identified at length by the judge, were not the sort of difficulties which might properly be 'explained away' by reference to his PTSD. Again, this submission was

attractively made but I am satisfied that it was wrong, for the reasons given by Mr Briddock. I use the one example on which the advocates focused on order to explain why I agree with Mr Briddock.

20. Mr Lindsay submitted that the judge had observed that the appellant had returned to his home area when he was returned (unlawfully) by the respondent to Nigeria. These were not thought by the judge to be the actions of a man who was genuinely in fear of his life on account of his sexual orientation. As Mr Briddock submitted, however, these might not be the actions of a *rational* man fearing for his life, but that says very little about the plausibility of a man with the appellant's mental health conditions acting in this way. It might have been that he was so overwhelmed by his mental health problems on return to Nigeria that he took a step which no rational person would have taken. That evaluation was for the judge, and it is absent from the decision. Despite Mr Lindsay's valiant attempt to sustain the decision, it is in my judgment flawed on this significant basis.

21. I do not propose in the circumstances to consider the third ground of appeal, although it is appropriate to record that it raised further complaints about the judge's assessment of the appellant's case, all of which were considered to be arguable when Judge Murray granted permission.

22. It follows from my conclusion on grounds one and two that the otherwise thorough decision of the FtT is flawed in law and cannot stand. Mr Briddock submitted that the proper relief was remittal to the FtT *de novo* in the event that I was with him on the second ground of appeal. Mr Lindsay did not suggest that that was inappropriate, and I agree. I therefore set aside the decision of the FtT in full and order that the appeal be remitted to the FtT and considered afresh by a judge other than Judge Monson.

Notice of Decision

The appellant's appeal is allowed. The decision of the FtT is set aside. The appeal is remitted to the FtT to be heard afresh by a different judge.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

18 November 2022