IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002343

First-tier Tribunal No: PA/53101/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

22nd September 2023

Before

UPPER TRIBUNAL JUDGE KEITH
DEPUTY UPPER TRIBUNAL JUDGE JARVIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

'CS' (CAMEROON)
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr. E. Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr D. Sellwood, counsel instructed by The Cardinal Hume Centre

Heard at Field House on 7 September 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the respondent 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. The reason is that the appeal includes consideration of a claimed fear of persecution.

DECISION AND REASONS

Introduction

1. We refer to the appellant as the Claimant, and the Respondent as the Secretary of State, for the remainder of these reasons.

2. The Secretary of State appeals against the decision of First-tier Tribunal Judge Clarke, who allowed the Claimant's asylum claim.

The background to the appeal

3. The Claimant is a foreign criminal (as defined by section 117D of the Nationality Immigration and Asylum Act 2002), by virtue of 4 convictions for 9 offences between 5th December 2003 and 12th October 2017 which include three offences relating to fraud and kindred offences. The Claimant was sentenced to two years imprisonment in 2003, and 21 months imprisonment in 2007 when he was also recommended for deportation. He was previously deported in September 2008 but returned to the UK in breach of his deportation order on 15th May 2017.

4. In a decision dated 16th June 2021, the Secretary of State considered the Claimant's protection claim based on the perception that he is a gay man, although he is not, with the perception based on his commercial distribution of sex toys in his country of origin, Cameroon.

5. The Claimant claims to have been detained and tortured and that a wanted notice was issued by the Cameroon police stating that he was wanted for charges of homosexuality. The Secretary of State's decision also makes reference to the Claimant's political opposition to the government and that he had also been discriminated against as a member of the Bamileke tribe. The Secretary of State did not accept the claim of detention and escape but in the alternative concluded that the Claimant's alleged escape from prison should be excluded from the protection of the Refugee Convention based on Article 1F(b), because it was a serious non political crime, on the basis that he had bribed prison staff to allow him to escape.

6. The Secretary of State also concluded that the Claimant should be excluded from consideration as a refugee because of his convictions for fraud which amount to a serious crime, by application of paragraph 339C(iv) of the immigration rules. The Secretary of State also considered the Claimant's claim of mental health issues which she concluded did not prove the alleged claim of torture and also found that it would not impede the Claimant's reintegration in the context that he had previously returned to Cameroon and had prospered financially on return.

7. In the most recent of the Secretary of State's decisions, (a supplementary letter dated 26th March 2023), the Secretary of State considered the Claimant's human rights claim based on his relationship with his partner who has leave to remain until August 2025 and their two children under the age of 18 born in the UK, (in March 2020 and May 2022).

8. The Secretary of State accepted that the Claimant has a genuine and subsisting parental relationship with both children but noted that the children are not British given that the Claimant is Cameroonian and their mother, a Congolese national, only has limited leave to remain. The Secretary of State also concluded that it would not be unduly harsh for his children to remain in the UK without him as they resided with their mother, and he could maintain contact with them.

9. It was also decided that there is no guarantee that the children will be able to remain in the UK indefinitely. Alternatively, the children could live in Cameroon if their mother agreed to this and that would be a matter of choice. The Secretary of State also considered the position with regard to the Claimant's partner and concluded that it would not be unduly harsh for her to return to Cameroon having only relatively recently arrived in the UK herself and had unsuccessfully claimed asylum in 2016. The Secretary of State also considered and rejected the proposition that there were very compelling circumstances such that the Claimant should not be deported given his repeat offending.

The Judge's decision

10. The Judge considered the protection and human rights claims. In respect of the protection claim, the judge considered first whether Article 1F(b) applied and concluded that it did not (at paragraph 45), relying upon the authority of AH (Algeria) v SSHD [2015] EWCA Civ 1003. In essence, the Claimant's crime was in bribing those to facilitate his escape rather than for example a serious crime such as murder, rape or arson.

11. The Judge also considered, at paragraph 60, whether the Claimant had rebutted the presumption under section 72 of the 2002 Act namely that he had been convicted of a particularly serious crime and constituted a danger to the community of the UK. The Judge found that the index offence was particularly serious but that he was not a danger to the community of the UK. The Judge noted that he had been convicted in 2007, was out of the UK from 2008 until 2017 and had not carried out any further offending since his return. No evidence had been adduced that the Claimant was a danger or had ever been.

12. Next, the Judge considered the Claimant's protection claim. The evidence included a report of Doctor Cohen (dated 10th December 2018) who diagnosed the Claimant as suffering from moderate to severe depression with psychosis and PTSD. She also considered scarring which in the context of the Claimant's psychological symptoms was consistent with the claim of torture. The Judge regarded Dr Cohen's report as reliable.

13. The Judge also considered a country expert report of a serving Cameroonian judge who confirmed the authenticity of the wanted notice. The Judge went on to consider the Claimant's account of his detention and escape and concluded that the claims were reliable (paragraph 98). The Judge also considered a CPIN entitled 'Cameroon: Sexual orientation and gender identity

or expression' (Version 1.0 - February 2020), which in his view contained background material consistent with the Claimant's account.

14. The Judge allowed the Claimant's appeal on refugee grounds.

The Secretary of State's appeal

15. The Secretary of State first argues that the Judge materially erred in his conclusions on whether the Claimant had rebutted the presumption under section 72 of the 2002 Act as the sentencing judge in the Claimant's criminal matter had remarked (as summarised by the Judge at paragraph 63) that the Claimant did not recognise his culpability and that no evidence had ever been adduced that he was a danger to the community of the UK [paragraph 64]. It is argued that these two findings are contradictory.

16. The Secretary of State also argued that the Judge had placed impermissible weight on the report of a Ms White, effectively because it was not a medico-legal expert. The Secretary of State further argued that while the Judge referred to considering the evidence in the round, in reality he took as his starting point the positive credibility of the Claimant's account of ill-treatment in Cameroon and then assessed the rest of the evidence to see whether that position had shifted, thereby infecting the remaining consideration and committing what is sometimes referred to as a 'Mibanga' error (see: Mibanga v SSHD [2005] EWCA Civ 367).

17. Moreover, it is argued that the Judge had erred in failing to consider previous adverse findings made in respect of the Claimant's credibility in the dismissal of an earlier appeal based on his claim to be in political opposition to the Cameroonian government.

18. Finally, it is averred that the Judge materially erred by not deciding the Claimant's human rights appeals.

19. While permission to appeal was initially refused, Upper Tribunal Judge Owens granted permission on 2nd August 2023 on all grounds; regarding it as at least arguable that the Judge's approach to section 72 of the 2002 Act was flawed when the Judge stated at paragraph 64 that there was no evidence that the Claimant had been a danger to the community in the UK when in the past he had been convicted of benefit fraud and driving offences.

The hearing before us

20. We heard helpful submissions from both representatives of which we have kept our own note.

Ground 1

21. In his submissions, Mr Tufan refined the Secretary of State's challenge to the Judge finding that the section 72 presumption had been rebutted. Mr Tufan highlighted that the Claimant had been in prison from November 2007 and was then out of the UK between 2008 and 2017 before re-entering illegally in

contravention of the terms of the extant deportation order. Mr Tufan also asked us to note that there was no independent evidence (i.e. an expert assessor's report) to support the claim that the Claimant was no longer a danger to the community.

Ground 2

22. Mr Tufan also argued that the Judge had impermissibly started his findings of fact in respect of the Claimant's protection claim (based on events in Cameroon in 2014) on the basis that the Claimant was credible and had failed to consider the claim in the round.

Ground 3

23. Mr Tufan also emphasised the Secretary of State's view that it was curious that a judge in Cameroon could act as an expert witness in the UK.

Ground 4

24. Mr Tufan added that the Judge had also failed to have proper regard to the two earlier Tribunal decisions which had, at least in respect of one of them, found heavily against the Claimant's credibility. Mr Tufan also criticised the Judge's explanation of the principles in Tanveer Ahmed [2002] UKAIT 439 at paragraph 85.

25. Mr Tufan quite properly accepted that the Secretary of State had not established how the Judge's failure to make decisions on the Claimant's human rights appeals could be otherwise material to the outcome of the refugee appeal.

26. In response Mr Sellwood relied upon his r. 24 reply dated 30 August 2023 and spoke to that document. We deal with those submissions in more detail in our findings.

Findings and reasons

27. We have considered Mr Tufan's concise and helpful submissions with care but have ultimately concluded that the Secretary of State has not established that the Judge materially erred in his consideration of the myriad material issues in this appeal.

28. In respect of the first ground as put by Mr Tufan (see above), relating to the Judge's findings on the application of section 72 of the 2002 Act (see paragraphs 60 – 64 of the judgment), we accept Mr Sellwood's argument that the Judge did not make conflicting findings.

29. We find that the Judge first dealt with the initial question of whether the Claimant's historic criminal offences constituted a 'serious crime' as per the

requirement in section 72(2) by reference to the further definition in section 72(2)(a) & (b) and concluded, without erring in law, that the Claimant's offence for which he received a sentence of 2 years imprisonment (on 5 December 2003) was sufficient to meet that definition, see paragraph 62.

30. The Judge then dealt with the secondary question of whether the Claimant constituted a danger to the community by reference to the circumstances at the date of the hearing. We conclude that the Judge applied the statutory provisions correctly and was entitled to find that the statutory presumption was rebutted in this case, as he did at paragraph 64.

31. Whilst Mr Tufan is right to point out that the Claimant was in prison for the period after November 2007, that he was then deported from the UK in 2008 and was out of the country until 2017 when he returned in breach of that order, we find that the Judge properly factored those elements into his assessment whilst also referring to the findings made by Judge McLachlan in the 2nd July 2005 judgment in which that judge dismissed the Claimant's asylum and human rights appeal.

32. We conclude that there is nothing unlawful or otherwise irrational in the Judge's conclusion that the presumption was rebutted in the circumstances where there was no evidence that the Claimant had reoffended since his last conviction and imprisonment in October 2007. We also reject the submission that the Claimant had to provide independent expert evidence (or similar) in order to rebut that presumption – we can see no legal basis for that expectation.

33. In respect of the second, third and fourth grounds which all flow into the same general point, we find that the Judge did not misdirect himself in law when assessing the 'new evidence', i.e. the claim and material relevant to events occurring in Cameroon between 2014 and 2017.

34. This is evident from the following features of the Judge's decision:

a. The Judge properly directed himself to the decision of Devaseelan v Secretary of State for the Home Department [2002] UKAIT 702 (albeit misspelt as 'Deveseelan') at paragraph 47.

b. The Judge also made express and sufficiently detailed reference to the Tribunal's earlier decisions: Judge McLachlan (7th July 2005) and a panel of Judge Corke and Mrs Morton (NLM) with a decision promulgated on 11th June 2008, at paragraphs 47 – 50.

c. The Judge also specifically identified these decisions as his starting point at paragraph 50.

35. We can equally see no evidence at all in the reasoning of the Judge from paragraph 50 onwards that he had pre-judged the credibility of the Claimant before then making the findings on the post 2014 evidence.

36. Instead, the Judge carried out a detailed and careful assessment of the 'new evidence' applying the authority of Karanakaran v SSHD [2000] EWCA Civ 11 and made findings where were plainly open to him, in the round, from paragraph 67 onwards.

37. There is additionally nothing in the Secretary of State's complaint that the report of Ms White was not a formal medico-legal document. We consider that point hopeless. It is plain that all evidence is admissible in the Tribunal and in the vast majority of cases the question is simply one of weight. We consider that the Judge gave perfectly lawful reasons for giving weight to Ms White's report, as part of the holistic assessment of the evidence, at paragraphs 79 & 81.

38. We also accept the point made by Mr Sellwood that the Tribunal also had the oral evidence of Dr Cohen as part of the medical evidence available to it (considered by the Judge at paragraphs 67 – 80). The Judge's findings in respect of the medical evidence were unquestionably open to him.

39. We also see no merit whatsoever in the unhelpfully discursive suggestion that it might not be appropriate for a judge in Cameroon to act as an expert. The Secretary of State has not even formalised the question into a coherent ground of challenge and we further note that the Secretary of State has not referred to any evidence or law to support the tentative suggestion that the report should not have been given weight.

40. Finally, we reject the Secretary of State's criticism of the Judge's findings on the post 2014 material on the basis that the Judge is said not to have properly factored in the strong adverse credibility findings made against the Claimant by Judge McLachlan in 2005 and as repeated by the Tribunal in 2008. We have already identified that the Judge directed himself properly on the legal approach in Devaseelan and summarised those earlier decisions – the Judge was plainly aware and indeed expressly noted that the Claimant had previously been disbelieved in respect of his earlier claim.

41. The Judge however explained in cogent detail why he was satisfied that the extensive new material, (which included an expert report from a judge in Cameroon who had travelled to the police station which issued the wanted notice, spoke to the officer who had issued the notice and confirmed that the notice was still in the police file), was reliable and powerful evidence supporting the Claimant's allegation that he was perceived to be gay by the Cameroonian authorities, had been arrested, mistreated and so on.

42. In respect of the absence of conclusions on the Claimant's human rights appeals, we say no more than that we agree with Mr Tufan that it makes no material difference in this case where, as we have found, the Judge made lawful findings on the Refugee Convention appeal.

Notice of Decision

43. The Secretary of State's appeal is dismissed – there are no material errors of law in the decision of Judge Clarke.

I P Jarvis

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

20 September 2023