Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00012/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 May 2022	**On 20 May 2022**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

OJ (THE GAMBIA)
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify him. Failure to comply with this order could amount to a contempt of court.

Representation:
For the Appellant: Mr. G Lee, Counsel, instructed by the JCWI
For the Respondent: Ms. A Everett, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant appeals against the decision of the respondent to revoke his refugee status, the respondent being satisfied that the appellant has been convicted by final judgment of a particularly serious crime and constitutes a danger to the community of the United Kingdom: paragraph 339AC(ii) of the Immigration Rules ('the Rules'). The respondent's decision is dated 6 February 2019.

2. Judge of the First-tier Tribunal Atreya allowed the appellant's appeal by a decision sent to the parties on 3 August 2021. The respondent was granted permission to appeal and by a decision dated 8 February 2022 I allowed the respondent's appeal to the extent that the decision of the First-tier Tribunal was set aside, with the resumed hearing taking place in the Upper Tribunal. Certain identified findings of fact were preserved.

Anonymity

3. I issued an anonymity order by my decision of 8 February 2022 and neither party sought for it to be set aside. I confirm the order above. I do so as it is presently in the interests of justice that the appellant is not publicly recognised as someone enjoying international protection: *Guidance Note 2002 No 2: Anonymity Orders and Hearings in Private*.

Background

4. The appellant is a national of The Gambia and is presently aged 38. He entered the United Kingdom with entry clearance as a visitor in September 2010 and overstayed. He subsequently claimed asylum in March 2011, stating that he possessed a well-founded fear of persecution based upon his sexuality. The respondent refused the application for international protection in April 2011, but the appellant was subsequently successful on appeal and was granted refugee status by the respondent on 5 October 2012. He enjoyed limited leave to remain in this country until 4 October 2017 and made an in-time application for settlement.

5. On 25 April 2018, the appellant was convicted by a jury on two counts at Snaresbrook Crown Court: (i) threatening a person with a blade/sharply pointed article in a public place and (ii) affray.

6. On 6 June 2018, the appellant was sentenced to 2 years' imprisonment on each count, concurrent. In sentencing the appellant, HHJ Zeidman commented, *inter alia*:

> "… it follows from the jury's verdict that, despite what you said and what you were beginning to say a few moments ago, the fact is that, number one, you had the knife with you in a public place, that you intentionally threatened [the victim] with that knife in a frightening way. You did so in such a way that there was truly an immediate and real risk of serious harm to him and you were not in any way acting in self-defence. As [the victim] set out it in his evidence – and he was a

> superb witness. I accept every single thing that he said. He is a person of the highest possibly integrity … He told us that 'it was a black-handled knife; the blade was quite long, [the appellant] was holding it; the blade was sticking out' and that 'when [the appellant] spoke [to the victim] and saw [the victim], [the appellant] lunged forward – just think how frightening that must have been – 'and raised the knife, which he pointed at me, and I turned around and ran back and I thought he was trying to slash, or stab me.'
>
> …
>
> I also, earlier on today, had read the psychiatric report. I know that you have had previous admissions to hospital. Fortunately, your mental health is not such that you could now be sent to a hospital for treatment, but I do take into account that you have had difficulties in the past, as set out in the psychiatric report and in the presentence report …"

7. By a decision dated 6 February 2019 the respondent decided to revoke the appellant's refugee status and issued a 'section 72' certificate. It was considered that the appellant had not rebutted the presumption that he constituted a danger to the community of the United Kingdom: section 72(6) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act').

Law

8. The 1951 UN Convention relating to the Status of Refugees makes no provision for the revocation of refugee status. Article 1C and Article 1F simply provide that the 1951 Convention no longer applies when the circumstances set out in those articles are met.

9. Article 32 of the 1951 Convention confirms that a refugee shall not be expelled from a country where they are lawfully present except on grounds of national security or public order.

10. Article 33(2):

> '2. The benefits 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.'

11. The norm established by Article 33(2) simply authorises the receiving State to divest itself of its particular protective responsibilities. The individual does not cease to be a refugee.

12. Article 33(2) has been incorporated into domestic law by paragraph 339AC(ii) of the Rules:

> '339AC. This paragraph applies where the Secretary of State is satisfied that:

…

(ii) having been convicted by a final judgment of a particularly serious crime, the person constitutes a danger to the community of the United Kingdom.'

13. The function of Article 33(2) is mainly to prevent the enjoyment of protection under the 1951 Convention by refugees who, given their individual behaviour, pose a fundamental threat to the receiving State. In *EN (Serbia) v. Secretary of State for the Home Department* [2009] EWCA Civ 630, [2010] Q.B. 633, the Court of Appeal confirmed that 'a particularly serious crime' enjoys an autonomous international meaning, but what amounts to such crime does not have to be the same in every member state. States enjoy a margin of appreciation in the assessment of such threat.

14. The use of the wording 'particularly serious' is indicative that the loss of protective responsibility, or even refoulement, is only warranted when account has been taken of all mitigating and other circumstances surrounding the commission of the offence.

15. 'Danger' is properly to be assessed as the requirement that there be serious danger, i.e., a risk of future danger for the community from comparable crimes being committed by the offender. The danger therefore has to be real and can be demonstrated by a particularly serious crime and the risk of reoccurrence of a similar offence, though the wording of Article 33(2) does not require a causal connection between the two requirements: *EN (Serbia)*.

16. In assessing such danger, it is appropriate to consider the circumstances of the individual case as well as the personal circumstances of the offender.

17. Article 33(2) is reflected in section 72 of the 2002 Act which provides that for the purposes of Article 33(2) an individual is presumed to have committed a serious crime and be a danger to the community if they are sentenced to imprisonment of at least two years.

18. Section 72(2) of the 2002 Act:

'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 -

(a) convicted in the United Kingdom of an offence, and

(b) sentenced to a period of imprisonment of at least two years.'

19. Section 72(6) provides that a presumption under section 72 that a person constitutes a danger to the community is rebuttable by that person.

20. Stanley Burnton LJ confirmed in *Secretary of State for the Home Department v. TB (Jamaica)* [2008] EWCA Civ 977, at [38]:

> 38. … Article 33.2 distinguishes between exclusion from the benefit of Article 33.1 on the ground of danger to the security of the country in which he is and exclusion on the ground of conviction of a particularly serious crime and danger to the community. In the former case, it is sufficient that there are reasonable grounds for regarding the refugee as a danger to security; in the latter case, the refugee must in fact have been convicted of a particularly serious crime and must in fact constitute a danger to the community. …'

Decision

21. At the outset I thank the representatives for their careful and helpful submissions, and I also thank the appellant's legal representatives for the preparation of the detailed appeal bundle.

22. The pursuit of this appeal had generated a significant volume of paper, understandably so considering the appellant's complex mental health needs and the regularity of his assessment by medical practitioners. However, upon careful reflection, both experienced representatives accepted that the sole question before this Tribunal was a simple one to be considered on the facts as they exist at the date of the hearing: does the appellant present a danger to the community of this country?

23. Mr. Lee conceded, and I consider that he was right to do so, that the appellant has been convicted of a serious crime. This issue generated much discussion before the First-tier Tribunal but I conclude that the sentencing observations of HHJ Zeidman clearly establish the seriousness of the offence: the appellant intentionally threatened his victim with a knife in a frightening manner that led to the victim being very scared and psychologically harmed. Such circumstances can only appropriately be considered to establish a serious crime for the purposes of this appeal.

24. As for the second limb to be established by the respondent, namely whether the appellant poses a serious threat to the community, it is appropriate to detail in full the findings of fact that were preserved from Judge Atreya's decision (the failure by the Judge to adequately proofread her decision was noted in my error of law decision of 8 February 2022):

> "70. The appellant did not give oral evidence because I accept that he lacks capacity to give further oral evidence to a Tribunal and/or be cross examined at this time on account of his mental ill health (paragraph 122/page 57) as identified by Dr Rachel Thomas, clinical psychologist dated 30th June 2021 at page 19 and other medical evidence served on the Tribunal (pages 104-118). I accept that he is acutely vulnerable because of his mental health and was not fit to give evidence before me. I am duty bound to given careful scrutiny to the oral and documentary evidence presented to me.

71. There is evidence from a psychologist about a diagnosis of significant psychiatric symptoms and a primary diagnosis of severe schizoaffective disorder (paragraph 46/page 35) and the importance of safety and stability in his external situation in order to be able to access treatment is could when well enough engage with appropriate treatment (page 137-139/63).

72. I heard from two 'live' witnesses, August Yeboah [Ibowa], Mateso Kutanda (pages 6-9) both of whom are support workers for the appellant and others within a supported accommodation hostel set up. They gave evidence by video link in the presence of the appellant. I find them both to be reliable and truthful. They are both support workers and work with the appellant on a daily basis in his supported accommodation. They believe he is compliant with medication though they do not administer his medication because they are not medically qualified. I accept their evidence that they know the appellant and they interact with him regularly and the appellant has not been aggressive to them or anyone else in the hostel and there has been no aggressive behaviour that has required moving him to another hostel.

73. I accept that the first witness has worked with [the appellant] since June 2020 and supports the appellant's interactions with outside agencies including his GP, solicitors and job centre. He did refer to the appellant's agitation at not being able to work which is because of his immigration position and frustration at not being fully independent. His view is that the appellant needs support because of his paranoia and referred to an incident that happened when the appellant was volunteering and handing out leaflets at Liverpool Street and was told to stand in a particular spot. He stayed at the spot all day not moving and when asked to move by a security guard the appellant refused stating that he had been told to stand there. This led to an arrest but there was no charge for the offence.

74. The first witness also referred to his lack of engagement with mental health services 9 months ago in August/September 2020 but confirmed that he was engaging with mental health services in recent months. The second witness has attended appointments with the appellant.

75. Overall I find that on the balance of probabilities I am persuaded by the support workers oral evidence which is accurate and reliable and I prefer the evidence they have given me on the day of the hearing and whilst I find that whilst the appellant continues to have mental health problems and is agitated and paranoid, that they do not consider him to be 'dangerous' or to pose a threat to them or other residents or them in the supported hostel. Of significance is that the first witness had direct experience of violent residents who had to be moved on and he specifically indicated that the appellant did not fall within this category.

76. I find that if the appellant's agitation at not being able to work has to be seen in the context of his frustration at not being

independent and waiting for his immigration status to be resolved having had the right to work as a refugee. It is entirely plausible that a person who is in supported accommodation is frustrated or otherwise agitated because they cannot live and work independently. It would be dangerous and wrong to conflate agitation at his lack of independence and current circumstances with violence and risk of committing violence.

77. I accept that the appellant's compliance with and engagement with mental health services fluctuates and is variable i.e., not engaging August/September 2020 and was at the date of hearing. The respondent sought to persuade me that there is discrepant evidence about this but going through the medical records it is clear that compliance has historically been an issue for the appellant with medical records identifying that his compliance with antipsychotic medication was unclear as far back as 2015. In terms of my findings, I am prepared to accept that the appellant was compliant and engaging with mental health services at the date of hearing because of the evidence of his support workers who did not administer his medication nor were they medically qualified but accepted the appellant's assurance that he was and assisted him with appointments and observed his behaviour at close quarters as support workers.

78. The appellant has a long history of criminal offending and three previous convictions for 6 separate offences before the criminal offence for which he was sentenced in 2017. This is not disputed. He was found fit to plea following a psychiatric assessment but identified as having clear and complex mental health and substance issues. He appeared for sentencing for an offence of threatening a person with a knife and affray on 23rd July 2017 following a not guilty plea. He was found guilty following a trial at the Crown Court.

79. HHJ Zeidman QC took into account in his sentencing the not guilty plea, the assault against a police officer in the past and public order offences. Significantly, he heard evidence from the victim who described a 'severe amount of psychological injury' as a result of the affray and the knife offence. (respondent's bundle).

80. The index offence was serious, and a victim was traumatised. Prior to this index offence he had not been convicted of an offence of equivalent seriousness nor has he reoffended since his release from prison

81. At the time of sentencing, he was found to be vulnerable because of his drug, alcohol and mental health issues as identified by a psychiatric report prepared by Dr Oyebode in 2011

82. The Pre-Sentence Report was that the appellant's previous offending had been relatively minor and that his risk of reoffending was low [A395]

> 83. The Respondent accepts that the appellant is at risk of persecution and Article 3 ECHR ill treatment in Gambia as set out at paragraph 33 of the reasons for refusal letter."

25. It is accepted by both parties that the appellant presents with extremely complex personal needs, consequent to significant mental health concerns. The latest of several medical reports provided to the Tribunal is one from Dr Thomas, consultant clinical psychologist, dated 30 June 2021. Dr Thomas confirms in her conclusion that the appellant is a traumatised and psychiatrically unwell man, who presents in consultation in a manner entirely consistent with an individual suffering from severe symptoms of schizoaffective disorder. He is also prone to a diagnosis of schizophrenia when less depressed and to psychotic breakdown. Dr Thomas opines that the primary cause of the appellant's psychiatric disorder is the traumatic events that occurred to him in The Gambia in addition to those experienced in this country. She further opines that the appellant currently largely lacks any insight into his psychiatric illness and is instead fuelled by omnipotent psychotic delusions about his own importance to other people and events as a psychological defence.

26. Ms Everett relies upon the appellant possessing no insight into his mental health and his inability to waver from his own agenda and pre-occupations. She drew my attention to medical evidence identifying the appellant's difficulties in working with doctors, preferring to take his own medication, which impacts upon the ability of medical practitioners to monitor his current medication compliance and to ensure that it is reliable.

27. Mr. Lee's submissions were rooted in the humanitarian nature of the 1951 Convention, observing that the Convention cannot properly be read as permitting a refugee to lose the benefits of protection consequent to serious mental health concerns.

28. Ultimately, as discussed with the representatives at the hearing, this is a matter where the Tribunal's consideration is solely concerned with the appellant's danger, or risk, to the community at the present time. My consideration as to revocation is founded upon historic events as well as the appellant's personal circumstances as they exist at the date of hearing and my assessment is to whether the appellant constitutes a danger to the community of this country is rooted in such evidence. This is a forward-looking assessment.

29. I am fully aware that the events that took place in July 2017 were immensely frightening for the victim who suffered significant psychological harm consequent to his experience.

30. I observe that though the appellant had three previous convictions for six separate offences prior to the index offence, they were primarily concerned with possession of cannabis with one count of using threatening and abusive words and behaviour. None of those offences were anywhere near the significance of the index offence.

31. I note the pre-sentence report prepared for Snaresbrook Crown Court by a probation officer in May 2018, *inter alia*:

> "It is evident [the appellant] has a number of complex needs, which remain unaddressed, these include, accommodation issues, issues with his family relating to his sexuality, drug and alcohol misuse issues and a complex mental health history which it appears even psychiatric doctors have difficulty agreeing on a diagnosis. It is my assessment that unless these issues are addressed, [the appellant] will continue to appear before the courts.
>
> [The appellant] is clearly voluntary, and will continues to be supported in the community by the Community Mental Health team, however, it is unclear moving forward how his accommodation issues will be managed, as Dr Oyebode's report indicates he has been assessed as unsuitable to reside in supported housing due to the risk he poses to other vulnerable residents, and given the nature of the index offence, and the circumstances surrounding the fire brigade having to be called to his house, it would appear [the appellant] also poses a risk to himself and other residents when living independently."

32. Despite the identification of these concerns the experienced probation officer was content to opine as to the assessment of risk:

> "[The appellant] was assessed using the Offender Group Reconviction Scale (OGRS) and (OASys). Probability of proven reoffending within 2 years is assessed as Low; Probability of proven non-violent reoffending is assessed as Medium and probability of violent-type reoffending is also assessed as medium. This is based on actuarial factors such as age, gender, number of previous convictions and age of first conviction. Given [the appellant's] offending over the last 3 years, I would concur with this assessment."

33. I find that over the nearly five years from the commission of the index offence in 2017, and particularly since the appellant was released from custody in April 2018, the assessment has proven accurate. Ms. Everett accepts on behalf of the respondent that the appellant has been convicted of no further crimes since the index offence.

34. Turning to the concerns raised by the probation officer, which are mirrored in various medical reports placed before the Upper Tribunal, it is clearly established that the appellant is now the beneficiary of a significant personal support regime, addressing his accommodation, personal and health needs. The evidence of his support workers as accepted by Judge Atreya is consistent as to his being, on occasion, difficult consequent to his mental health concerns, which I observe includes paranoia. However, the accepted evidence of the support workers is that they are able to work with the appellant and he has proven capable of living and responding to treatment in a safe environment.

35. In evidence before the First-tier Tribunal, Mr. Ibowa confirmed that the appellant was engaging with mental health services and taking his

medication. Over time the appellant appeared to Mr. Ibowa to be calmer towards other persons such as Mr Ibowa's colleagues. A second support worker, Mr Kutanda, confirmed in evidence to the First-tier Tribunal that the appellant was engaging with mental health services.

36. Several medical reports have been filed with this Tribunal and they establish that the appellant has very complex mental health concerns that include grandiose ideas and paranoia. It is highly likely that he will always require mental health support in this country. However, he is receiving appropriate care and has been receiving it since his release from custody in April 2018. Whilst his behaviour can be challenging on a day-to-day basis, it is directed towards experienced staff who are able to work with him. In respect of the public in general, since his release he has not committed any further offences. I find that this state of affairs exists because of the present care regime addressing, beneficially, the problems identified by the probation service.

37. I am satisfied that the continuation of such support, the appellant's continued compliant behaviour, his residence in the accommodation provided, and the fact that he has no further convictions establishes that the appellant is satisfactorily engaging with his mental health care regime and is not proving to be of concern to the general public. I conclude that the appellant is not presently a danger to the community and therefore rebuts the presumption established by section 72. The respondent has proven incapable of meeting all the requirements needed to revoke the appellant's refugee status.

38. It was accepted by the respondent in her decision letter that the appellant cannot be returned to The Gambia as his protected article 3 rights would be breached following his return. The sole issue before this Tribunal is therefore concerned with the revocation of refugee status. In such circumstances, the appellant's appeal against the decision of the respondent to revoke his refugee status is allowed as he has rebutted the presumption that he is a danger to the community of the United Kingdom.

Notice of Decision

39. The decision of the First-tier Tribunal promulgated on 3 August 2021 involved the making of a material error on a point of law and was set aside by a decision of the Upper Tribunal dated 8 February 2022.

40. The decision is remade. The appellant's appeal is allowed.

Signed: *D O'Callaghan*
Upper Tribunal Judge O'Callaghan

Date: 9 May 2022

TO THE RESPONDENT
FEE AWARD

No fee was paid and therefore no fee award is made.

Signed*: D O'Callaghan*
Upper Tribunal Judge O'Callaghan

Date: 9 May 2022