Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00059/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 December 2019	**On 10 January 2020**

Before

THE HONOURABLE MR JUSTICE GOSS
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

SK
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S. Ferguson, Counsel instructed by Freemans Solicitors
For the Respondent: Mr C. Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, SK, is a citizen of Sudan, born on 4 December 1996. By a decision and reasons promulgated on 23 September 2019, First-tier Tribunal Judge O'Malley allowed his appeal against a decision of the respondent to revoke his refugee status, dated 13 November 2017. A feature of this appeal is that both parties before the First-tier Tribunal applied for permission to appeal on overlapping, although not identical,

grounds. The overlap relates to the construction and application of section 72 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

2. It was the appellant before the First-tier Tribunal who was granted permission to appeal, so on that basis we will refer to the parties as they were below.

Factual Background

3. The appellant arrived in the United Kingdom as an unaccompanied asylum-seeking child in August 2013. He was recognised as a refugee by the respondent on 25 October 2013. He was granted five years' leave to remain until 24 October 2018. The basis of his recognition as a refugee was that he was a member of the particular social group of orphaned children in Sudan and on the basis of his actual and imputed political opinion. His father had been killed by the Sudanese government and the Janjaweed militia for political reasons. As a result, his own political views had been galvanised and he would face the risk of being persecuted on account of those, in addition.

4. The appellant did not reach the end of his initial five-year grant of leave to remain because, in July 2016, he raped a young woman in an area of wasteland in South London. The appellant denied responsibility, but following a trial he was convicted by a jury on 13 January 2017 in the Crown Court at Blackfriars. His conviction was for a single count of rape of a female over the age of 16. He was sentenced to seven years' imprisonment. That sentence of imprisonment had the effect of engaging the automatic deportation provisions in the UK Borders Act 2007.

5. As the appellant was a person with refugee status, the Secretary of State decided that the presumption in section 72 of the 2002 Act was engaged, namely that the appellant was a serious criminal who posed a danger to the community of the United Kingdom. Secondly, the Secretary of State considered that there were grounds to revoke the appellant's refugee status in any event, pursuant to the framework set out in Rule 339A(v) of the Immigration Rules. The respondent considered that the background materials relating to Sudan suggested that the appellant would no longer be at risk upon his return. In particular she considered that he, by definition, can no longer be a member of the particular social group of orphaned children in Sudan as he is now an adult. The respondent considered that there was no evidence that he would have any form of political profile such that it would engage a risk of persecution upon his return. She considered that he would be able to relocate to Khartoum as a young man with the skills and linguistic abilities he has built up during his residence in this country.

6. As such, on 13 July 2017 the Secretary of State informed the appellant that she intended to revoke his refugee status. As is required by the Immigration Rules, the UNHCR was notified and, on 22 September 2017,

the UNHCR submitted a series of observations in response to the Secretary of State's proposed course of action.

The Decision Below

7. The decision of the First-tier Tribunal is in two parts. First, the judge dealt with the presumption under section 72 of the 2002 Act (see paragraphs 59 to 71). That led to the operative conclusion at paragraph 70 that the appellant had not rebutted the presumption under section 72. The appellant seeks to challenge that conclusion in these proceedings.

8. We should observe at this point that, although the appellant and respondent had much in common in their grounds of appeal, they part company in a significant respect at this juncture. As will be seen, the judge proceeded to make findings under the Refugee Convention in relation to the Secretary of State's decision to revoke the appellant's refugee status, and purported to allow the appeal on Refugee Convention grounds. It was common ground before us that to do so was an error of law. The judge was required under section 72(10) of the 2002 Act to dismiss the appeal insofar as it relied on revocation of protection grounds.

9. The appellant contends that judge should have found that the appellant had rebutted the presumption.

10. The second part of the judge's decision was that the appellant was to succeed on refugee grounds. She considered that there had not been the required fundamental and durable change in the circumstances in connection with which refugee status was granted, with the effect that the decision to revoke the appellant's refugee status was unlawful: see paragraphs 89 to 92.

Relevant Legal Framework

11. A foundational principle of refugee law is that those recognised as refugees enjoy the benefit of the principle of *non-refoulment*: see Article 33(1) of the Refugee Convention 1951. Article 33(2) of the Convention excludes certain persons from the prohibition against *refoulement* where there are reasonable grounds for regarding them as a danger to the security of the country, in this context the United Kingdom, or where they have been convicted by a final judgment of a particularly serious crime or constitute a danger to the community of the host country.

12. Section 72(2) of the 2002 Act establishes a rebuttable presumption that those who have been convicted in this country of an offence resulting in an imposition of a sentence of imprisonment for at least two years are to be regarded as having committed "a particularly serious crime and to constitute a danger to the community of the United Kingdom". The provision is stated to apply specifically to aid the construction and application of Article 33 of the Refugee Convention. The presumption is

rebuttable (see subsection (6)). Where the Secretary of State has issued a certificate that the presumption in section 72 applies, a tribunal hearing an appeal on Refugee Convention grounds, including on revocation of protection grounds, must first determine whether the certificate issued by the Secretary of State merits the application of the rebuttable presumption. If, having given the appellant an opportunity for rebuttal, the tribunal agrees that one of the presumptions applies, the tribunal must dismiss the appeal insofar as it relies on a Convention or revocation of protection ground (see section 72(10)).

13. The duty contained in section 86(2)(a) of the 2002 Act for the tribunal to determine any matter raised as a ground of appeal continues to apply. The effect is that, although a tribunal is bound to dismiss an appeal on Refugee Convention or revocation of protection grounds where the section 72 presumption has not been rebutted, it nevertheless remains necessary for the tribunal to proceed to consider the underlying ground of appeal that was advanced by the appellant in the first place even though, having so determined that ground of appeal, the tribunal would be prohibited from allowing the appeal on the basis of it.

Revocation of protections status

14. Once a person has been recognised as a refugee, the possibility of their status ceasing is dealt with by Article 1C of the 1951 Convention. Significant for present purposes is Article 1C(5). It is not a provision which relates to the *conduct* of the refugee, but rather the wider circumstances in which the refugee was recognised as enjoying the protection of the Convention. It states, where relevant:

> "This Convention shall cease to apply to any person falling under the terms of section A if:
>
> […]
>
> (5) He can no longer, because the circumstances in connexion with which he has been recognised as a refugee has ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality …"

That test is reflected by paragraph 339A(v) of the Immigration Rules.

15. In MA (Somalia) v Secretary of State for the Home Department [2018] EWCA Civ 994 the Court of Appeal held that a cessation decision is the mirror image of a decision to determine refugee status. That finding followed the judgment of the Court of Justice of the European Union in Abdulla and Others (Joined cases C-175/08, C-176/08, C-178/08 and C-179/08). At paragraph 2(1) of MA (Somalia), Lady Justice Arden, as she then was, said:

> "The relevant question is whether there has been a significant and non-temporary change in circumstances so that the circumstances which caused

> the person to be a refugee have ceased to apply and there is no other basis on which he would be held to be a refugee."

The term "significant and non-temporary" may be traced back to Article 11(2) of the Qualification Directive 2004/83/EC.

Discussion

16. It was common ground at the hearing before us that the judge erred as to the overall impact of section 72. Having found that the appellant had not rebutted the presumption, it was incumbent upon the judge to dismiss the appeal insofar as it related to the decision of the Secretary of State to revoke the appellant's protection status: see section 72(10). It was not open to the judge to purport to *allow* the appeal on the basis that the appellant continued to meet the requirements of the Refugee Convention, by virtue of the fact that the Secretary of State had failed to demonstrate that there had been the required significant and non-temporary change in the circumstances in Sudan.

17. Ms Ferguson on behalf of the appellant challenges the judge's analysis of the non-rebuttal of the section 72 presumption. In her grounds of appeal and in her Rule 24 response (prepared in response to the respondent's application for permission to appeal, before it was apparent whether permission to appeal would be granted to the appellant or respondent before the First-tier Tribunal), she submits that the judge at paragraph 60 set the test for whether the presumption had been rebutted too high there. The judge held:

> "it is for the appellant to show either that it was not in fact particularly serious, because of mitigating factors associated with its commission, or that because there is no danger of its repetition he does not constitute a danger to the community".

18. We find that the judge correctly directed herself as to the formulation and application of the test for the rebuttable presumption. As the judge correctly noted in that same paragraph, the Court of Appeal considered the presumption in EN (Serbia) v Secretary of State for the Home Department [2009] EWCA Civ 630. It held:

> "[66] …Under section 72, it is for the Secretary of State to establish that the person in question has been convicted of a relevant offence. In practice, once the State has established that a person has been convicted of what is on the face of it a particularly serious crime, it will be for him to show either that it was not in fact particularly serious, because of mitigating factors associated with its commission, **or that because there is no danger of its repetition he does not constitute a danger to the community**." (Emphasis added).

We consider that in paragraph 60, the judge formulated the test for whether the presumption had been rebutted entirely in line with the approach taken by Lord Justice Stanley Burton in EN (Serbia).

19. Turning to the judge's analysis of whether the appellant had succeeded in rebutting the presumption, we consider that the judge reached a conclusion that was open to her on the facts. The judge considered the factors before and against whether the appellant had rebutted the presumption and gave reasons for her findings that he had not.

20. In relation to the factors militating in favour of the finding that he had rebutted the presumption, the judge noted at paragraph 67 that, upon his release from prison, the licence conditions to which the appellant will be subject will have the effect of providing a degree of protection to the community. We have some doubt however as to the extent to which the availability of license conditions was a valid consideration, because, by definition, if stringent licenced conditions are required to mitigate risk, then it is likely to be difficult to find that a person is ever not a danger to the community. If the only means by which such an individual can be said not to present such a danger is to the imposition of such conditions, then the fact that the individual presents a risk requiring such mitigative steps is itself a basis for concluding that he or she presents a danger to the community.

21. Taken to its logical conclusion, that submission would mean that all but the most dangerous of offenders, or the most risky of individuals, could be managed in some way, provided there were sufficient state resources. That approach would deprive Article 33(2) of the Convention and section 72 of their effect. We do not need to reach a considered view on that point because we consider that the factual findings reached by the judge were entirely within the range of responses open to her.

22. At paragraph 68 the judge said:

> "The assessment in the 2017 pre-sentence report was that he was a high risk and continued to deny his offence. The evidence of the appellant is that he had changed his stance on guilt shortly after the report was compiled, however, he has not undertaken any offence related work during his 3 years in detention. I was concerned that the appellant's evidence indicated significant minimalisation of a terrible crime involving the forcible detention, rape and terrorising of a foreign tourist who had limited English. The appellant further isolated the victim by taking her mobile telephone from her and required her to give evidence at his trial as he maintained his not guilty plea."

23. Then at paragraph 70 the judge reached her global conclusion to which we have already referred in relation to why he does not present such a risk.

24. Ms Ferguson submits that the appellant is in, to adopt her terminology, a catch-22 situation. In order to demonstrate that he no longer presents a serious danger to the community, it is necessary for him to undertake a number of courses or other rehabilitative work whilst in custody. To do that he is reliant upon the Ministry of Justice and those who administer the prison estate to facilitate such steps, but he has been unable, she submits, to find any assistance of the sort which would benefit him.

25. We consider that Ms Ferguson's submissions on this point amount to disagreements with legitimate findings of fact reached by the judge, rather than arguments which reveal those findings were reached upon the basis of some error of law or other procedural irregularity. The judge noted at paragraph 68 that the appellant had not undertaken any courses in prison, and although the submission of Ms Ferguson was that he had been unable to do, so we do not consider the fact that she makes that submission to render the judge's findings on this point irrational. No appeal on a point of fact lies to the Upper Tribunal and appeals are restricted to points of law.

26. On that basis, we reject the submissions of Ms Ferguson that the judge erred when reaching her conclusion concerning the rebuttal of the presumption and find that the judge's conclusion on this point stands.

The Refugee Convention Issue

27. It follows that, in the light of her findings on the section 72 issue, by purporting to allow the appeal on the substantive revocation protection issue, the judge fell into error. As will be demonstrated, the judge was prohibited by statute from allowing an appeal on those grounds; the obligation under section 72(10) was to dismiss the appeal to the extent it relied on revocation of protection grounds. It was an error of law for the judge to purport to allow the appeal on the very basis she was bound by statute to dismiss it. However, it was still necessary for her to consider the substantive, underlying facts. As this Tribunal held in the case of Essa (Revocation of protection status appeals) [2018] UKUT 00244 (IAC) it remains necessary for a judge, following the application of section 72, to make findings of fact concerning the ground of appeal advanced to the Tribunal (see paragraph 21 of Essa).

28. Mr Avery on behalf of the respondent accepted however that the conditions in Sudan are such that the appellant *would* face an Article 3 risk upon his return. There can be no suggestion that the fact that the Article 3 threshold is made out that there is no longer a risk on ECHR grounds arising from the risk posed by the judge or the militia and other military forces with state connections.

29. As such, and noting the absence of any submissions by the respondent concerning the judge's findings of fact on the substantive Refugee Convention issue, we reach the following conclusions.

    (a) The judge's analysis of the underlying Refugee Convention issues was sound, even though she was bound to dismiss the appeal insofar as it related to the revocation of protection issue.

    (b) The judge reached conclusions that she was entitled to reach on the evidence before her. Due to the highly complex nature of the section

72 framework, when taken with the statutory jurisdiction of the First-tier Tribunal, the judge erred when concluding that she was entitled to allow the case on Refugee Convention grounds. She was not. She was merely permitted to make findings going to the issue raised in the grounds of appeal, Refugee Convention criteria cessation of protection status had not been revoked.

(c) In light of Mr Avery's concession concerning Article 3, we find that the appellant would face an Article 3 risk if he were returned to Sudan at the present time.

30. As such, we preserve all findings of fact of the judge in the First-tier Tribunal but set aside her decision to the extent that it was allowed on Refugee Convention grounds and instead remake it allowing it on Article 3 human rights grounds.

31. To that limited extent, this appeal is allowed.

32. In view of the risk currently faced by the appellant upon his return to Sudan, an anonymity order is appropriate.

NOTICE OF DECISION

Judge O'Malley's decision involved the making of an error of law.

We set it aside to the extent that it purported to allow the appellant's appeal on Refugee Convention grounds, and remake the decision, allowing the appeal on Article 3 grounds.

Anonymity direction is made.

Signed *Stephen H Smith* Date 6 January 2020

Upper Tribunal Judge Stephen Smith

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 their 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.

TO THE RESPONDENT
FEE AWARD

We make no fee award.

Signed *Stephen H Smith* Date 6 January 2020

Upper Tribunal Judge Stephen Smith