Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/01463/2020

THE IMMIGRATION ACTS

Heard at FIELD HOUSE
On 2 November 2021

Decision & Reasons Promulgated
On 5 January 2022

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE GA BLACK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

D P
(ANONYMITY DIRECTION MADE)
Respondent

Representation:
For the Appellant: Ms S Cunha (Home Office Presenting Officer)
For the Respondent: In person

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Anonymity was granted at an earlier stage of the proceedings because the case involves protection issues. We find that it is appropriate to continue the order. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the appellant and to the respondent.

DECISION AND REASONS

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1. The Appellant has appealed against a decision made on 29 January 2020 by the Secretary of State ("the respondent") refusing his protection and human rights claims. This is an appeal by the Secretary of State. However, we will refer to the parties as they were designated in the First-tier Tribunal.

2. First-tier Tribunal Judge Gandi ("the Judge") allowed his appeal in a decision promulgated on 8 February 2021.

3. The appellant, born on 4.5.1997, is a citizen of Angola. He arrived in the UK in January 2003 with his mother who claimed asylum and he was granted indefinite leave to remain on 7 May 2008. On 4 January 2017 the appellant was convicted at the Central Criminal Court of supplying Class A drugs and sentenced to 4 years detention in a Young Offenders Institution. He was served with a Notice of decision to deport on 6 April 2017. Following his release from detention an emergency travel document was agreed with the Angolan officials on 2 September 2019. The appellant claimed asylum on 3 October 2019. The appellant's asylum claim was that he was in fear of persecution because of his father's association with the Front for the Liberation of the Enclave of Cabinda ("FLEC") and he feared being ill-treated on return to Angola as people suspected him of witchcraft.

4. The issues determined by the First tier Tribunal were:

   (i) whether the appellant enjoyed protection from *refoulement* under Article 33 of the Refugee Convention 1951,

   (ii) whether the certificate under section 72 Nationality, Immigration & Asylum Act 2002 ("NIAA") was rebutted,

   (iii) whether the appellant had made out his asylum claim, and

   (iv) Article 8 in the context of whether there were very compelling circumstances to outweigh the public interest in deportation.

5. The respondent appealed on the following grounds (summarised):

   (i) <u>Ground 1</u>

   The Judge failed to provide adequate reasons for allowing the protection claim and in rebutting the presumption under section 72 NIAA. The Judge glossed over the appellant's violent high harm offending, his psychological demeanour and conduct and failed to adequately reason why he did not present a danger to the community.

   The Judge failed to give adequate reasons given the appellant's serious index offence and his previous convictions.

   (ii) <u>Ground 2</u>

   The Judge failed to assess the OASys and medical reports in the round with the appellant's overall poor credibility regarding his protection claim. The Judge relied on the expert reports without proper consideration of his serious offending. The assessment of the expert reports in the context of the appellant's criminality and propensity to offend failed to provide reliable evidence on his credibility.

The Judge cites no background evidence to support his finding that the respondent faces a real risk on return and would be questioned at the border.

The Judge failed to engage with the points raised in the refusal letter as to credibility and relied primarily on the report of Dr Schubert which are not entirely based on objective information. The Judge has looked at the evidence in a one dimensional way in respect of the medical report and OASys in concluding the section 72 certificate was rebutted.

The Judge failed to properly reason his failure to claim asylum until the last minute and the remaining aspect of the appellant's asylum claim.

The Judge finds "*additional protective factors*" in place as support for his rebuttal of section 72. These factors fail to outweigh the concerns raised in Dr Sahota's report and the OASys report which identify risk factors leading to reoffending such as high stress and financial difficulties. There is no finding made that the appellant's family circumstances have changed and cannot be seen as a protective factor. The Judge failed to take into account that he breached his licence by failing to attend probation and that he still has issues with aggression and intimidating behaviour. This is a significant and present risk.

(iii) Ground 3

The Judge made a material misdirection of law in the Article 8 assessment and gave inadequate reasons. The Judge failed to have adequate regard to the relevant jurisprudence – **ZH** (Tanzania) v SSHD 2011 UKSC**, SSHD v PG** (Jamaica) [2019] EWCA Civ 1213, **NA** (Pakistan) v SSHD [2016] EWCA Civ 662, **MS** (s.117(6):very compelling circumstances) Philippines [2019] UKUT 00122 (IAC).

6. Upper Tribunal Judge Kebede granted permission on the papers on 10 May 2021 in the following terms:-

> "*The first ground raises points of arguable merit in regard to the Judge's findings on section 72 of the NIAA 2002. Likewise, with the second and third grounds. Whilst the weight to be attached to the evidence is a matter for the Judge, there is arguable merit in the assertion in the grounds that the Judge's assessment of the appellant's credibility and risk on return to Angola relied on the report of Dr Schubert to the exclusion of other relevant factors including the concerns expressed by the respondent in the refusal decision. That decision impinges upon the judge's Article 8 assessment and the question of very compelling circumstances. All ground have arguable merit and permission is accordingly granted on all grounds*."

Rule 24 Response

7. The appellant submitted a Rule 24 response which we have taken into account and which the appellant himself presented to us at the hearing.

We note that an anonymity direction was requested on the grounds that this is a protection claim and a direction was given in the First tier Tribunal having regard to the fact that he was a vulnerable witness and there is evidence as to his mental health and relationship with his children.

8. The response also cited IH (s.72; particularly serious crime) Eritrea [2009] UKAIT 12 at [14], "... *it must be established that the individual was* in fact *convicted of the 'particularly serious crime' and that he is* in fact *a 'danger to the community'; reasonable grounds alone for so concluding will not suffice* (SSHD v TB (Jamaica) [2008] EWCA Civ 977, at [38] *per* Stanley Burnton LJ)."

The law

9. Art 33(1) of the Refugee Convention 1951 sets out the prohibition against "expulsion or return" of a refugee in the following terms:

> "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."

10. Section 72 NIAA provides that

> (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.

The error of law hearing

11. At the hearing the appellant appeared in person. The previous hearing was adjourned in order to allow him further time to get solicitors, but he had not been able to do so. He made no application for an adjournment. He indicated that he was content to proceed agreed with the hearing and acknowledged that even if he had more time it was unlikely that he would be able to instruct solicitors. He handed in the Rule 24 response prepared by Counsel who represented him before the First-tier Tribunal.

12. The Tribunal fully explained to the appellant the procedure in an error of law hearing and its role in providing assistance to him given that he was not legally represented. The respondent confirmed that he understood the position and that he was aware of the issues and did not require the Tribunal to set out the detailed considerations for the hearing.

13. Ms Cunha made submissions relying on the grounds of appeal and reasons for refusal letters. She conceded that the human rights claim stood or fell alongside the asylum claim. The main focus was on Ground 1 of the

grounds of appeal, that the Judge had in effect glossed over the appellant's case and focussed on the expert evidence to the exclusion of other relevant factors. The consideration of section 72 was focussed on the expert reports and the decision was inadequately reasoned in terms of the serious offence and previous convictions.

Decision and reasons of the First-tier Tribunal

14. In light of Ms Cunha's concession that the first ground formed basis of the error of law argument, we have accordingly focussed on that ground as the remaining were dependant on the first ground.

15. In the decision and reasons the Judge set out the issues to be determined and fully set out the law, facts and relevant caselaw was cited. The Judge carefully summarised the cases for the respondent and the appellant [4-5]. The starting point was consideration of section 72 NIAA and the Judge cited EN (Serbia) (2009). The Judge referred to the refusal decision and took the view that in it the respondent "*merely relied on the nature of the offence which was conspiring/supplying controlled drug class A*" and length of sentence of 4 years detention [19]. The Judge looked for more detailed information in the OASys report and psychiatric report, neither of which were challenged. The Judge considered the evidence of risk of reoffending and risk of harm, finding that the appellant was assessed as medium risk of reoffending. The Judge stated that the OASys report covered the noncompliance and dishonesty and the existence of some risk factors [21]. The Judge concluded that "*from the index offence he has the potential to cause serious harm but not in the immediate future as he appears motivated to change his lifestyle when released. There are a number of additional protective factors now in place* (page 154)" [22]. The Judge summarised the OASys report and referenced the fact that during the commission of the offence a person died, however the appellant was not convicted of any offence in connection. The Judge referred to the appellant's significant issues with aggression, breach of licence, his negative attitude in detention, his past history of violent offending as per the OASys report. The Judge identified from the report that... "*Although he has a past history of violent offences, he does not pose an imminent risk to his other children under his care*" [21]. The Judge found that he had contact with his daughter K and saw his other daughter M at weekends. His family were seen as a protective factor.

16. The Judge then considered the psychiatric report of Dr Sahota. She relied on the report and stated that the presenting officer had not challenged it. Further the Judge found that it was "*consistent with what is written in the OASys report as regards concerns about the level of stress the appellant is undergoing* "[32]. The Judge summarised Dr Sahota's conclusions that substance abuse (a risk factor) was in remission and his antisocial behaviour was primarily driven by financial motivation, that psychological issues contributed to offending and at times of stress there was an exacerbation of antisocial traits. Dr Sahota opined that the appellant had insight and motivation to change which were seen as essential markers of success in therapy to address personality difficulties [33].

17. At [34 a-h] of the decision the Judge set out the factors in support of her decision that the presumptions under section 72 were rebutted:

    a. The appellant's motivation to change lifestyle such as drug misuse;

    b. The stability of his accommodation;

    c. The emotional stability provided by his family including his partner and daughter with whom he lives;

    d. Although he is not working as he is not allowed to, he is keeping busy by being responsible for the care of his daughter.

    e. His risk of serious harm being medium term and although he has the potential to cause serious harm it is not in the immediate future;

    f. His index offence in itself not being classed as being indicative of a risk of serious harm and offending behaviour

    g. On licence before his recall although he was in breach of his licence conditions, the appellant did not commit any further offences;

    h. Once released on immigration bail, there is no evidence that he committed any further offences or breached any of the terms of his licence conditions.

18. We now summarise the Judge's consideration of appellant's claim for asylum based on a fear of persecution due to his father's political activism in FLEC. The Judge took into account that the respondent was a child at the time of the relevant events involving his father which would impact on his ability to recall events [36]. The Judge took into account three expert reports: an independent social worker's report dealing with the impact of deportation on the children, a country expert report, and a psychiatric report [38]. The Judge placed significant weight on the expert reports relying on the entirety of evidence therein and stating that the presenting officer raised no challenge to either the qualifications of the experts or the content of the reports.

19. The Judge preferred the material referred to in the skeleton argument at paragraph 34 which was more up to date background material. The Judge noted that the presenting officer did not seek to rely on other background material.

20. The Judge considered credibility in the context of the very late claim for asylum and the concerns raised by the respondent in this regard [41]. The Judge found nothing unusual in a person not making a claim for asylum whilst not in fear of removal and being unaware of the asylum process. The Judge found that the appellant was a young child who had been granted ILR and who was secure in the UK. The Judge further considered all the factors raised by the respondent but concluded that the late claim for asylum did not of itself affect credibility [51]. The Judge reasoned that the young age of the appellant at the time he lived in Angola was

sufficient explanation for his inability to describe his father's role in FLEC [51]. As to how he would respond to questioning on return to Angola the Judge took the view that the appellant could not be expected to lie.

21. The Judge relied on the entirety of the country expert report of Dr Schubert who concluded that the appellant was likely to be stopped and questioned at the airport and that his father's connections with FLEC would come to light [49]. The respondent accepted that questioning was likely given the return using emergency documents. The Judge appreciated that the appellant was not himself involved in FLEC but had regard to the fact that the security forces have a long and well documented history of targeting family members of suspected FLEC supporters. There was a pattern of systematic government repression of suspected support. The Judge took into account that the appellant was from Cabinda but found that upon questioning he would be at risk of being identified with his father [54-58].

22. The Judge considered the issue of risk on return from past abuse as a result of suspected involvement in witchcraft, and relied on the country expert report. The Judge concluded that internal relocation was a viable alternative [62].

Our analysis

23. We approach this appeal by acknowledging the seriousness of the offence for which the appellant has been convicted, its significant detrimental effect on the community at large and to those addicted to class A drugs, and the previous convictions. The seriousness of the offence was a substantial issue before the Judge. We have set out the operative reasoning which led the Judge to allow the appeal based on findings of fact reached having assessed the evidence as a whole. The question before us is to consider whether the decision discloses a material error in law as opposed to a disagreement of fact. (*Henderson v Foxworth Investments Ltd* [2014] 1 WLR 2600 "*It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached*.") We further emphasise that the respondent in raising ground of appeal must show "*a substantial doubt as to whether the decision-maker erred in law…*" and that "*such adverse inferences will not readily be drawn*" (*South Bucks DC v Port* (No2) [2004] 1 WLR 1953) *per* Lord Brown at page 1964). Our focus is to consider whether the judge reached a decision that was open to her on the evidence she heard and whether she gave adequate reasons in support of her decision. Of significance in our view is that in arguing her grounds and submissions, the respondent was critical of the Judge's approach to material issues that the Judge made clear in her decision that the presenting officer either did not invite her to consider or where no challenges were raised as to the expert evidence. We are satisfied that it was entirely open to the Judge to rely on and place weight on the unchallenged expert evidence.

24. The Judge began her consideration of issues under section 72 by stating that "*the respondent in coming to the decision that the presumption has not been rebutted has merely relied on the nature of the offence which was conspiring/supplying controlled drugs class A and the length of the sentence which was four years*"[19]. It is apparent that she had the offences and sentence at the forefront of her consideration before looking to the additional evidence of the expert reports. In addition to the OASys and psychiatric reports, the Judge had before her extracts from the judge's sentencing remarks which summarised in terms that the offence involved selling on a commercial basis, was not a one off, and carried out for profit. The sentencing judge remarked on the misery that drugs cause to other people and which create terrible problems in society. The sentencing judge emphasised that the appellant had relevant previous convictions for supplying class B drugs in 2015 and that the guidelines listed his wrongdoing under leading role. We are satisfied that the Judge was fully aware of the nature and seriousness of the offence and the appellant's previous convictions as set out in the OASys report upon which she relied "*heavily*".

25. The Judge followed the approach in IH as set out above and concluded that the presumptions that the offence was a particularly serious offence and that the appellant was a danger to the community were rebutted. We have set out in full her reasons at [34a-h]. The respondent's grounds contend that the Judge glossed over violent high harm, psychological demeanour and conduct, we are satisfied that the Judges' reasoning demonstrates that she had regard to all the evidence before her including the nature and seriousness of the offence and the appellant's conduct and demeanour. Further, in considering Article 8 the Judge set out further analysis of the nature and seriousness of the offence and his history of offending [80-94]. The decision must be read fairly and as a whole. The Judge specifically looked for more detailed material beyond the scope of the refusal letter and relied on the OASys report prepared to assess risk and to identify risk of serious harm [20 & 28]. Manifestly the report provided detailed, relevant and comprehensive information about the nature and seriousness of the offence, the previous convictions (7 convictions for 13 offences), the pattern of offending, the involvement of violence, the motivation for offending being largely financial and accommodation issues, his past education, work history and his expression of remorse. We are satisfied that the Judge considered all the relevant material although not all of it was rehearsed in the decision. Whilst the Judge's reasoning may on the face of it focussed on the evidence as to risk in determining the evidence in rebuttal of presumption that the appellant presents a danger to the community, we are satisfied that in reaching her conclusions the Judge took into account the nature and seriousness of the offence and the past history of violent offending [28]. The Judge's approach was balanced having regard to both positive and negative aspects of the OASys report and the factors relevant to the risk assessment, such as the noncompliance and dishonesty [21]. The Judge placed weight on the assessment made in the OASys report as to imminent risk and the finding of risk of serious harm to the community as

medium and on the protective factors in place at the present time identified in the OASys report.

26. The Judge's decision provided clear and sufficient reasoning in support of the decision made. Accordingly, we conclude that the grounds argued by the respondent in effect amount to a disagreement with the facts and assessment made by the Judge which in our view cannot be seen to be a decision that no reasonable Judge could have reached. It was undeniably open to the Judge to place weight on the expert evidence which was not challenged. We would add that in the record of proceedings we found little or no argument put by the respondent's representative of the kind that now appears to have been envisaged by the respondent. This was a detailed, thoughtful and considered decision in which each issue that was correctly identified and considered in turn by the Judge [13]. We are satisfied that there was no material error of law disclosed in the consideration of the section 72 certificate.

27. We now turn to the asylum claim. The grounds argue that the Judge failed to take into account the issues impacting on credibility in the asylum claim when considering section 72. This ground is weak as the Judge has in detail dealt with those issues at [41-44] and given full reasons. Contrary to the assertion made in the grounds of appeal, the Judge referred to background material as set out in the refusal letter relating to the situation in 2015 and 2017 [39]. We refer to paragraph 20 above where we have summarised the Judge's consideration of the issues raised as to credibility.

28. In terms of the background material the Judge again placed weight on the expert reports in particular that of Dr Schubert. The respondent's refusal letter cited the CPIN dated January 2015 specifically dealing with people from Cabinda and extracts from USDS 2016 *Country Reports on Human Rights Practices – Angola* dated March 2017 regarding witchcraft. As noted by the Judge at [39] that material was out of date. We are of the view that the Judge reasonably did not set out in detail the background material relied on by the respondent, preferring and placing weight on the detailed and up to date expert report [57]. The Judge further stated that there was no additional evidence relied on by the presenting officer at the hearing. The Judge relied on that material provided in the skeleton argument and the expert report. It is clear to us that the Judge engaged with the position taken by the respondent in arguing that the appellant was himself not an activist, by pointing out that the appellant's case as put before the Judge was the risk faced because of the association with father's political activism. The Judge placed weight on the unchallenged country expert report in its entirety [52-58].

29. We conclude that the grounds amount to no more than a disagreement with the assessment of the facts and evidence. "*As Lord Hoffmann said in Biogen Inc v Medeva Plc [1996] UKHL 18, [1997] RPC 1 at [54]:'Where the application of a legal standard ... involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation.'"(MI(Pakistan) v Secretary of State* [2021] EWCA Civ 1711.

30. We would finally add that in reaching the decision as to very compelling circumstances the Judge took into account as she must the decision made to allow the asylum claim having found that the appellant faced a real risk of persecution on return to Angola [111].

Notice of Decision

The appeal is dismissed as the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

Signed Date 25 November 2021

Judge GA Black
Deputy Judge of the Upper Tribunal