



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004929
First-tier Tribunal No: PA/07858/2019

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 19 May 2023

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

XX
(ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Ms V Easty, counsel instructed by Duncan Lewis & Co Solicitors
For the Respondent: Ms A Nolan, Senior Home Office Presenting Officer

Heard at Field House on 19 April 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

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

Introduction

1. This is the remaking of an appeal against the decisions of the Secretary of State of 1 and 30 August 2019 to refuse the appellant's protection application.

Anonymity

2. An anonymity direction was made previously and is reiterated because this is a protection matter involving a vulnerable appellant who has been accepted as a victim of modern slavery.

Background

3. It is the appellant's case that he entered the United Kingdom clandestinely during 2006. Between August 2006 and October 2009, the appellant received convictions for five offences which were trademark and minor traffic offences. He was, in 2016, convicted of possession of cannabis with intent to supply as well as an offence relating to criminal property. He was sentenced to two years' imprisonment for both offences. Thereafter the appellant applied for asylum during which he raised a claim that he was a victim of trafficking. The appellant's asylum claim was refused and his appeal against that decision was dismissed in July 2017. The appellant made further representations which were ultimately considered and refused by way of a decision dated 1 August 2019. This is the decision which is the subject of this appeal. A supplementary refusal letter was also issued on 30 August 2019. The appeal was heard by the First-tier Tribunal during 2019 but that decision was set aside by the Upper Tribunal and remitted to the First-tier Tribunal for a rehearing.
4. On 16 November 2020, the Single Competent Authority (SCA) decided that there were reasonable grounds to accept that the appellant was a potential victim of modern slavery. On 13 June 2022, following further enquiries the SCA decided that the appellant was a victim of modern slavery, in the form of forced criminality.
5. The rehearing of the appellant's appeal took place before a panel of the First-tier Tribunal on 19 July 2022. The appeal was allowed under the Refugee Convention as well as on Article 3 medical grounds.
6. At a hearing before the Upper Tribunal on 14 February 2023, the decision of the First-tier Tribunal was found to contain a material error of law in that the panel failed to consider whether the appellant was excluded from protection under section 72 of the Nationality, Immigration and Asylum Act 2002. The decision to allow the asylum part of the appeal was set aside, with all findings preserved. Also preserved was the decision of the panel to allow the appeal on Article 3 medical grounds, which was not subject to any challenge by the Secretary of State.
7. In advance of the hearing, those representing the appellant submitted a skeleton argument, an updated witness statement from the appellant, an addendum psychiatric report as well as Home Office guidance in the form of Exclusion (Article 1F) and Article 33(2) of the Refugee Convention, version 7.0, which was published on 28 June 2022.
8. In the appellant's witness statement dated 12 April 2023, he mentions the circumstances which led to him being found to be a victim of forced criminality.

In 2020, a trafficker, Mr Chen, asked me to commit cannabis related offences on multiple occasions but I refused and was assaulted and beaten due to this. Every time this happened, I reported it to the police and went to a Court hearing as a witness in February

2022. I told the Court how Mr Chen tried to recruit me into working for his cannabis business and how he assaulted and beat me when I refused to do this.

9. The addendum report of Dr Nuwan Galappathie confirms that the appellant continues to suffer from a provisional diagnosis of a neurocognitive disorder caused by a head injury as a result of a severe beating dating from 2004, a severe episode of depression, general anxiety disorder and Post-Traumatic Stress Disorder.
10. In addition, Dr Galappathie commented on the risk of the appellant reoffending, whether he was a danger to the public and provided recommendations for managing risk. He also recommended that the appellant be considered to be a vulnerable witness, stating that he was fit to give evidence provided adjustments and specific special measures were in place.

The hearing

11. Ms Nolan clarified that the respondent's position was that the appellant had committed a particularly serious crime and he was a danger to the community. There had been no compliance by the Secretary of State with the directions to file a skeleton argument as the case had been allocated to Ms Nolan in place of the previous presenting officer.
12. As the appellant had been identified as a vulnerable witness, I asked Ms Nolan to have regard to the recommendations in the psychiatric report. She stated that she wished to ask a few questions about his current circumstances. Ms Easty assisted by stating that the representatives had discussed cross-examination and that Ms Easty was happy that the questions were uncontroversial. Thereafter, I heard evidence from the appellant, with the assistance of a Mandarin-speaking interpreter. Ms Nolan's cross-examination of the appellant was entirely appropriate, and I am satisfied that he was fit and able to be questioned.
13. I was then assisted by submissions from both representatives which are summarised here. Ms Nolan submitted that the appellant was convicted of a particularly serious offence which was reflected in the two- year sentence he received for possession of cannabis with intent. This was a serious offence because of the impact of drugs on users and the wider community. Regarding the rebuttal of the presumption of dangerousness, the relevant factors in the appellant's case were contained in the addendum psychiatric report. Specifically, that environmental factors were more likely to have contributed to his offending, that the appellant was easily influenced at the time of the index offence, that he still denied committing an offence and that he was incapable of demonstrating understanding or remorse as a result of rigidity caused by his neurocognitive disorder.
14. Ms Nolan emphasised that the positive conclusive grounds decision related to matters taking place in 2020 and not the offence which led to the appellant's 2016 conviction. The trafficking expert's report before the First-tier Tribunal had stated only that there were indicators that the appellant may have been a victim of trafficking at several points of his account and the respondent did not accept

that the index offence was committed owing to the appellant being a victim of modern slavery.

15. Returning to Dr Galappathie's report, Ms Nolan drew my attention to the required careful approach towards risk management so the appellant could be safely managed in the community. Those interventions were stable accommodation, access to mental health treatment, avoidance of alcohol and substance misuse and need to avoid criminal associates. She submitted that there was no evidence that these interventions were in place.
16. As for the appellant's evidence, Ms Nolan submitted that he had said that his mental health was not good but that he was not taking medication for this, he was using alcohol to help with back pain and had stable accommodation. While acknowledging that the psychiatric report found that the appellant posed a low risk, this was on the basis that the appellant could be safely managed with the recommended interventions. The appellant had not rebutted the presumption.
17. Ms Easty relied on her detailed skeleton argument as well as the supporting evidence. She succinctly responded to the points made by Ms Nolan which I summarise below.
18. The appellant had no indication as to how the Secretary of State's case would be put. The respondent had not provided a skeleton argument or any supporting evidence such as an OASys report to show that she was relying on anything other than the length of the sentence. Ms Easty asked me to reject the submission that the appellant's vulnerability made him more dangerous. She suggested that had the trial judge known of the appellant's neurological difficulties, it might have made a difference to the outcome of sentence. The respondent had not mounted a positive case but was instead relying on the appellant's expert report. Dr Galappathie had not said that the appellant was an alcoholic and had recorded that he did not report drinking to excess. The appellant's oral evidence was that he drank a small amount of alcohol to enable him to sleep because of a bad back and this did not demonstrate alcoholism or a tendency to reoffend. In terms of risk management, the appellant had stable accommodation, he wished to work, and it was open to the Secretary of State to facilitate permission to work. The appellant's inability to understand that he had offended should not work against him and the psychiatric report showed that the appellant understood that he needed to avoid those involved in offending. That he had reported a criminal and given evidence in court demonstrated rehabilitation. The appellant was not a danger to the community and had clearly rebutted the assumption.
19. At the end of the hearing, I reserved my decision.

Decision on remaking

20. In reaching this decision, I have taken into consideration all the evidence before me as well as the submissions made.
21. The relevant law is set out in section 72 of the 2002 Act as well as Article 33(2) of the Refugee Convention as follows.

Serious criminal

(1) This section applies for the purpose of the construction and application of Article 33(2) of the Refugee Convention (exclusion from protection).

(2)A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is—

(a)convicted in the United Kingdom of an offence, and

(b)sentenced to a period of imprisonment of at least two years.

(6)A presumption under subsection (2), (3) or (4) that a person constitutes a danger to the community is rebuttable by that person.

Article 33(2)

The benefit of the [non-refoulement] provision may not, however, be claimed by a 2 refugee whom 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.

22. The respondent did not address her mind to Section 72 prior to submitting her grounds of appeal against the decision of the First-tier Tribunal. In those grounds, the respondent only raised the fact that the panel failed in its statutory duty to consider excluding the appellant owing to the two-year prison sentence he received. I have had regard to the judge's sentencing remarks in order to consider all the circumstances of the offence, applying *IH* (s,72; 'Particularly Serious Crime') Eritrea [2009] UKAIT 00012, however those remarks lack detail and as such provide little to no assistance. Based on the evidence, before me I am satisfied that the appellant's offending which concerns possession of illicit drugs with intent to supply and which resulted in the required two-year sentence amounts to a particularly serious offence.
23. Turning to the presumption of dangerousness, the respondent's guidance, at page 36 gives the following advice to caseworkers, which I consider has application in this case.

The individual must therefore be given the opportunity to rebut this presumption and any evidence provided must be carefully considered in assessing whether they are a danger to the community. Factors such as the motivation for their crime, likelihood of reoffending and mental capacity should be considered as part of this assessment. You do not need to provide the opportunity to rebut this presumption where you already have sufficient evidence which demonstrates that they are not a danger to the community. For example, in some cases there will already be sufficient evidence from the prison. Another example could be where they received a conviction a number of years ago, which resulted in a 2-years sentence, and all the evidence indicates they are a reformed character who does not pose a danger to the community.

24. As indicated above, there was no compliance by the respondent with the Tribunal's direction to submit a skeleton argument in advance of the remaking hearing. At the hearing itself, there was no challenge on behalf of the respondent to the credibility of the appellant's written or oral evidence. In addition, Ms Nolan did not challenge the expertise or opinion of Dr Galappathie, rather she relied on several parts of his report during her submissions.
25. I also found the appellant to be a witness of truth for the following reasons. He answered all questions posed promptly, in detail and consistently. Furthermore, he was candid about his alcohol consumption.

26. Dr Galapatthie was asked by those representing the appellant to comment on his future risk of harm risk of reoffending and whether he posed a danger to the public. I am satisfied that Dr Galapatthie was provided with all the necessary information to address those issues. At paragraph 70 of the report, it is noted that the appellant was aged 37 at the time of his first traffic offences and that the index offence did not occur for a further 7 years, which suggested that 'he does not have an underlying tendency to commit offences and environmental/situational factors' were more likely to have contributed to his offending. Dr Galapatthie then examined those factors, noting that the provision of stable accommodation was key, that work would give him a sense of purpose, that he should avoid those involved in criminal activity and avoid substance misuse. Dr Galapatthie concluded that the appellant's risk of offending and causing harm to others was low and could be safely managed in the community.
27. Recommendations for managing risk were that the appellant acquired stable accommodation, treatment for his mental health diagnoses, avoided substance misuse and criminal associates, was permitted to work and having a stable immigration status.
28. Ms Nolan contended that the appellant's environment contributed to a risk of offending. She noted references in Dr Galapatthie's report to the appellant being easily influenced at the time of the index offence as well as his inability to demonstrate understanding or remorse for the offence owing to his neuro cognitive disorder. Those submissions were not supported by the evidence before me. The appellant has now been accommodated by a local authority, he is due to be granted leave to remain following his article 3 appeal being allowed, he does not use illicit drugs and his alcohol intake is limited to a drink or two at night time to relieve back pain to enable him to sleep. In addition, the appellant has not offended in the five or six years since he served his sentence and there is up-to-date expert evidence that he poses a low risk of re-offending and causing harm. The genuine nature of the appellant's rehabilitation is evidenced by his willingness to report a named individual who involved him in criminal activity at gunpoint as well as the fact that the appellant gave evidence in court against that person. It is these events which led to the appellant's account of being subject to modern slavery being accepted by the SCA. There is a dearth of evidence to suggest that the appellant presents a danger to the community.
29. The panel of the First-tier Tribunal found that there was a reasonable degree of likelihood that the appellant would face persecution in China for the reasons he claimed. Having carefully considered all matters, I am satisfied that the appellant has rebutted the presumption of dangerousness and as such there is no justification for excluding him from the benefit of the Refugee Convention.

Decision

The appeal is allowed on protection grounds.

T Kamara

Judge of the Upper Tribunal
Immigration and Asylum Chamber

25 April 2023

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

T Kamara
Judge of the Upper Tribunal
Immigration and Asylum Chamber

25 April 2023

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.

3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent" is that appearing on the covering letter or covering email