Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2023-004004
First-Tier Tribunal No: RP/50034/2021
LR/00084/2022

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 February 2024	**On 22 May 2024**

Before

THE HON. MRS JUSTICE THORNTON
UPPER TRIBUNAL JUDGE PERKINS

Between

SL
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Rea, Counsel, instructed by David Benson Solicitors
For the Respondent: Mr Tufan, Presenting Officer for the Secretary of State

DECISION AND REASONS

Introduction

1. The Appellant appeals against the decision of the First Tier Tribunal (FTT), dismissing his appeal against the decision of the Secretary of State dated 28 January 2021. By the decision the Secretary of State indicated his intention, having revoked the Appellant's refugee status in a previous decision, to deport the Appellant to the Democratic Republic of Congo ("the DRC") pursuant to an order made under s.32 UK Borders Act 2007. In doing so, the Secretary of State issued a certificate under s.72 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") to the effect that the Appellant had committed serious crimes and should be denied the benefit of the Refugee Convention because he constitutes a danger to the community of the UK.

Background

2. The Appellant is a citizen of the DRC born on 1 July 1993. In 2002 the Appellant's mother arrived in the United Kingdom and was granted refugee status, on 25 August 2004, on the basis of her political views. The Appellant joined her in January 2006, aged 12. On 30 January 2008 he was granted indefinite leave to remain.

3. The FTT judge set out the Appellant's criminal record in the UK at paragraph 3 of his decision, as follows:

> "On 10 September 2008 the Appellant was convicted of robbery and a 6 month referral order made.
>
> On 22 October 2008 he was convicted of theft from a person and given a further 6 month referral order.
>
> On 26 April 2012 he was convicted of making a false representation for gain and required to do 60 hours work in the community.
>
> On 26 January 2017 he was convicted of possession with intent to supply Class A and Class B drugs and on 23 February sentenced to 42 months' imprisonment.
>
> On 5 July 2019 he was convicted of possession with intent to supply Class A and Class B drugs and on 23 February sentenced to 42 months' imprisonment.
>
> On 5 November 2021 he was convicted of possession with intent to supply and involvement in the supply of Class B drugs and sentenced to 20 months' imprisonment.
>
> There are other convictions for failing to surrender to custody and to comply with a community order. The Appellant pleaded guilty to all the offences charged.
>
> All the convictions pre-date 28 June 2022 (coming into force of the Nationality and Borders Act 2022). On 6 March 2017 the SSHD gave notice of her intention to make an order for his deportation but did not make the order until 25 January 2021. This was some nine months before the Appellant committed on 4 November 2021 the drug dealing offences for which he has most recently been convicted."

4. On 23 March 2018, the Appellant was served with a notice revoking his refugee status.

5. On 28 January 2021, the Secretary of State notified the Appellant of his decision to deport him to the DRC. He issued a certificate under section 72 of the 2002 Act that the Appellant had committed serious crimes and should be denied the benefit of the Refugee Convention because he constitutes a danger to the community.

6. Following a hearing before the FTT on 24 July 2023, the Appellant's appeal was dismissed on 27 July 2023. On 6 December 2023, the Appellant was granted permission to appeal to the Upper Tribunal.

7. On 30 May 2023, the FTT made a direction which was uploaded onto MyHMCTS. The direction stated:

> "*The attention of the Appellant is drawn to the decision in PO (DRC) [2023] UKUT 117. The Appellant is within two weeks of this direction to advise whether he is proceeding with his protection claim……*"

8. No response was received from the Appellant's representatives.

The decision of the First Tier Tribunal

9. At the start of the hearing before the FTT, the Appellant's representative sought an adjournment to consider the decision of PO (DRC-Post-2018 elections) (CG) [2023] UKUT 00117. The representative explained that his instructing solicitors were not aware of the direction made on 30 May 2023. The judge refused the adjournment noting that the representative acknowledged the direction would have been noticed because the appeal was on MyHMCTS. The judge considered the Appellant had been given ample notice of the matters addressed in PO which is a country guidance decision. There was nothing about a refugee claim in the Appellant's statement. The Appellant's solicitors had ignored the Tribunal's direction and the application appeared to be time wasting. The Judge went on to explain that the expert report provided on behalf of the Appellant did refer to the position of members and supporters of the Mouvement Populaire de la Revolution (the MPR). PO had been heard on 15 June 2022 and the expert report is dated 23 December 2022 and consequently any information which would have been available to the Upper Tribunal when it heard PO would have pre-dated the expert report. The grounds of appeal referred at length to the issue of refoulement, it must have been evident then that the Appellant needed to address the basis for his Refugee Convention claim.

10. Turning to the section 72 certificate, the judge upheld the certificate on the basis of the following reasoning:

> "*60. I am required to address the certificate under s.72 of the 2002 Act as the first item in my consideration of the appeal. The Appellant has been convicted on two separate occasions of possession with intent to supply Class A drugs. On the second of these he was also convicted of possession with intent to supply Class B drugs. On the third occasion more than one year after the SSHD had made an order for his deportation, he was convicted of possession with*

intent to supply Class B drugs. The second offence involving Class A drugs was shortly after the probable expiry of his licence in respect of the first offence in 2017. The third was during the currency of his criminal licence in respect of the 2019 offence. The Appellant claimed as recorded in the 2017 sentencing remarks and at the hearing that he had fallen into criminal activity because the SSHD had not issued him with the identity documentation to which he was entitled and with which he would have been able to obtain lawful work.

61. At the hearing, the Appellant stated his initial leave had expired in 2008 but he had not applied for his bio-metrics to be taken until 2012 and the SSHD had rejected his application because it had not been properly completed. There was no evidence what he had done to rectify any defect in his application or how he had supported himself during the period between 2012 and his arrest for possession of drugs with intent to supply for which was sentenced on 23 February 2017. I do not find that this account is any mitigation for the Appellant's criminal activities.

62. Plenty has been written about the pernicious, destructive and far-reaching effects and personal tragedies caused by the peddling of illegal substances. Those who engage in the supply chain, even at the lowest levels, constitute a danger to the community. The Appellant's remorse in 2017 lasted until shortly before expiry of his criminal licence when he committed similar offences resulting in his 2019 conviction. His remorse would not appear to have been a spur to him to resolve his outstanding bio-metric application to the SSHD the resolution of which he states would have enabled him to find lawful work. The Appellant said he had attended and completed drug awareness courses but was unable to provide any evidence of other than his mere assertion but he did supply evidence of completing IT and Health & Safety courses.

63. The Appellant said at the hearing that he now had the relevant documentation to obtain lawful work and that he was working as hard as he can for five days a week. At the hearing he stated he could produce bank statements to evidence such earnings. He has produced a statement covering only four continuous weeks and while it does indicate receipts on 2 June 2023 of £54.50 and on 16 June 2023 of £484.50 from the same company, this hardly establishes regular and constant work producing earnings sufficient to maintain himself and his family as he claimed at the hearing. He has not shown that what he claimed was the cause of his becoming involved in drug dealing, namely the inability to earn sufficient money to maintain himself, is no longer a temptation.

64. Looking at this in the round, I am not satisfied the Appellant has rebutted the presumption that he continues to be a danger to the community. He did not challenge that he had been convicted in the United Kingdom of a particularly serious crime and sentenced to a period of imprisonment of at least two years. Each of the terms of imprisonment to which the Appellant was sentenced in 2017 and 2019 was for over two years. I uphold the certificate given under s.72 of the 2002 Act and so the Appellant is excepted from the benefit of the principle of non-refoulement offered by the Refugee Convention: see paragraphs 12 and 13 of KM (exclusion; Article 1F(b)) DRC [2022] UKUT 00125 (IAC)."

11. It was, and remains, common ground that the Appellant is a 'foreign criminal' for the purposes of the deportation provisions in section 117A-D of the 2002 Act. Both Exception 1 and Exception 2 in Section 117C were relied upon before the FTT judge but

it is only the judge's treatment of Exception 1 that is raised as a ground of appeal before us. In concluding that the Appellant was not entitled to the benefit of Exception 1 to deportation the judge concluded as follows:

> *"68 The SSHD accepted the Appellant had been resident in the United Kingdom for most of his life. She argued his offending history showed he was not socially and culturally integrated. The Appellant's claim that on return to the DRC he would face very significant obstacles to his re-integration was based on his length of absence and lack of any family network. The expert report refers to the majority in the DRC living a precarious existence without a social security system. The expert considers the Appellant's age, lack of stability and his illegal ways in the United Kingdom will make him liable to return to ways which will bring him into confrontation "with very dangerous people". Page 17 of the expert report refers to the continuing violence in the east of the DRC. The Appellant comes from and lived in Kinshasa, a considerable distance from the East, and there was no evidence or suggestion that on return he would seek to relocate to the east of the DRC. There was no evidence the Appellant was not mentally and physically fit. I accept the Appellant will face substantial difficulties initially on return to the DRC, particularly because he left at the age of 13 but I do not find he has shown that those difficulties will amount to very significant obstacles."*

12. The judge went on to deal with Exception 2 and concluded that deportation would not be unduly harsh.

13. The judge concluded at paragraph 78:

> *"The deportation of foreign criminals is in the public interest. The more serious the offence the greater the public interest in deportation. The Appellant's criminal history contains several offences of drug dealing. Looking at this history and all the evidence in the round, I find the appeal cannot succeed on Article 8 grounds as reflected in ss.117A-D of the 2002 Act and that there are no very compelling circumstances justifying the grant of leave outside the 2002 Act and the Immigration Rules."*

The Grounds of Appeal

14. The Appellant advances three grounds of appeal:

    a. Ground 1 - Irrational approach to evidence in that the judge failed to analyse the question of whether the appellant was likely to face "very significant obstacles" to his integration into Kinshasa in sufficient detail and/or give sufficient reasons for his findings, given that the Appellant left Kinshasa as a child and had no experience of independent living there.

    b. Ground 2- Flawed proportionality assessment in that the judge placed insufficient weight on the OASys assessment with his OASys Violence Predictor indicating a low probability of violent reoffending after 2 years. The appellant submits that, on the evidence presented, he has rebutted the presumption that he constitutes a danger to the community and there was inadequate evidence before the Tribunal that he constitutes a present danger to the public.

c. Ground 3- Procedural unfairness in that the judge unreasonably refused to adjourn for expert evidence, in light of the new country guidance decision of PO (DRC-Post-2018 elections) (CG) [2023] UKUT 00117.

The legal framework

15. The FTT judge explained in his decision, to which there was no challenge, that the Appellant's appeal was against the refusal of the Appellant's asylum claim which the Secretary of State dealt with principally on the basis that the Appellant, by reason of the nature of his offending, was excluded from the benefit of the Refugee Convention as certified under s.72 of the 2002 Act.

16. Article 1A of the Convention defines a refugee. Article 1C provides for when the Convention ceases to apply to any person otherwise falling under the terms of the Convention. Article 33 (Prohibition of expulsion or return ('refoulement')) then provides:

> "1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a 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 judgement of a particularly serious crime, constitutes a danger to the community of that country."

17. Section 72 (serious criminal) of the 2002 Act provides:

> "(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.
>
> …
>
> (10) The …Tribunal... hearing the appeal—

(a) must begin substantive deliberation on the appeal by considering the certificate, and

(b) if in agreement that [a presumption under subsection (5A) applies] (having given the appellant an opportunity for rebuttal) must dismiss the appeal in so far as it relies on the ground specified in subsection (9)(a)."

18. As the Judge went on to the explain, to which there was also no challenge, the rest of the appeal was based on the Appellant's private and family life in the United Kingdom and whether he meets any of the exceptions in s.117C of the 2002 Act. Section 117C of the 2002 Act provides:

"Article 8: additional considerations in cases involving foreign criminals…

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh."

Discussion

Ground 1 – very significant obstacles to integration

19. Ground 1 focusses on the judge's assessment of whether there would be very significant obstacles to the Appellant's integration into the DRC (section 117C(4)(c) of the 2002 Act). The grounds of appeal challenge the judge's decision on the basis he took an irrational approach to the evidence. Permission was granted on the basis it was arguable that the judge did not analyse the question of whether the appellant was likely to face 'very significant obstacles' to his integration in Kinshasa in sufficient detail and/or gave sufficient reasons for his findings given that the appellant left Kinshasa as a child and has no experience of independent living there.

20. On behalf of the Appellant, Ms Rea submitted that the judge's analysis failed to consider the Appellant's circumstance in the round and failed to apply the principles set out in Kamara [2016] EWCA Civ 813. The expert report refers to the majority of people in the DRC living a precarious existence without a social security system. The

expert considers the Appellant's age, lack of stability and his illegal ways in the United Kingdom will make him liable to return to ways which will bring him into confrontation "with very dangerous people." The Appellant has never lived independently in DRC and has been absent for 17 years. On the facts of this case the finding that the Appellant would not face very significant obstacles to his integration is irrational. In response Mr Tufan submitted that the Appellant was someone who had spent his formative years in the DRC. He speaks Lingua. The judge was aware of, and referred to, the expert report.

21. When considering whether there will be very significant obstacles to integration into a country proposed for deportation, a judge is required to make a "broad evaluative judgment " as to "whether the individual in question will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life." Kamara [2016] EWCA Civ 813 per Lord Justice Sales at [14]. In Parveen v SSHD [2018] EWCA Civ 932, Underhill LJ said at [9]: "The task of the Secretary of State, or the Tribunal, in any given case is simply to assess the obstacles to integration relied on, whether characterised as hardship or difficulty or anything else, and to decide whether they regard them as "very significant"."

22. The FTT's analysis in this regard is at paragraph 68 of the decision, which is set out in full above. The judge recorded the Appellant's case that he would face very significant obstacles due to his length of absence from the country and absence of family network He acknowledged the expert assessment that the majority of people in the DRC live a precarious existence. He referred to the expert assessment that there are particular circumstances and attributes associated with the Appellant which will be liable to expose him to risk on return. He noted the reference to continuing violence in the east but pointed out that the Appellant comes from Kinshasa and there was no evidence he would seek to relocate to the east. The judge concluded in this regard that there was no evidence before him that the Appellant was not mentally and physically fit. Whilst he accepted the Appellant would initially face substantial difficulties on return, it had not been shown that the difficulties will amount to very significant obstacles.

23. The judge's reasons indicates that he accepted the expert evidence that the majority of people in the DRC live a precarious existence. He also accepted that the Appellant left the DRC at the age of 13 (we were told this was an error and the Appellant left when he was 12). The judge cites the expert assessment that there are particular features of the Appellant's background and circumstances which will be liable to expose him to risk on return but does not expressly indicate whether he accepts that assessment. He refers to the violence in the east of the country, but this does not appear to have been part of the Appellant's case before him. Beyond a general reference to the Appellant's apparent mental and physical fitness, the judge does not address how the Appellant may be expected to overcome, either the general obstacle of the precariousness of life in the DRC or the Appellant's particular circumstances that are considered liable to

expose him to risk. The Appellant has never lived independently in the DRC, having left when he was 12 and he has no family there.

24. Accordingly, we conclude that the judge failed to make the broad evaluative judgment required by Kamara [2016] EWCA Civ 813 at [14]). In particular, he failed to evaluate how the Appellant can be expected to be enough of an insider in the DRC to understand how life in the DRC is carried on, to make him capable of participating in life in the DRC so as to have a reasonable opportunity to be accepted there. In the circumstances of the present case, this extends to the dangerous elements of DRC society that the expert considers he is at risk of being exposed to, by reason of his particular attributes and circumstances. The judge also failed to explain how the Appellant's apparent mental and physical fitness will assist him when the majority of the population live a precarious existence and when the Appellant has never lived an independent life in the DRC and he has no family there.

25. Ground 1 succeeds.

Ground 2 – the section 72 certificate

26. Before us, it was common ground that the presumption in section 72 of the 2002 Act has two aspects; firstly that an appellant has been convicted of a particularly serious crime and secondly that he constitutes a danger to the community. Both aspects are susceptible to rebuttal and the questions have to be examined separately (EN (Serbia) v SSHD [2009] EWCA Civ 630 at [80]). Pursuant to section 72(10) of the 2002 Act, the Tribunal must begin by considering the certificate, and give the Appellant the opportunity to rebut any alleged presumption.

27. Ms Rea submitted that the judge failed to refer to an OAYS report, in breach of section 72(10) of the Act. The report concludes that the Appellant poses a low risk of violent offending in the first and the second years following release and is thereby evidence capable of rebutting the presumption that he constitutes a danger to the community. The judge gave no reasons for finding that the Appellant has failed to rebut the presumption that he constitutes a danger to the community, focusing solely on whether he had been convicted by a final judgment of a particularly serious crime. The judge should have considered each part of the presumption separately. In response Mr Tufan submitted that the OAYS report indicates a medium risk of reoffending. Mr Tufan went on to explain the Appellant had reoffended after the dates of the OAYS assessment and the report was not therefore sufficient to rebut the presumption. In this regard Mr Tufan produced before us a record of the Appellant's previous convictions. Ms Rea objected to the production of the evidence on the basis it was not evidence before the FTT judge. Her initial instructions were that the offending relied on by Mr Tufan had occurred prior to the date of the OAYS assessment. We adjourned the proceedings briefly to allow the parties an opportunity to discuss matters and for Ms Rea to take fuller instructions. On resuming, Ms Rea accepted the factual chronology advanced by Mr Tufan and conceded that the Appellant had offended again after the date of the OAYS assessment. Nonetheless, she submitted that it was not apparent from the FTT ruling whether the judge was aware of the

chronology in this regard as the record of convictions was not before him. She maintained her submission that the judge's reasons were inadequate to demonstrate whether he had upheld the section 72 certificate on the basis of offending which post dated the OAYS report, or whether he had failed to consider the OAYS report at all. Neither Ms Rea or Mr Tufan were present at the FTT hearing so were unable to tell us anything further about the content of the hearing.

28. The OASYS report is based on an assessment dated 19 February 2021. Ms Rea's submissions focussed on the analysis of the report in relation to the prediction for violence behaviour. It may be said to be unsurprising that the prediction is low given the Appellant's offending as an adult is primarily drugs related. Ms Rea did not seek to demur from the judge's analysis that drugs are a scourge of society. As Ms Rea had to concede during the hearing, the Appellant offended again after the OAYS assessment. Whether or not the judge had the official record of the Appellant's offending he was clearly aware of the date of the subsequent offending because he made specific reference to it in his ruling. It follows that the OAYS report could not materially assist the Appellant in rebutting the presumption that he is a danger to the community. It cannot therefore be said that there is any material error in the judge making no reference to the report in his analysis. Moreover, we do not accept Ms Rea's submission that the judge failed to address both aspects of the rebuttable presumption, in particular whether the Appellant is a present threat. The judge does so at paragraphs 62 – 64 of his ruling, by reference to the Appellant's conduct and earnings.

29. Ground 2 fails.

Ground 3 – refusal of an adjournment

30. Ms Rea submitted that the Judge erred in failing to grant the Appellant's request for an adjournment. She submitted that the Appellant's expert could not have considered the case of PO as it was not handed down until after his report had been issued. On our observation that the judge's criticisms in this regard were directed at the Appellant's legal team, not the expert, Ms Rea submitted that an essential element of the Appellant's appeal is against the Secretary of State's decision to revoke the Appellant's refugee status. The Appellant's inability to return to the DRC, either on the basis of non-refoulment or very significant obstacles, has always been at the core of his claim.

31. In response Mr Tufan emphasised that the Appellant's legal team had been given the opportunity to address the case of PO. They could still have requested an adjournment before the hearing but did not choose to do so, waiting until the day itself. In any event there was nothing the expert could have said to advance matters given the nature of the appeal.

32. We accept Mr Tufan's submissions.

33. The direction drawing attention to the case of PO was uploaded onto My HMCTS. The judge noted the acknowledgement by the Appellant's representative that his representatives were aware of the direction as the appeal had been uploaded onto My HMCTS. Even if they were not, they ought to have been. As Mr Tufan pointed out, an

adjournment could have been requested at any time before the hearing instead of waiting until the day of the hearing, thereby potentially wasting valuable tribunal time and resource. Moreover, we agree with Mr Tufan's submission that it is not apparent that the expert could have materially advanced matters had he been permitted the opportunity to comment. As the FTT judge explained at paragraphs 57 and 59, the appeal was against the refusal of the Appellant's asylum claim which the Secretary of State dealt with principally on the basis that the Appellant by reason of the nature of his offending was excluded from the benefit of the Refugee Convention as certified under s.72 of the 2002 Act. The judge went onto state that:

> "Neither in his written statement nor his oral testimony has the Appellant explained why he has a well-founded fear of persecution for a Refugee Convention reason on return to the DRC. At paragraph 9 of his 2021 statement he simply and without reference to any particular circumstances asserts he fears that if he returns his life will be in danger and he will be killed by the Congolese authorities."

34. Ground 3 fails.

Disposal

35. The appeal is allowed on the basis that the judge failed to properly consider whether there will be very significant obstacles to the Appellant's integration into the DRC in the event of deportation (s117(C)(4) 2002 Act). We consider this aspect of the appeal should be retained in the Upper Tribunal for an assessment of whether section 117C(4)(c) of the 2002 Act applies to the Appellant. All other findings are preserved.

Notice of Decision

The appeal is allowed on the basis that the judge failed to properly consider whether there will be very significant obstacles to the Appellant's integration into the DRC in the event of deportation.

Signed: *Mrs Justice Thornton* Date: 04/02/24

The Hon. Mrs Justice Thornton sitting as an Upper Tribunal Judge.