**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: RP/00086/2019

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 18 November 2020** | **On 3 March 2021** |

**Before**

**UPPER TRIBUNAL JUDGE NORTON-TAYLOR**
**DEPUTY UPPER TRIBUNAL JUDGE JOLLIFFE**

**Between**

**M A M**
**(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, 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 appellant or members of his family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.**

**Representation:**
For the Appellant: Ms A Childs, Counsel, instructed by Duncan Lewis Solicitors
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

**DECISION AND REASONS**

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Introduction and procedural history

1. The Appellant is a Sudanese national, born on 1 July 1987. He is a non-Arab Darfuri, and is a member of the Berti tribe. He entered the United Kingdom on 28 July 2015 and applied for asylum on 29 July 2015. On 11 November 2015, he was granted refugee status and leave to remain until 10 November 2020.

2. On 28 August 2017, the Appellant committed two sexual offences. While drunk and under the influence of the drug Spice, he attacked two different lone women in west London within a short period of time and made unwanted and forceful sexual advances on them. The first woman was able to fight him off and run away. The second woman screamed and managed to fight him off, and he was apprehended by passers-by. On 10 November 2017, following his guilty plea to these offences, he was sentenced to 2 years' imprisonment for each offence to run consecutively, coming to 4 years in total.

3. On 22 May 2019 the Secretary of State wrote to inform him of her intention to revoke the grant of his refugee status under section 72 of the Nationality, Immigration and Asylum Act 2002 (hereafter, "section 72") and Article 33(2) of the Refugee Convention (hereafter, "Article 33(2)"), and inviting him to submit any representations that he wished to make. The letter noted at paragraph 12 that due to the potential risk to him on return to Sudan, there was no intention to deport him at the present time. On 1 August 2019, the UN High Commission for Refugees made representations to the Secretary of State concerning the proposed revocation of his refugee status.

4. On 6 August 2019, the Secretary of State took a decision to revoke his refugee status. The decision stated in paragraph 2 that the Appellant had not made any representations against the proposed revocation. It set out the Appellant's history and the relevant legal framework for decisions to revoke refugee status. The remarks of the judge who sentenced the Appellant showed that the effects of his attacks were considerable, and they had serious consequences for the victims of the attacks.

5. The Appellant appealed that decision. On 5 November 2019 First Tier Tribunal Judge Baldwin heard his appeal, and by a decision promulgated on 11 November 2019 he dismissed it. He also made an Anonymity Direction. As a preliminary issue he considered the Appellant's application for an adjournment because the OASys (Offender Assessment System) report indicated that the Appellant was vulnerable, and further evidence about that was required. The Presenting Officer opposed the application, and Judge Baldwin refused it on the basis that the Appellant and his solicitors had had enough time to assemble the evidence, and that it was fair and just to proceed.

6. The Appellant appealed that judgment to the Upper Tribunal. By a decision promulgated on 24 February 2020, Upper Tribunal Judges Kopieczek and Norton-Taylor allowed the appeal on the basis that Judge Baldwin erred in law by refusing the application for an adjournment. An expert report could have addressed both

parts of section 72(2), and could have made a difference to the outcome of the appeal. The factual findings of Judge Baldwin would not be preserved. The error of law decision is appended to this decision.

Legal framework

7. So far as relevant, section 72 NIAA 2002 states as follows:

*72 Serious criminal*

*(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.*

*…*

*(9) Subsection (10) applies where –*

*(a) a person appeals under section 82 of this Act or under section 2 of the Special Immigration Appeals Commission Act 1997 (c. 68) wholly or partly on the ground mentioned in section 84(1)(a) or (3)(a) of this Act (breach of the United Kingdom's obligations under the Refugee Convention), and]*

*(b) the Secretary of State issues a certificate that presumptions under subsection (2), (3) or (4) apply to the person (subject to rebuttal).*

*(10) The Tribunal or Commission hearing the appeal –*

*(a) must begin substantive deliberation on the appeal by considering the certificate, and*

*(b) if in agreement that presumptions under subsection (2), (3) or (4) apply (having given the appellant an opportunity for rebuttal) must dismiss the appeal in so far as it relies on the ground specified in subsection (9)(a).*

*(10A) Subsection (10) also applies in relation to the Upper Tribunal when it acts under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.]*

8. Paragraph 339D of the Immigration Rules concerns the exclusion of a person from humanitarian protection:
*Exclusion from humanitarian protection*

*339D. A person is excluded from a grant of humanitarian protection for the purposes of paragraph 339C (iv) where the Secretary of State is satisfied that:*

*(i) there are serious reasons for considering that they have committed a crime against peace, a war crime, a crime against humanity, or any other serious crime or instigated or otherwise participated in such crimes;*

*(ii) there are serious reasons for considering that they have guilty of acts contrary to the purposes and principles of the United Nations or have committed, prepared or instigated such acts or encouraged or induced others to commit, prepare or instigate such acts;*

*(iii) there are serious reasons for considering that they constitute a danger to the community or to the security of the United Kingdom; or*

*(iv) there are serious reasons for considering that they have committed a serious crime; or*

*(v) prior to their admission to the United Kingdom the person committed a crime outside the scope of (i) and (iv) that would be punishable by imprisonment were it committed in the United Kingdom and the person left their country of origin solely in order to avoid sanctions resulting from the crime.*

9. The Court of Appeal considered section 72 and Article 33(2) in *EN (Serbia) v SSHD* [2009] EWCA Civ 630. It held that Article 33(2) imposed two requirements for deportation of a refugee, namely conviction for a particularly serious crime and constituting a danger to the community, and it did not expressly require a causal connection between the two. The term "particularly serious crime" in an international treaty had an autonomous meaning and did not necessarily mean the same in each Member State, as criminal laws varied between countries. The term should apply to what was criminal under domestic law when deportation was considered. Not every crime for which the criminal is sentenced to 2 years' imprisonment will be "particularly serious" within the meaning of section 72 – see *EN* at [69]. At [66], the Court held that

"*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.*"

10. Section 72 was considered in *IH (s.72; 'Particularly Serious Crime') Eritrea* [2009] UKAIT 00012. At paragraph 74, the Tribunal held that:

"*Thus, the forensic investigation of whether a crime is a "particularly serious" one in a given case must be a struggle by the decision-maker (judicial or otherwise) with the facts and circumstances relating to the conviction and the offender. The conclusion, which is part*

*factual but essentially one of judgment, must be conscientiously and rationally arrived at. No definitional or descriptive lexicon has been suggested to us that can assist further in the judicial quest for what is a "particularly serious crime".”*

11. The Tribunal was also directed to the judgment in *JL (medical reports – credibility) China v SSHD* [2013] UKUT 145 (IAC), and has taken account of the principles articulated in it.

The hearing

12. The hearing was scheduled for 18 November 2020. On 17 November 2020, the Appellant's solicitors submitted by email the following documents: a witness statement from the Appellant dated 16 November 2020; an undated letter from Nicole Voak, a Probation Services Officer with Tower Hamlets Probation; and an amended psychiatric dated 22 June 2020 report from Dr Michael Shortt, a Consultant Forensic Psychiatrist. Ms Childs explained that the psychiatric report had only been received on about 16 November 2020. Mr Lindsay pragmatically stated that he had read the documents that morning and despite their late production he was ready to proceed.

13. Given Mr Lindsay's position, the Tribunal decided to admit this evidence, despite the lateness of its production, and directed that the solicitors should by 19 November 2020 write to explain why these documents had been produced so late in the proceedings. In the event, an explanation was provided and, in the circumstances, we deemed it satisfactory. Nothing more need be said about this.

14. The Tribunal decided that the Appellant should be treated as a vulnerable witness, in light of the psychiatric report. Thus, we have applied the guidance set out in the Joint Presidential Guidance Note No.2 of 2010. It was agreed that the issue for the Tribunal to determine was whether the Appellant could rebut the Secretary of State's view that he should be presumed to be a serious criminal for the purposes of section 72(2) of the 2002 Act. Mr Lindsay explained that the Secretary of State accepted that even if the Appellant was unsuccessful in this appeal, he would in any event not be removed for the time being because he would still be at risk in Sudan on Article 3 grounds. It was also accepted (in our view, rightly) that the Appellant remained a refugee within the meaning of Article 1(2A) of the refugee Convention by virtue of his ethnicity and the prevailing country conditions in Sudan.

15. The Appellant gave oral evidence through a translator. In his witness statements dated 26 September 2018, 11 July 2019 and 21 October 2019, he said that he felt remorse that he had committed the criminal offences, and had explained why he feared to return to Sudan. In his witness statement dated 16 November 2020, he stated that because of the torture which he had suffered in Sudan, he was sexually impotent. He was therefore confused at having been arrested for sexual assault. He said that he would never have committed his offences if he had been in his right mind, and expressed regret to the women he attacked. He explained that he had been

unable to find work since his release in 2019, that because of the Covid 19 pandemic he had been unable to register for any courses run by the Probation Service, and that he had rediscovered his religion and now read the Qur'an.

16. Mr Lindsay cross-examined the Appellant. He said that he accepted he committed the offences for which he had been convicted, but he was not "*conscious*" at the time, and did not remember them. He was asked about the recommendation in the OASys report that he should engage with necessary drug and alcohol services and whether he had in fact done so, and he stated that he had not done so. When asked about his attitude towards his sexual impotence and whether he remained a risk towards women, he stated *"Is there a lion who can attack his prey without claws?"* He was asked whether he considered the attacks were not serious because he had not penetrated the women, and he answered *"Unfortunately, I cannot even rape someone"*. When asked whether his crimes were serious, he replied that he would not like someone who had done the things which he had done.

17. It was put to the Appellant that the OASys report said he posed a medium risk of serious harm due to his "sexual preoccupation", but he denied that he had any such pre-occupation. He did not accept that he was in denial, or that he posed a risk to women. He was asked about impulsive behaviour, that he had lost his money gambling and that shortly before he committed the sexual assaults he smoked an unknown drug. He said that at the time had been homeless for several months, and needed £1,500 to rent a room. A man had told him that he could double his money through gambling, but he had lost his money in 5 minutes. Regarding smoking an unknown drug, he stated that he had not known it was Spice, and had only been told that in prison. He said he took the risk of smoking it because it was offered to him by a woman, and he felt that if she could take it, he could too.

18. He explained that he now lived at a hostel in Hackney, which required a level of good behaviour from residents, including that if a resident is seen drinking or taking drugs, he or she is at risk of being thrown out. The hostel has both male and female residents, and he was considered safe to be around female residents. He had previously lived in a hostel in south London, which had imposed abstinence rules and regular testing.

<u>The reports</u>

19. There was an extract from an OASys report about the Appellant dated 16 October 2019. It assessed him as being a medium risk of reoffending, due to his immigration status and unemployment, and as a medium risk of serious harm, because of tendencies to substance misuse, sexual pre-occupation and violent sexual attacks. It specified the steps he needed to take to manage his risks, which were that he had no contact with his victims; that Hammersmith and Shepherds Bush were exclusion zones for him; that he informed probation of any new relationship with a woman;

that he complied with immigration requirements; and that he engaged with drug and alcohol services.

20. The National Probation Service letter from Nicole Voak stated that she and a colleague had supervised the Appellant since May 2020. He had not reoffended since his release from prison, and had attended all appointments and complied with this the requirements of his order. He was assessed as posing a medium risk to the public. His risk factors were lifestyle and associates, accommodation and substance misuse. He had addressed these, although it was not specified in what way he had done so. The letter stated that there were "*no concerns*" about his risk level, and he did not pose an imminent risk of harm to the public.

21. The psychiatric report is by Dr Michael Shortt, a Consultant Forensic Psychiatrist. Mr Lindsay did not dispute his competence or credentials, which are that he is a member of the Royal College of Psychiatrists, has done higher training in forensic psychiatry at Springfield University Hospital and was an academic clinical fellow in forensic psychiatry at St George's University. He has experience of writing medico-legal reports going back to 2008. His report was based on an interview conducted on 15 May 2020 through an interpreter and via an online platform. He had seen the letter of instruction, witness statements, the OASys assessment, and the various documents concerning the Appellant's refugee status listed at 6.1.5-10 of the report.

22. The report set out the Appellant's history, including being abused in Sudan, claiming asylum in Great Britain and his criminal offences, commenting *"[The Appellant] has mentioned being oblivious to such offending behaviours due to his consumption of alcohol and unintentional illicit substance misuse."* The report stated that the OASys report found the Appellant was a low risk of reoffending and a medium risk to the public. He remains in contact with family members, including his three siblings in Sudan. He suggested to Dr Shortt that some of his relations on his mother's side have autism, although there was no diagnosis by a GP or psychological service. He had lived with his family in his village until 2003, when due to the civil war they moved to a city, Madani. There was no history of criminal offences, drug use or domestic violence in his family. He left school at the age of 13 after being bullied, and later trained to be a butcher.

23. The Appellant had a history of misusing cannabis and alcohol both in Sudan and in Great Britain, but he said he had stopped using them while in prison, and had focussed on his Islamic faith, although he had used cannabis on his release from prison. While in prison his asthma had been treated, but he had not received treatment for his drug and alcohol misuse.

24. When Dr Shortt asked the Appellant about his offences, he said *"If I did it, it's a shame because of my religion but I was out of my mind at the time"*. He said he wished he could apologise to the women involved. He had self-harmed by scratching his arm with a knife, and had suicidal thoughts. During the interview he displayed considerable anxiety, and had a low mood. He had memory problems.

25. Dr Shortt's risk assessment was that the Appellant's substance misuse was a major factor in his offending. His risk of future offending would be increased if he destabilised by not complying with his treatment for PTSD, by his depression and substance misuse, though his faith reduced the substance abuse risk. He stated that the Appellant had expressed regret for his offences. If his immigration status was normalised and he was able to work and study, his future risk would reduce.

26. Dr Shortt's opinion was that the Appellant had a moderate depressive episode and PTSD, but he was confident that he had capacity for legal purposes. He had received no psychological or psychiatric input. The National Institute for Clinical Excellence guidelines indicated that a person with PTSD should have 8-12 weeks of trauma focussed psychotherapy, and perhaps more than that. He should also be treated with Eye Movement Desensitisation and Reprocessing, and with anti-depressant medication such as Sertraline. If the Appellant was removed from the United Kingdom, his condition might deteriorate and his risk of self-harm would rise.

The parties' submissions

27. In Ms Childs' Skeleton Argument dated 17 November 2020, she formulated the issues as being whether the Appellant had been convicted of a particularly serious crime, and whether he constituted a threat to the security of the United Kingdom. She correctly cited *EN* as authority for the propositions that not every crime which receives a sentence of 2 years is particularly serious, and that the Tribunal must consider mitigation.

28. As mitigation, she noted that the sentencing judge had not imposed an extended sentence, and had not made a Sexual Harm Prevention Order. She relied on the fact that the Appellant had been homeless at the time of the offence, had suffered from mental health problems, and had been abused in Sudan, including having been severely beaten by the security forces and detained. He had expressed regret for his actions, which were committed under the influence of alcohol and the drug Spice, and which were out of character. He had pleaded guilty to his offences, thereby avoiding the need for his victims to testify, and had been a 25% discount on his sentence.

29. If the Tribunal did find the crime was a particularly serious one, it should then consider whether the Appellant was a danger to the community. She cited the OASys report which assessed his risk of reoffending as low, and that it was only his immigration status and unemployment which raised his risk. He had tried to find work, but his immigration status had made this more difficult. He had shown insight into the effect of his alcohol and drug use. He has received a lot of support from the Probation Service during his licence period. She also relied on the report of Dr Shortt.

30. In her oral submissions at the hearing, Ms Childs emphasised the Appellant's circumstances when he committed the attacks – he was homeless, he had suffered PTSD in his journey from Sudan, he had been recognised as a refugee, and at the

time he spoke little English. He had been badly advised about accessing support, but now had a hostel place. She reiterated his guilty plea, and that he understood the effect which drugs and alcohol can have on him. He has been allowed to live in mixed-sex accommodation, which suggests there are no concerns about his sexual risk.

31. For the Secretary of State, Mr Lindsay relied on the decision letter. He said that the Appellant had made two separate attacks on lone women, which were serious and involved a considerable amount of force. The fact that the Appellant suffered from PTSD and other mental health problems did not reduce the seriousness of the attacks. He noted that Dr Shortt did not engage with some aspects of the OASys report, in particular the comment that the Appellant had a *"sexual preoccupation"*.

32. Mr Lindsay commented that the Appellant's evidence was vague and evasive and did not fully accept his personal responsibility, for example when he said, *"If I did it, it's a shame"*. His evidence did not properly reflect the seriousness of his offences – for example, his comment that *"Unfortunately, I can't even rape someone."* The Appellant's claim that he did not even think about sex was clearly wrong, given the reference in the OASys report to his *"sexual preoccupation"*. It suggested that he was in denial about the seriousness of his offending. This aspect of the OASys report had not been considered by Dr Shortt, which undermined the cogency of his conclusions. Dr Shortt's observation at 17.9 of his report, that if the Appellant had a job, it would give a structure to his life which would reduce the risk of boredom and poor finance that could cause him to drink alcohol or take drugs, suggested these were triggers which could cause him to reoffend. He invited the Tribunal to dismiss the appeal.

The Tribunal's Findings

33. When the Appellant was sentenced, HHJ Curtis-Raleigh said the attacks were *"terrifying"*, and that they were of a type which caused real fear and made women feel restricted in what they could do. We agree. The Appellant grabbed his first victim from behind in the dark, pulled her to the ground, got on top of her and tried to kiss her. His method of attacking his second victim was similar. The victim impact statements make it clear that both victims were very profoundly affected by the attacks in many aspects of their lives and for a long time. The Appellant claimed in his witness statement that he is sexually impotent, although Dr Shortt did not confirm this through physical examination. Even if the Appellant is impotent, it does not reduce the seriousness of his attacks, nor does the fact that his victims were able to fight him off. HHJ Curtis-Raleigh rightly felt that the Court needed to protect people from the actions of men like the Appellant.

34. Dealing with the mitigation advanced, it is true that the judge did not impose an extended sentence. However, he did impose a total sentence of 4 years. This is a substantial sentence, and consistent with the offence being very serious. It is also true that no application was made for a Sexual Harm Prevention Order. However, SHPOs

are typically imposed to restrict a convicted sex offender from engaging in particular jobs, for example working with children, or certain activities, such as types of internet use. *R v Smith and Others* [2011] EWCA Crim 1772 makes clear the need for the terms of a SHPO to be tailored to the exact requirements of the case. Given that the offences were violent attacks committed at random, it is unclear what kind of restriction would be effective and could be tailored to the circumstances of the offence, particularly in light of the requirement that an SHPO should be capable of being enforced and policed.

35. The Appellant was homeless and suffering from mental health problems when he committed the offences, and he pleaded guilty and expressed regret. All of these matters are mitigating factors. However, in our judgment they do not outweigh the terrifying nature of the attacks and their effect on the victims. We conclude that the Appellant has failed to rebut the presumption that the offences for which he has been convicted were particularly serious within the meaning of section 72.

36. The burden is on the Appellant to persuade us that, in the formulation of the Court in *EN*, there is no danger of his offence being repeated and so he does not constitute a danger to the community. Ms Childs relied on the report of Dr Shortt and the comment in the OASys report that his risk of offending was low, as well as the wider mitigating circumstances around his offences.

37. The Tribunal recognises that these matters provide some support for the view that the Appellant is a low risk of reoffending. However, the Tribunal was troubled by the reference in the OASys report to his *"sexual preoccupation."* That report referred to his risk of reoffending as low in the context of statistics about reoffending rates, rather than his specific presentation and circumstances. The risk assessment specific to the Appellant was a medium risk of reoffending, because of his immigration status and unemployment. The inference was that if his immigration and employment situations were improved, his risk would reduce. He presented a medium risk of serious harm because of his substance misuse, sexual preoccupation and violent sexual attacks.

38. The Tribunal was very concerned by these last comments. The view expressed that he had a sexual preoccupation is based on many interactions with the Appellant as part of the offender management process, and we attach considerable weight to it. Dr Shortt did not engage with the concern that the Appellant had a sexual preoccupation, and there was nothing in the evidence to suggest that this had been properly addressed.

39. The Appellant made two remarks in his evidence which indicated a deeply worrying attitude to sexual issues – when asked about his attitude towards his sexual impotence and towards women, he said that *"Is there a lion who can attack his prey without claws?"* This was a bizarre and troubling observation, and not one which suggested he had achieved any insight into his sexual preoccupation and history of sexual violence. When asked whether his attacks were not serious because he had not penetrated the women, his comment was "*Unfortunately, I cannot even rape someone*".

This also troubled the Tribunal. The regret which he said he felt was expressed conditionally – to the effect that, if I did it, then I am sorry. This indicated that the regret was partial or qualified. We concluded that he lacked real insight into his offending.

40. His offending behaviour was impulsive. The Appellant's evidence was that he had embraced his Islamic faith and that he would not abuse alcohol or other substances in future. However, he had not done therapeutic or other work to address his substance issues. There was no sufficiently cogent reason to think that if the Appellant was in future placed in a stressful situation similar to when he committed his offence that he would have the resources to prevent himself acting impulsively.

41. In these circumstances, the Tribunal concluded that the Appellant poses a considerable threat to the community, in particular to women. The evidence he had produced did not rebut that threat for the purposes of section 72 NIAA 2002.

42. Accordingly, and in light of the sole ground of appeal available to the Appellant under section 84(3) of the 2002 Act, his appeal is dismissed and the decision of the Secretary of State is confirmed.

43. We restate here our agreement with the Respondent's concession that the Appellant remains a refugee within the meaning of Article 1(2A) of the Refugee Convention.

**Notice of Decision**

**The appeal against the Respondent's decision to revoke the Appellant's refugee status is dismissed.**

**An anonymity direction is made.**

Signed *J Jolliffe* Date: 15 January 2021

Deputy Upper Tribunal Judge Jolliffe

APPENDIX 1: ERROR OF LAW DECISION

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: RP/00086/2019

**THE IMMIGRATION ACTS**

**Heard at Field House**
**On 14 February 2020**

**Decision & Reasons Promulgated**

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**Before**

**UPPER TRIBUNAL JUDGE KOPIECZEK**
**UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

**M A M**
**(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, we 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 appellant or members of his family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.**

**Representation:**
For the Appellant: Ms A Childs, Counsel, instructed by Duncan Lewis Solicitors
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

**DECISION AND REASONS**

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## Introduction

1. The appellant is a national of Sudan and is a member of the Berti ethnic group. As a result of this, he was recognised as a refugee on 11 November 2015 and granted limited leave to remain in the United Kingdom until 10 November 2020.

2. The appellant now appeals with permission against the decision of First-tier Tribunal Judge A J M Baldwin ("the judge"), promulgated on 11 November 2019, in which he dismissed the appellant's appeal against the respondent's decision, dated 6 August 2019, revoking the appellant's refugee status, pursuant to paragraphs 338A and 339AC(ii) of the Immigration Rules ("the Rules"). These provide that a person's grant of refugee status can be revoked where:

> "having been convicted by a final judgment of a particularly serious crime, the person constitutes a danger to the community of the United Kingdom."

3. On 27 September 2017, the appellant was convicted on two counts of sexual assault and sentenced to 2 years' imprisonment for each offence (committed against two separate women), each sentence to run consecutively. In addition, he was made subject to the notification provisions of the Sexual Offenders Act 2003 for an indefinite period. In light of this, the respondent made the decision leading to the appeal to the First-tier Tribunal. The core legislative element of that decision was the issuing of a certificate under section 72 of the Nationality, Immigration and Asylum Act 2002, as amended ("the 2002 Act"). Insofar as is relevant, section 72 of the 2002 Act reads as follows:

> "72 Serious criminal
>
> (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.
>
> …
>
> (9) Subsection (10) applies where—

> (a) a person appeals under section 82 of this Act or under section 2 of the Special Immigration Appeals Commission Act 1997 (c. 68) wholly or partly on the ground mentioned in section 84(1)(a) or (3)(a) of this Act (breach of the United Kingdom's obligations under the Refugee Convention), and
>
> (b) the Secretary of State issues a certificate that presumptions under subsection (2), (3) or (4) apply to the person (subject to rebuttal).
>
> (10) The Tribunal or Commission hearing the appeal—
>
> (a) must begin substantive deliberation on the appeal by considering the certificate, and Nationality, Immigration and Asylum Act 2002 Page 56
>
> (b) if in agreement that presumptions under subsection (2), (3) or (4) apply (having given the appellant an opportunity for rebuttal) must dismiss the appeal in so far as it relies on the ground specified in subsection (9)(a)."

4. Notwithstanding the decision to revoke the appellant's refugee status, the respondent has accepted throughout the appellate proceedings that he cannot be removed from the United Kingdom to Sudan by virtue of the absolute protection afforded to him by Article 3 ECHR.

5. It is to be noted that the appellant's appeal to the First-tier Tribunal was under section 82(1)(c) of the 2002 Act, and his sole ground of appeal was that contained in section 84(3) of that Act, namely whether the revocation decision breached the United Kingdom's obligations under the Refugee Convention and/or in relation to a person's eligibility for a grant of humanitarian protection.

## The judge's decision

6. The judge begins his decision with the consideration of an adjournment application made on behalf of the appellant. In the lead up to the hearing, the First-tier Tribunal had issued directions to both parties, requiring them to use their best endeavours to obtain and produce an OASys report. In the event, the respondent failed to provide a copy, whilst the appellant's solicitors complied with the direction, although only two pages of the 47-page report were available to them. These were included in the appellant's bundle.

7. In support of the adjournment application, it was asserted that the OASys report had only been written 2 weeks prior to the hearing. An expert report was to be sought from a psychologist or psychiatrist in order to respond to the OASys report and address what were believed to be certain mental health and other related issues. There had been insufficient time for such a report to be commissioned.

8. The judge refused the application on the basis that the appellant and his solicitors had had ample opportunity to adduce whatever evidence they wished to rely on. The judge relied on the overall timeframe relating to the respondent's decision-making

process, and the appellant's release from immigration detention approximately 2 months before the hearing. In addition, he took the view that issues raised in the extracts of the OASys report only related to "extraneous factors" such as the appellant's immigration status and unemployment, neither of which was said to have any real bearing on the issues in the appeal.

9. Based in large part upon the sentencing remarks of HHJ Curtis-Raleigh (which clearly articulated the circumstances of the offences), the judge concluded that the appellant had been convicted of "undoubtedly particularly serious crimes"; thus, the first presumption contained in section 72(2) of the 2002 Act has not been rebutted (see [22]). At [23]-[24], the judge went on to conclude that the appellant was also "a danger to the community"; the second presumption had not been rebutted either. In light of these conclusions, the judge was bound to dismiss the appeal, in line with section 72(10)(b) of the 2002 Act.

**The grounds of appeal and grant of permission**

10. The grounds of appeal are threefold: first, it is said that the judge acted unfairly in refusing the adjournment application, particularly given the very short timeframe between the production of the OASys report and the hearing; second, the judge erred by placing too much reliance on the sentencing remarks and had not taken account of certain other factors; third, the judge took irrelevant factors into account when concluding that the appellant was a danger to the community.

11. Permission to appeal was granted by First-tier Tribunal Judge Osborne on 20 December 2019.

**The hearing**

12. Ms Childs relied on the grounds and focused on the adjournment issue. She submitted that it was in effect impossible for the appellant (who is legally aided) to have commissioned a relevant expert report in time for the hearing before the judge. A report could have addressed issues relevant to both limbs of section 72(2) of the 2002 Act. In respect of the "particularly serious crime" issue, Ms Childs relied on paras 66 and 69 of the leading authority on section 72, EN (Serbia) [2009] EWCA Civ 630; [2010] 3 WLR 182, which indicated, in her submission, that the seriousness of offences must be assessed in view of the surrounding circumstances as a whole. The applicant's mental state and other connected factors could be relevant to that assessment. In respect of the "danger to the community" issue, it was submitted that a report could have dealt with the OASys report, rehabilitation, and future risk in general.

13. Mr Jarvis essentially made two points in response. First, that there was no error in respect of the refusal of the adjournment application. Second, if there was, an expert

report might conceivably be relevant to the issue of the "danger to the community" issue, but would be very unlikely to materially address past events, namely whether the crimes for which the appellant had been convicted were "particularly serious" in nature. Therefore, any error by the judge was immaterial.

14. We express our gratitude to both representatives for the clear and concise manner in which they put their respective cases forward.

**Decision on error of law**

15. We conclude that the judge did err in law by refusing the application for an adjournment. We conclude that this error is material because we are satisfied that the expert report sought by the Appellant could have properly addressed both limbs of section 72(2) of the 2002 Act, and that the evidence could have made a difference to the outcome of the appeal.

16. The overarching requirement when considering the application for an adjournment is that of fairness (see, for example SH (Afghanistan) [2011] EWCA Civ 1284). The appellant had been aware of the respondent's intention to revoke his refugee status since 22 May 2019, and of the appeal decision since its service on 6 August 2019. It is also right that he had been released from immigration detention some 2 months before the hearing. However, in our judgment it is the production of the OASys report that is of most significance. That report categorised his risk of reoffending as "medium" and it also identified certain "vulnerabilities" such as his immigration status and unemployment, although we note that substance misuse is also cited. The report at least arguably raised matters which could properly be the subject of an expert report from a suitably qualified professional. The very short timeframe of just 2 weeks between the production of the OASys report and the hearing, whilst alluded to briefly by the judge, effectively precluded the appellant from being able to commission a report of his own. Not least amongst the obstacles in his path would have been the process of obtaining funding from the Legal Aid Agency, a point confirmed by Ms Childs and in respect of which we have no reason to doubt.

17. The fact that the truncated copy of the OASys report was in the appellant's possession prior to the hearing does not undermine the appellant's case. He (through his solicitors) had sought to comply with the directions issued by the First-tier Tribunal as best he could in the circumstances.

18. On the facts of this case, we are satisfied that the judge acted with procedural unfairness by refusing the application for an adjournment.

19. Our reasons for concluding that the error is material are as follows.

20. Para 66 of EN (Serbia) states:

> "66. I see no reason why a rebuttable presumption, imposed for the purposes of a decision as to whether removal would be in breach of Article 33(1), should be incompatible with Article 33(2) of the Convention, at least in cases in which it may reasonably be inferred that a conviction gives rise to a reasonable likelihood that a person's conviction is of a particularly serious crime and that he constitutes a danger to the community. The Convention does not prescribe the procedure by which the conditions required by Article 33(2) are to be established; and the creation of a rebuttable presumption is a matter of procedure rather than of substance. I accept that the Convention places an onus on the State of refuge. 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."

21. The final sentence of this passage indicates that in seeking to rebut the "particularly serious crime" presumption under section 72(2) of the 2002 Act, an individual is entitled to put forward "mitigating factors associated with its [the crime] commission". In keeping with this authoritative guidance was the view of the Asylum and Immigration Tribunal in IH (s.72; 'Particularly Serious Crime') Eritrea [2009] UKAIT 00012, where at para 74, the following was said:

> "thus, the forensic investigation of whether a crime is a "particularly serious" one in a given case must be a struggle by the decision-maker (judicial or otherwise) with the facts and circumstances relating to the conviction and the offender."

22. We note that the Court of Appeal was appraised of the decision in IH and said nothing to indicate a disapproval of the passage quoted above (see para 88 of EN (Serbia)).

23. The guidance shows us that the assessment of whether the appellant's crimes were "particularly serious" involved consideration of *all* relevant factors relating to their commission. There is no reason to suggest that the appellant's mental health and other aspects of his circumstances at the time could not have had a bearing on the assessment. In turn, an expert report from a suitably qualified professional could provide evidence as to the appellant's circumstances at the time of the offences which could (and we need put it no higher than that) have affected the judge's conclusion on the first rebuttable presumption.

24. Para 66 of EN (Serbia) also indicates that specific evidence going to the existence of "mitigating factors" is capable of having an impact on the assessment of whether an individual represents a "danger to the community". This was recognised (in our view, quite rightly) by Mr Jarvis. Indeed, the potential importance of adducing expert evidence on the second rebuttable presumption represents a clearer basis for the materiality of the judge's procedural error than in respect of the first. Again, we are satisfied that a report on the appellant's circumstances as they were at the date of the hearing before the judge could have affected the conclusion on the "danger to the community" issue.

25. Whilst we do have some misgivings about one or two of the factors taken into account by the judge when assessing the "danger to the community" issue, it is unnecessary to reach conclusions on these. The materiality of the procedural error is sufficient for us to set aside the judge's decision, and this we do.

## Disposal

26. Having regard to para 7.2 of the Practice Statement and all other relevant circumstances, we conclude that this appeal should be retained in the Upper Tribunal. None of the judge's findings shall be preserved. Relevant fact-finding can be undertaken in due course. It is clear from our error of law decision that a remaking decision cannot take place until the expert report sought by the appellant has been produced.

27. The scope of the remaking decision shall be limited to the question of whether the respondent's decision to revoke the appellant's refugee status is contrary to the United Kingdom's obligations under the Refugee Convention. It has not been asserted that humanitarian protection is relied on. Neither Article 3 nor Article 8 ECHR are in play.

## Anonymity

28. The First-tier Tribunal made an anonymity direction and we maintain that on the basis that the appellant remains a person in need of international protection, whether or not he is excluded from the protection of the Refugee Convention.

## Notice of Decision

**The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.**

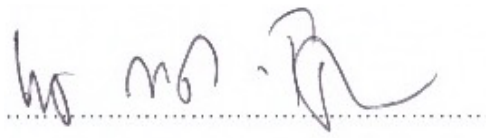
**We set aside the decision of the First-tier Tribunal.**

**This appeal is adjourned for a resumed hearing in the Upper Tribunal.**

## Directions to the parties

1. **Any further evidence relied on by the appellant shall be filed and served no later than 14 days before the resumed hearing;**

2. **Oral evidence from the appellant shall be permitted, but only if an updated witness statement is provided in accordance with direction 1;**
3. **Both parties shall file and serve skeleton arguments no later than five days before the resumed hearing.**



Signed Date: 20 February 2020

Upper Tribunal Judge Norton-Taylor