Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/13048/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 11th February 2020	**On 3rd March 2020**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KH
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Mr Allan Briddock, of Counsel, instructed by Wilson Solicitors LLP

DECISION AND REASONS

Introduction

1. The claimant is a citizen of Sudan born in 1981. He arrived in the UK in 2010 and claimed asylum in a false identity claiming to be from Chad, his claim was refused, and the appeal dismissed. In August 2011 the appellant made a fresh claim in his real identity, but this was refused in

November 2011 without a right of appeal. He was convicted of a number of offences between 2012 and 2105, including arson in September 2015 for which he was given a five year sentence of imprisonment. The appellant appealed against the decision to refuse his protection and human rights claim made when he was written to notifying him that a deportation order would be made against him under s.32(5) of the UK Border Act 2007 unless he showed that an exception in s.33 of the 2007 Act applied. His appeal against the refusal of the human rights claim was allowed by First-tier Tribunal Judge Thorne in a determination promulgated on the 18th September 2019 who found he was a refugee and had rebutted the presumption at s.72 of the Nationality, Immigration and Asylum Act 2002 that he was a danger to the community.

2. Permission to appeal was granted by Upper Tribunal Judge Rimington on 27th November 2019 on the basis that it was arguable that the First-tier judge had erred in law in failing to follow EN (Serbia) v SSHD & Anor [2009] EWCA Civ 630 which found that it was likely that the claimant would be a danger to the community if he had been convicted of a particularly serious crime and there was a real risk of its repetition. It was also arguable that the reports the First-tier Tribunal relied upon in allowing the appeal did not support this conclusion as the psychologist concluded the claimant was a moderate risk of re-offending and the OASys report that he was a medium risk of reoffending and a medium risk of serious harm.

Submissions – Error of Law

3. The Secretary of State argues in the grounds of appeal, skeleton argument and oral submissions from Mr Clarke in summary as follows. The appeal was allowed because the appellant succeeded on asylum grounds and he was found to have rebutted the presumption at s.72 of the 2002 Act that he was a danger to the community. It is argued that it was not open to the judge to rationally reach this latter conclusion given the evidence in the OASys report and from the probation officer. EN (Serbia) holds that there is a danger to the community if a person has been convicted of a particularly serious crime and there is a real risk of repetition.

4. It is also argued for the Secretary of State that there was a misdirection of the law as to the threshold for finding that s.72 had been rebutted as there was no reference to the case law on which the Secretary of State relied, and the proper interpretation of the key case of EN (Serbia) is that a “managed risk” is nevertheless a real risk that serious crime may be repeated. This was said to be a material issue in this case because it was clear from the report of the forensic psychologist, Dr Katherine Boucher, set out at pages 256 to 283 of the respondent’s bundle for this hearing, that the real risk of serious offending would reappear if the management in terms of the claimant’s mental health and probation support did not continue as he might then revert to the alcohol and

substance abuse which had fuelled his previous offending. The First-tier Tribunal had failed to factor in a consideration of how the risk of serious harm could increase with this claimant, for instance by considering the possibility of a deterioration in his mental health. Reliance in this connection was placed on the case of Restivo (EEA prisoner transfer) [2016] UKUT 00449 which holds that a threat of recidivism managed and reduced by imprisonment nevertheless continues to exist for the purposes of showing deportation of an EEA national is permitted under the Immigration (EEA) Regulations 2016.

5. In the rule 24 notice and in oral submissions from Mr Briddock the claimant argues in summary as follows. The challenge to the finding that the claimant was not a danger to the community is a rationality challenge. It is argued that there is no evidence that the decision is irrational, or that there was a misdirection of law. There is clear evidence from the decision that all material evidence was considered: there is clear and correct consideration of the OASys assessment, the psychiatric report and the forensic psychologist report, see paragraphs 25 -28 of the decision. There was also consideration of the evidence provided by the Probation Service. It was open to the First-tier Tribunal to find that the index offence was old and that the last offence committed by the claimant was in 2015.

6. It is argued by the claimant that there is proper consideration of the judgement in EN (Serbia) which was put before the First-tier Tribunal in the claimant's skeleton argument so it is clear that the decision was made in the context of the guidance from the Court of Appeal. There is no evidence the First-tier Tribunal misapplied the correct threshold for s.72, and no basis to find that decision was not a rational one based on an accurate understanding of the expert evidence. It is argued that it is clear from the decision that the First-tier Tribunal was aware of the fact that the risk of reoffending was being managed, and that it was appropriate for the First-tier Tribunal to make a decision based on the risk at the date of hearing whilst obviously making a global assessment taking into account the longevity of any positive developments, such as not committing crime or abusing alcohol, in coming to its conclusion on risk. It is clear from the case of MA Pakistan [2014] EWCA Civ 163, cited by the Secretary of State in her grounds of appeal, that an assessment by OASys is not determinative of risk and the evidence must be assessed in the round. Restivo is argued to be of no relevance as it is about assessing risk posed by an imprisoned appellant, and this appellant is not in custody.

7. At the end of the hearing I reserved my determination. It was agreed that there would be a further remaking hearing in the Upper Tribunal if an error of law was found, as any remaking would need to take into account of the further period of time the claimant had been in the community and any other pertinent developments in his life.

Conclusions – Error of Law

8. The First-tier Tribunal found that the claimant is a non-Arab Darfuri and that he would be at real risk of persecution if returned to Sudan. The challenge is to the lawfulness of allowing the appeal on asylum grounds, although it was of course also allowed under Article 3 ECHR.

9. With respect to s.72 of the 2002 Act the First-tier Tribunal sets out the provision at paragraph 32 of his decision. It is implicitly accepted that the claimant has been convicted of a particularly serious crime at paragraph 33 of the decision, but found that he has successfully rebutted the presumption that he constitutes a danger to the community at paragraph 34 of the decision.

10. The reasoning for finding that the claimant has successfully rebutted the presumption of danger to the community is set out at paragraphs 34 to 36 of the decision and is, in summary, as follows: that the last offence was old, as it was committed in 2015; that the claimant was released from detention in December 2017 and has not reoffended since; that the claimant's credible oral evidence is that he did rehabilitation courses in prison, is not abusing alcohol or drugs and has stayed out of trouble since leaving prison and sees his probation officer regularly; and that the evidence of his probation officer is that he believes the claimant would be a productive member of society if given an opportunity to engage in personal development activities and work; that the OASys report says he is a medium risk of harm to the public, and the forensic psychologist says that he is a moderate risk of reoffending but the forensic psychologist assesses that current risk factors are low and suggests he is not a current risk to the general public. These documents are also summarised at paragraphs 24 to 28 of the decision.

11. I do not find that the First-tier Tribunal erred in law by failing to consider any material evidence. There are summaries of all the relevant reports which I find to be very short but sufficiently accurate.

12. The key finding in EN(Serbia) is set out at paragraph 45 of that judgement and is as follows: "So far as "danger to the community" is concerned, the danger must be real, but if a person is convicted of a particularly serious crime, and there is a real risk of its repetition, he is likely to constitute a danger to the community."

13. It is argued for the Secretary of State that if the claimant is currently not posing a risk of repeating serious criminal behaviour because he is managing the risks that lead to his offending, for instance by avoiding contact with criminal associates or not drinking to excess or taking drugs or by accepting support and guidance from the Probation Service and/ or Health Service, then this does not reduce the risk so it is not a real risk if absent that management he would pose a real risk of repeating his offending. It is further argued that at the least the First-tier Tribunal failed to interrogate how robust the management that is currently put in place by the claimant is given his mental health

problems. It is argued that Restivo supports this approach and interpretation of EN (Serbia).

14. I do accept that this is a correct analysis of the test in EN (Serbia). As Mr Briddock argued the First-tier Tribunal must determine the issue of whether, at the date of hearing, there is a real risk of repetition of serious criminal offending. I do not accept that "managed risks" can be separated out from risk in general in light of all of the material evidence. Whether anyone will commit crime is a matter of the management of their lives, and their ability to seek and accept help from others when needed. The case of Restivo is not about persons who are managing their own lives but about people who are managed by the prison system so as to minimalize their ability to commit crime. This claimant is not such a person who is managed by the prison system. He is someone who has been in the community for the past two years and is managing his own life, albeit with the support of the Probation Service, friends and access to the Health Service. I do not therefore find that there was a misdirection on the law.

15. When considering whether a person is a danger to the community under s.72 of the 2002 Act, and thus whether there is a real risk of repetition of particularly serious crime, there must be consideration of the likely future behaviour of any appellant which will be informed by his past behaviour and his current management of any problems he has which may affect his judgement as set out in the various expert reports and his own evidence, with consideration of the sustainability of that management.

16. I find that the decision of the First-tier Tribunal Judge was entirely open to him. He understood that the past history led to a conclusion set out in the OASys report and by Dr Boucher that the claimant had a moderate or medium risk of reoffending. However, the First-tier Tribunal Judge was able to give weight to the opinion of Dr Boucher that the claimant's current risk factors are presently low and that the claimant is not currently a risk to the general public for the following reasons: firstly his Probation Officer finds that he has reduced his alcohol consumption and has no current problems, having undertaken intensive risk reduction and rehabilitative work, which enable him to conclude that the claimant would be a productive member of society if he was granted the opportunity to engage in personal development activities and employment; secondly because of the claimant's own credible oral evidence that he has stayed out of trouble, sees his Probation Officer regularly and is not abusing alcohol or drugs; and thirdly, and perhaps most importantly, the evidence that the claimant's risk management strategy as a whole has stood the test of time as his last offence was in 2015 and he had not offended since being released from detention in December 2017.

17. With respect to his mental health situation, which Mr Clarke raised as a factor not sufficiently considered when the First-tier Tribunal considered

the way in which the claimant is managing his risk of reoffending, the evidence in the reports is that it has improved as the most recent report of Dr Boucher (dated August 2019) states that he does not meet the diagnosis for any major mental health disorder, although he has traits of PTSD, anxiety and depression which he might beneficially address through cognitive behavioural therapy although her opinion is that this is of limited benefit until inter alia his immigration status becomes stable. It is noted that the claimant has previously engaged in psychotherapy, and from the report of Dr Thomas, which was before the First-tier Tribunal and is at page 111 to 164 of the respondent's bundle for this hearing, this would appear to have been over a period of years from 2011 with the Helen Bamber Foundation. There is no evidence that indicates that the claimant would not engage with the Health Service or NGO providers to address his remaining mental health issues when needed and appropriate (particularly as he is supported in this by a friend who is a senior psychotherapist who is able to alert his GP when help was needed as was done in April 2019 – see letter at page 42 of the respondent's bundle for this hearing), and thus I do not find that it was a material error for this aspect not to have featured in the analysis of risk as in essence there is nothing that the claimant can usefully do to address his mental health problems at the current time, and the evidence shows that he has assistance when it is needed.

Decision:

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

2. I uphold the decision of the First-tier Tribunal allowing the appeal on asylum and human rights grounds.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of his protection claim.

Signed: Fiona Lindsley Date: 18th February 2020
Upper Tribunal Judge Lindsley