IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001784
First-tier Tribunal Nos:
RP/50104/2021
LR/00072/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 24 July 2023

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

YM
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr A Basraa, Senior Presenting Officer
For the Respondent: Mr I Ricca-Richardson, Counsel, instructed by Luqmani Thompson & Partners

Heard at Field House on 6 July 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. I shall refer to the parties as they were before the First-tier Tribunal: the Secretary of State is once more "the Respondent" and Mr YM is "the Appellant".

2. The Respondent appeals with permission against the decision of First-tier Tribunal Judge Cary ("the Judge"), promulgated on 3 May 2023 following a hearing on 28 April 2023. By that decision, the Judge allowed the Appellant's appeal against the Respondent's decision to revoke his refugee status. That decision was based on paragraph 339AC(ii) of the Immigration Rules and included the issuing of a certificate under section 72 of the Nationality, Immigration and Asylum Act 2002, as amended.

3. The Appellant, a citizen of Sudan, was recognised as a refugee in this country in 2007 and granted five years' leave to remain. He was granted indefinite leave to remain in 2012.

4. Following a couple of minor convictions the Appellant was then convicted of GBH in or around December 2017, following which he was sentenced to two years' imprisonment.

The issues

5. This appeal is concerned with the section 72 certificate, specifically the second rebuttable presumption, namely whether the Appellant constituted a danger to the community of the United Kingdom. The Judge concluded that the Appellant had been convicted of a particularly serious crime and that is not in dispute.

6. The Respondent's challenge concerns the approach taken by the Judge to the standard of proof. At [38], the Judge made reference to section 72 and stated that: "The standard of proof is the same that normally applies in asylum cases namely a reasonable degree of likelihood". The last sentence of [47] reads as follows:

> "The Appellant only has to establish that he is not a danger to the community on the lower standard of proof and in those circumstances I am prepared to accept that he is able to rebut the statutory presumption and

establish that it is not reasonably likely that he represents a current danger to the community".

In light of that core conclusion the Judge allowed the appeal.

The grounds of appeal

7. The Respondent's grounds of appeal are narrowly drawn. At [4] it is said that the Judge fell into error by applying an "unlawful lower standard of proof" when considering section 72. At [5] it is said that this alleged error was "self-evident" with reference to what the Judge had said at [38] and [47], to which I have already referred.

8. Permission was granted by the First-tier Tribunal without providing any reasons whatsoever for so doing. I observe here that this approach is not compliant with guidance from the Upper Tribunal to the effect that reasons for the grant or refusal of permission must be stated.

9. Following the grant of permission Mr Ricca-Richardson, who appeared before the Judge, provided a detailed rule 24 response.

The hearing

10. At the hearing I asked Mr Basraa and Mr Ricca-Richardson if they were aware of any authority which had specifically dealt with the question of the standard of proof applicable to the rebuttal of a presumption under section 72. Neither could point to any. As it was the Respondent's appeal, I asked Mr Basraa to explain why it was that the balance of probabilities was the applicable standard. He relied on [45] of EN (Serbia) [2009] EWCA Civ 630; [2010] 3 WLR 182 and [13] and [14] of IH (s.27; 'Particularly Serious Crime') Eritrea [2009] UKAIT 00012. When pressed to elaborate, he submitted that the Judge had not grappled with the need for the danger to be "real" as stated in [45] of EN (Serbia). He did not accept Mr Ricca-Richardson's submission in the rule 24 response that the evidence before the Judge was so strong that any error of law as to the standard of proof was immaterial. Mr Basraa did accept that none of the evidence before the Judge had been challenged, nor had there been any such challenge in the grounds of appeal.

11. Mr Ricca-Richardson submitted that EN (Serbia) did not support the Respondent's contention on the standard of proof issue. With reference to his previous skeleton argument and the rule 24 response, Mr Ricca-Richardson submitted that the reasonable likelihood standard was correct, or at least that the Judge had not erred in law by applying it. He accepted that the Judge could have worded his self-direction more clearly at the end of [47], but submitted that it was the second part of that final sentence which indicated the correct approach and that if one were to substitute the phrase "real risk" for "reasonably likely" it would sit well with what was said in EN (Serbia). He submitted that in any event, even if the Judge had erroneously applied the balance of probabilities, the unchallenged evidence was overwhelming and the Judge would inevitably have come to the same conclusion, namely that the appellant had rebutted the presumption as to danger.

12. At the end of the hearing I reserved my decision.

Decision

13. I remind myself of the need for appropriate judicial restraint before interfering with a decision of the First-tier Tribunal. Any misdirection in law must be clearly established.

14. For the reasons set out below, I am not satisfied that the Respondent has identified an error on the Judge's part relating to the standard of proof.

15. Firstly, EN (Serbia) says nothing about the standard of proof. It is apparent that the Court was not being asked to deal with that particular issue at [45] or elsewhere in its judgment. The reference in [45] to the need for the danger to the community to be "real" was in fact addressing the issue of the presumption from the opposite perspective, namely that the Respondent needed to show that the danger was real before the question of rebuttal arose.

16. Secondly, the decision in IH takes the Respondent's case no further. What is said at [13] and [14] is concerned with the significance of

excluding an individual from the protection of the Refugee Convention; it says nothing about the standard of proof applicable to the rebuttable presumptions.

17. Thirdly, I am not aware of any authority which has specifically addressed this question of law.

18. Fourthly, there is in my judgment no reason in principle, and certainly none to which Mr Basraa was able to point, why the Judge's approach was clearly wrong.

19. Fifthly, if one looks again at [45] of EN (Serbia) it is clear that the Court was indicating that the danger had to be "real" and not simply speculative. If the danger had to be real for the presumption to apply, it makes sense for the individual seeking to rebut the presumption to be able to show that it was not reasonably likely that they did in fact represent a danger to the community. If the words "real risk" were substituted for "reasonably likely" in that equation, there is nothing objectionable about the level at which the standard of proof was set by the Judge.

20. Sixthly, and following on from the preceding point, I have read the Judge's decision sensibly and holistically, as I am bound to do. In that context, I accept Mr Ricca-Richardson's submissions that the second half of the final sentence of [47] represents the self-direction which the Judge in fact applied: "I am prepared to accept that [the Appellant] is able to rebut the statutory presumption and establish that it is not reasonably likely that he represents a current danger to the community".

21. In light of the above, and in combination with the detailed consideration of the significant evidence before him, the Judge was entitled to allow the appeal on the basis he did.

22. In the event that I were wrong in my primary conclusion that the Judge had not erred in respect of the standard of proof, and assuming that he should have applied the balance of probabilities standard, I am

satisfied, that the nature and unchallenged status of the evidence before him meant that the outcome would inevitably have been the same.

23. I do not propose to set out all of that evidence here, but would refer to the helpful summary set out at [23]–[27] of Mr Ricca-Richardson's rule 24 response. I reiterate that that evidence was not challenged before the Judge and has not been challenged in the grounds of appeal. The evidence was plainly very significantly in the Appellant's favour. No material matters were left out of account (certainly the Respondent has not sought to identify any). I note in particular the Judge's repeated reference in his decision to there being "no evidence" or "nothing" to suggest that the Appellant represented a danger to the public. On any rational view this was not a marginal decision by the Judge. If the standard of proof had been raised from reasonable likelihood/real risk to the balance of probabilities this was plainly not requiring certainty on the Judge's part, only that it was more likely than not that the Appellant did not represent a danger. The significant body of evidence pointed in one direction only.

24. In light of the above, the Respondent's appeal is dismissed in respect of the grounds put forward and, alternatively, on the question of materiality.

Anonymity

25. I make an anonymity direction in this case because the Appellant is a refugee and there is no reason why the Tribunal's usual practice should be departed from.

Notice of Decision

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

The decision of the First-tier Tribunal stands.

The appeal to the Upper Tribunal is accordingly dismissed.

H Norton-Taylor

Judge of the Upper Tribunal

Immigration and Asylum Chamber

Dated: 18 July 2023