Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/04772/2019

THE IMMIGRATION ACTS

Heard via Skype for Business at Field House	**Decision & Reasons Promulgated**
On 28 October 2020	**On 7 December 2020**

Before

UPPER TRIBUNAL JUDGE ALLEN
UPPER TRIBUNAL JUDGE RIMINGTON

Between

AD
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Syed-Ali, instructed by Arden Solicitors Advocates
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Libya. He appealed to a Judge of the First-tier Tribunal against the respondent's decision of 11 May 2019 to exclude him from the protection of the Refugee Convention under Article 33(2) and certifying that he was not entitled to the principle of non-refoulement under Article 33(1). He was also refused humanitarian protection under paragraph 339C of the Immigration Rules. It was proposed to grant him discretionary leave to remain for twelve months. The appeal against the decision to exclude him was allowed by the First-tier Tribunal Judge. He

found that the appellant had been convicted of a particularly serious crime and concluded that he had rebutted the presumption that he was a danger to the community of the United Kingdom and was therefore not excluded from refugee protection. The Secretary of State sought and was granted permission to appeal against this decision, and in a decision dated 29 January 2020 Upper Tribunal Judge Coker found an error of law and set aside the judge's decision.

2. The hearing before us was the rehearing of the appeal.

3. Despite directions having been made by the Upper Tribunal Judge including a requirement for the appellant to file and serve a completed tabbed, paginated and indexed bundle of documents on which he sought to rely, he had not provided a witness statement and proposed to give oral evidence. We directed that he provide a written statement and the hearing had to be adjourned for a written statement to be provided by him. At the same time Mr Tufan put in a copy of the Police National Computer report listing the appellant's convictions.

4. We also clarified the position with regard to the letter at I1 of the Home Office bundle. This is reported to refer to the appellant and to a conviction for conspiracy to supply a class A drug. Mr Tufan accepted that this was a mistake and was not part of the appellant's criminal history. As a consequence, we need say no more about that letter and it has not formed any part of our deliberations.

5. The appellant gave oral evidence. He relied on the witness statement which he had provided today and also on his previous witness statement of 27 August 2019. He had had a chance to look at both statements and wished to adopt them as part of his oral evidence.

6. When cross-examined by Mr Tufan the appellant was asked what his current financial circumstances were. He said that he lived with his mother and siblings and had help from a family member since his father had been kidnapped in Libya. It was normal in Libya for family to help family.

7. He agreed that when he committed the crimes in question he was getting help from family at that time and agreed that nothing had changed with regard to his financial circumstances between then and now.

8. It was put to him that the offender manager was concerned that part of the reason for the crimes he had committed was financial issues, so if his circumstances had not changed it should be questioned why the Tribunal should believe that he would not reoffend. The appellant said that it depended on which probation manager you asked and others were confident that no financial issues had led him to commit the crimes. The crimes were not financially motivated. He had been suffering from confused thinking then and on the basis that some power had been taken

away from him and the only way to recover the power was in that way. The offences were not financially motivated at all.

9. Mr Tufan said that he had based his reference to this on what was said on page 13 of 50 in the OASys assessment.

10. The appellant agreed that he had done courses as referred to by the offender manager on page 21 in the OASys Report, for example courses in developing awareness and drug issues. It was put to him that there was a reference there to outstanding work in the RESOLVE Programme, however, there were concerns that his scores would not be high enough to meet the threshold.

11. The appellant said that that course was reserved for people who had lived a life of crime and had anger issues and a lack of self-control. He had not been a career criminal. His motive had been one of skewed thinking. The assessment had led to the conclusion that characteristics which that course sought to resolve were not applicable to him as he was not impulsive or angry. He would have loved to do the course but he did not reach that level of criminality.

12. He said that the offences were committed in late 2014 and early 2015. He was asked whether it was not the case that six months before they were committed he had been convicted of possession of a firearm in a public place and also a controlled drug and he said he thought it was in the same period of time. The arrest was his wake up call and was within the same months.

13. It was put to him that the PNC suggested that he was remanded on unconditional bail for two offences and the offences were seven months later. He thought the information provided in the PNC was wrong. It was the same imitation firearm as he had used for the robberies. It was not a seven month period before the two and he had been arrested in June 2015. (We observe that he was correct about this).

14. It was put to him that the offender manager in the OASys Report concluded that he posed a medium risk of harm to the public, coming down from high risk. It was put to him that there was nothing in the documentation to suggest that this had changed and he was asked why he could not get documentation to say that he had changed. He said that was the latest OASys and because of COVID there was more now. He had telephone calls twice a week and that had gone up from once a month. It stated that he was medium risk regardless of his situation. The latest was from last year and that would show change. He was asked where that was and he thought one should have been provided in the bundle and he could ask his representatives why not.

15. We put it to the appellant that there was no evidence from the offender manager or the Probation Service than July 2017 and he said he thought

this was odd and he used to have curfew and that had been reviewed and there were meetings.

16. Mr Syed-Ali helpfully told us that to his knowledge the 2017 report was the last one. The appellant had been handled by the Probation Service since then and there was a Probation Office letter last month but they did not have that.

17. The appellant agreed in response to further questions from Mr Tufan that he was released on 13 March 2019. It was put to him that when he said at paragraph 4 of today's witness statement that he had been released around two years ago it was in fact one year and seven months. He agreed. He had not taken drugs or drunk alcohol since release and was free of both. He was asked whether there was any objective evidence to confirm that and he queried what kind that might be. He was asked whether there were not tests or probation officer reports and he said no but he had agreed that they could test him and they did not feel the need to do so. He was free of PTSD and could cope without the need for alcohol or drugs. He exercised and talked to his family and friends and read and meditated. There was no objective evidence either way.

18. He was referred to what was said at page 17 of 50 in the OASys Report that even though not yet tested in the community it appeared he had remained drug-free in custody. It was put to him that that suggested he could revert. He said that they had not felt the need to test him.

19. With regard to the reference to the use of violence, at page 7 of the OASys Report, he said that the guilt and regret weighed too heavily on him for that to recur. He could not imagine what the victims were going through. He wished he could go back and help them get through it. He felt shame, guilt and regret. He had done victim awareness courses and programmes to meet the victims if they wanted to and would apologise if it would mean anything to them. He wanted to give back to society through work and volunteering. He could not change the past but he could live a different life.

20. He was now in the last year of his degree. He was asked whether he had lived in New York and said he grew up there. He hoped that he was quite an educated person. His licence would expire on 11 February 2022.

21. It was put to him that since his release the lack of further crimes was because it was to his advantage. He said he did not understand the question and it was put to him that it served his purposes in that he was on licence. The appellant said that even if he committed crimes after probation he would go back to prison and he did not want to commit a crime now. When asked why he would not he said he was not a criminal anymore. He had been going through something mentally, emotionally and was very regretful. He was not the same person, so he would not commit a crime again. He wanted to be there for his family. He was not

the person he had been previously. His family were his priority and he wanted to be able to live a normal life.

22. We asked the appellant with regard to his first statement where he had said he could not work as he had no permission to work, the fact that the BRP document in the file showed that he could. He said that he was granted residence in May but the BRP and the national insurance card did not come until the end of August, after he had made the statement.

23. He was referred to the fact that in the second statement he said there was difficulty because of the pandemic with volunteering but there had been no COVID restrictions for a year after his release. He said yes, he was focussing on family and study and there were probation restrictions including curfew, so there was not much else he could do. He had a lack of experience for jobs.

24. He was referred by us to the two psychiatric reports which said he did not have mental health difficulties and he said that PTSD was such a difficulty. We put to him that one of the experts said he did not have PTSD and he said not any more and that was the 2019 report but the issues were now gone. We referred him to paragraphs 106 and 108 of Dr Cumming's report and he said he had had mental health issues.

25. We referred him to the fact that there was reference in the OASys Report to him being an alcoholic and we asked him if that was how he had described himself and he said not at all. He had been asking for help at times and was not able to do so before and hence the use of alcohol and drugs. When we read to him what was said in the report on page 100 in the bundle, he said that he thought that when you went into such programmes there were mantras and things you said such as that and did that as a group but in his face-to-face discussions they understood his situation might have been a little different. The dependency was related to the mental health issues. He agreed that he had said he took cannabis when in the USA.

26. On re-examination Mr Syed-Ali referred the appellant to him saying he took cannabis in the USA and asked him whether he was saying he was not dependent on alcohol or drugs outside that period. He said that at first when he went to university he tried these things in the USA when he was younger and did not enjoy them. He had not been sleeping well in that difficult period and it helped him sleep. He tried cannabis, but when he was 17 and 18 which was a long time ago. He did not remember being dependent on taking it regularly and he was a straight A student before and now. He did not socialise with the friends he had gone around with then now. He had new friends via videos he was editing for export and he had learned new skills.

27. In his submissions Mr Tufan relied on the points set out in his skeleton argument. It had been said in EN (Serbia) [2009] EWCA Civ 630 that the

person in question had to be assessed now in order to assess the danger to the community and this was a rebuttable presumption.

28. The crimes committed by the appellant were serious and the question was whether he could rebut the presumption that he was a danger to the community. The OASys Report was the only background material available with regard to his offending. The appellant said he could not get a fresh assessment from the probation officer. He was assessed as being at low risk of reoffending but medium risk of harm to the public. Reference was made to page 41 of the OASys Report and the degrees of likelihood set out there. It was relevant to note what had been said in MA (Pakistan) [2014] EWCA Civ 163 that a risk of 17% reoffending over a two year period was a good reason for supporting a decision to deport. Mr Tufan also referred to what had been said in JZ [2008] EWCA Civ 517 and Kamki [2017] EWCA Civ 1715. Both limbs, the risk of reoffending and the risk of harm, had to be considered with regard to the issue of danger to society. The appellant's offending was clearly very serious and had become progressively more violent. He was sentenced to seven and a half years in prison on a guilty plea, it would have been ten years otherwise. There was reference at page 28 of the OASys Report to a serious escalation.

29. There was also reference to financial issues being a factor. The offences had paid for alcohol and drugs. The appellant confirmed there was no change in his financial circumstances and he had family help. The OASys Report referred to him being drug-free and alcohol-free in prison, but he had not been tested outside prison conditions. He said that this was the case but there was no objective corroborative evidence and he also said that there were difficulties in getting a probation officer assessment. Mr Tufan could not say how true that was and there was no letter or even an email from a probation officer. The appellant was still on licence. Mr Tufan had made the point to the appellant that being crime-free suited his purposes. The circumstances had not been tested, neither here nor there. Taken in the round and the risk he posed to the public, he had not discharged the burden on him.

30. In his submissions Mr Syed-Ali also relied on his skeleton argument. The question was of probability of risk and how likely the appellant was in his present state of mind to commit a further crime. This had to be assessed at the civil standard. The Tribunal had heard his evidence in cross-examination. He had experienced traumatic experiences in Libya and dealt with those with alcohol and drugs and while for a short period he was dependent he had committed the crimes in question. It led to financial benefit but that was not the intention. It was necessary to factor in the current situation and although there was no more recent evidence there was the probation officer's letter now in respect of the leave extension application and it was a matter of common sense. Whether or not the appellant had the state of mind when he committed the crimes the question was his state of mind today. He had a very strong incentive and the Tribunal had heard his answers. He had said what life he wished to

lead and he had a every incentive to be crime-free. He could not be removed to Libya anytime soon.

31. It was argued on the appellant's behalf that given the developments he had gone through in his self-development he was a different person. With regard to what had been said in MA (Pakistan), this gave a range of propensity. The background of the appellant in that case was different. The appellant in the instant case had a high level of living in Libya and experimented with alcohol but did not wish to do so on a regular basis. Allowances should be made. He had a history of alcohol and drug abuse but was not dependent. What was said in the OASys Report as set out in the skeleton was adopted as part of Mr Syed-Ali's argument. The appellant's psychiatric state today was that he appreciated the crimes he had committed and had a heightened awareness. He was helping his family and had picked up the pieces with them and would be volunteering but for the COVID-19 restrictions. His appearance should be taken into account and his manner of giving evidence with regard to his life now. His emotional state was relevant and his witness statement was important. Paragraphs 2.6, 2.09 and 2.11 of the OASys Report were of relevance. Cumulatively he had addressed the risk to the community. He would not risk committing a crime, saying his risk was mitigated. Paragraph 49 and paragraph 54 of Dr Husni's report were relevant and that informed the risk of reoffending. The skeleton at paragraphs 19 and 20 addressed the issues of danger to the community. He had rebutted the presumption and the appeal should be allowed.

32. We reserved our decision.

The Law

33. Article 33 of the Refugee Convention provides as follows:

> "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 judgment of a particularly serious crime, constitutes a danger to the community of that country."

34. Section 72 of the Nationality, Immigration and Asylum Act 2002 provides that a person may be excluded from protection on the basis of criminality the severity of which meets or passes a specified threshold:

> "(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."

History, evidence and submissions

35. On 8 September 2015 the appellant was convicted of nine counts of robbery, three counts of attempted robbery and twelve counts of possessing an imitation firearm when committing an offence. On 21 October 2015 he was sentenced to twelve concurrent terms of 90 months' and 30 months' imprisonment.

36. One can see from the comments of the sentencing judge that the appellant had pleaded guilty in effect to twelve robberies, nine of which were committed and three attempted. They all involved robberies of small shops late at night and he threatened the occupants of the shops while balaclavas or hoods and using an imitation firearm. No-one was seriously injured physically but the occupants of the shops were extremely frightened and were traumatised and shocked by what happened to them.

37. In a response to the Notice of Liability that section 72 could be applied to his case the appellant claimed that he was suffering from post-traumatic stress disorder at the time of his offending and claimed that he had witnessed killings during the conflict in Libya. As can be seen from his first witness statement, his father had been chief of Colonel Gaddafi's security in Libya and was held in custody and ill-treated although he had subsequently been released. The appellant expressed regret for his criminal actions, saying that he had suffered from what he had witnessed during the war in Libya. He referred to previous symptoms which the psychiatrist had set out in line with symptoms of PTSD and told the court that at the time of committing the crimes he was involved in drugs although this was no excuse. He took full responsibility for all the harm and pain he had caused. He said that all he could do was to take positive steps before becoming a better man and he was at least able to make better decisions in the present. He had stayed away from drugs since being imprisoned and referred to the OASys Report which confirmed that he was drug-tested and there were no drugs found in any of his test samples.

38. He had started to study for a Bachelors degree with the Open University with the support of his family, whom he knew he had hurt and also to whom he wanted to repay his debts. He prayed for forgiveness and did

physical training and sought to help others. He had become a peer supporter for Phoenix Futures at HMP Pentonville and a peer supporter at HMP The Mount for the RAPt Programme, in which he helped prisoners overcome their substance/alcohol addiction. He had become the induction orderly and had had invaluable work experience as the education orderly and carried out other activities while in prison to support and assist other prisoners. He said that whilst in custody he had reduced his risk of harm to the public from high to medium and was currently at low risk of reoffending.

39. He said that after his release from prison on 13 March 2019 his options had been narrowed due to the Home Office's decision not to grant him asylum status and he had not been allowed to work or pursue his plans in business. He referred to his studies with the Open University and that he had worked very hard to overcome his symptoms of depression and anxiety. He said that he holds weekly meetings with his probation manager and works closely with them. He has reconnected with his family, helps his mother and reads and exercises. On being granted DLR he intends to register a limited company and work in business.

40. The point is made in Mr Syed-Ali's skeleton argument that the question of danger to the community is a question of fact requiring contemporaneous assessment, i.e. at the date of the appeal. He notes there that the appellant was predicted to pose a low risk of reoffending and had not committed an offence for another one year and seven months. With reference to what was said by Mr Tufan in respect of MA (Pakistan), the appellant had nearly two years without further incident. He had addressed the risk involved by attending training courses while in prison. His alcohol and drug dependency were the drivers/triggers for his crime. This was relevant to the risk threshold and it was relevant to note that the appellant no longer considered that alcohol or drug dependency drove his decisions and he took full responsibility as was explained in the OASys Report and by the probation officer. It could be seen from the OASys Report that he had demonstrated a high level of remorse and the responsibility he had taken demonstrated the level of insight he had into how his actions impacted on his victims. The index offences were a serious escalation in the seriousness from previous offending but did not form an established pattern of similar offending. This could not be judged in a vacuum without considering the process of his development and issues contributing to risks of offending and harm. The fact that there is an incentive to remain crime-free just because there is an impending asylum appeal does not automatically take away the weight of efforts made to turn his life around. A real risk of repetition of offences has to be assessed now, considering his development and understanding in order to assess the danger to the community.

41. The essential points made in Mr Tufan's skeleton argument address the key issue of whether or not the appellant has rebutted the presumption of constituting a danger to the community under section 72. It was accepted that he has been engaging with rehabilitation and been educationally

bettering himself and that the risk assessment had been reduced to a medium risk of serious harm. However, it is argued in line with what was said in MA (Pakistan) that bearing in mind the appellant's OGP probability of proven violent-type reoffending being assessed at 18% in two years, low category, with regard to what was said in MA in respect of 17% risk of reoffending over a two year period, this was a good reason for supporting a decision to deport. It was also said, in JZ (Colombia) that even if there is a low risk of reoffending but that risk involves the commission of a very serious offence it is perfectly permissible to conclude that such a person is a danger to the community.

Discussion

42. Set out above are the relevant legal tests and the arguments by the representatives. We have also set out the evidence of the appellant, which was supplemented in his most recent witness statement including the fact that he had not been able to volunteer for community organisations because of COVID restrictions and he has completely turned his life around. He said that it is very difficult to obtain a re-assessment from the probation officer. He had contacted the probation officer several times for a letter as to a risk assessment and they had failed to provide it. He says that he is a completely different man from the one who went to prison.

43. It is relevant to bear in mind, as Mr Tufan pointed out, that the appellant's circumstances in the financial sense are essentially as they were at the time when the index offences were committed. He is living at home with his family and with family support. That position has not changed. It is unclear to what extent financial issues motivated the committing of the offences. Although the appellant had denied it, for example to Dr Cumming (see for example paragraph 109 of his report) Dr Cumming queried whether it was really the case that the offences were not financially driven and done in order to pay for drugs and/or alcohol. Dr Cumming also noted (at paragraph 108) that the appellant some years after coming to the United Kingdom experienced symptoms some of which seemed to resonate with PTSD, and this seemed a potential explanation for the robberies, but this relied largely on the appellant's account and he wondered how, considering one of the traumas was being threatened at gunpoint, having a handgun conformed with the diagnosis of PTSD and the memories of that incident upon his memory. He did not find that the appellant had a mental illness and therefore did not require mental health disposal.

44. We do not have the benefit of any evidence from the Probation Service subsequent to the OASys Report of 2017. The appellant said in his second statement that he had tried unsuccessfully to obtain a letter as to a risk assessment. However, as Mr Tufan argued, there is no evidence to support what he says, even in the form of a letter or even an email. It is of course the case that the appellant was assessed at that time and there is no more recent evidence as we say to go against this, as posing a 17%

risk of medium risk of harm to the public, and we bear in mind, as of course we must, what was said in MA and JZ, quoted above. Against this must be put the evidence that he has given of the efforts that he has made by taking courses while in prison and the attitudes that he has displayed subsequent to his release from prison.

45. Bringing all these matters together, we do not consider that the appellant has rebutted the presumption. Clearly, the offences were very serious and the assessed level of risk that he poses to the public as set out in the OASys Report is at a level which we find has not been rebutted by what he has said in his evidence, his attitude and behaviour subsequently. He remains in the same financial position as he was at the time when the offences were committed, and the explanation which in part he gave before us of feeling at the time having had power taken away from him and wishing to re-assert it is not on the evidence one which we find we can properly and safely conclude has gone away. He has expressed concern for the victims, but there is also quite a significant element in his oral and written evidence of the emphasis he places on his own personal development and wishes to improve himself. Although that can to an extent be said to be tied in with the wish to rehabilitate there is an element of self-regard in this which we consider can and should properly be factored into our overall evaluation. In our view the evidence provided by and on behalf of the appellant is not such as to rebut the presumption in this case and as a consequence his appeal is dismissed.

Notice of Decision

The appeal is dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 12 November 2020

Upper Tribunal Judge Allen