**IN THE UPPER TRIBUNAL**
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2022-005534
First-tier Tribunal No: PA/01049/2021

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**
**On 24 May 2023**

**Before**
**UPPER TRIBUNAL JUDGE O'CALLAGHAN**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**AA (AFGHANISTAN)**
(ANONYMITY ORDER MADE)

Respondent

**Representation:**
For the Appellant: Mr T Melvin, Senior Presenting Officer
For the Respondent: Ms K Cronin, Counsel, instructed by Wesley Gryk Solicitors LLP

**Heard at Field House on 27 April 2023**

**Order Regarding Anonymity**

**The victim of the crimes for which the appellant before the First-tier Tribunal, AA, was convicted by a jury at Canterbury Crown Court on 26 May 2017 enjoys life-long anonymity in relation to the offences committed: Sections 1 and 2(1)(aa) of the Sexual Offences (Amendment) Act 1992.**

**Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, AA, his adoptive parents and siblings, and his witnesses, RS, LS, TJ and MA, who filed letters of support with the First-tier Tribunal, are 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 the appellant, his adoptive parents and siblings, and his**

**witnesses, RS, LS, TJ and MA, who filed letters of support with the First-tier Tribunal.**

**Failure to comply with this order could amount to a contempt of court**.

## DECISION AND REASONS

### Introduction

1. The appellant before the Upper Tribunal is referred to as the Secretary of State, the respondent as AA.

2. The issue before the Upper Tribunal is a narrow one, as it was before the First-tier Tribunal. Can AA rebut the presumption established by section 72 of the Nationality, Immigration and Asylum Act 2002? If so, the Secretary of State concedes that AA is entitled to refugee status.

3. The Secretary of State served a decision to make a deportation order on 10 June 2019, and refused AA's subsequent international protection and human rights claim by a decision dated 25 September 2020.

4. On 24 May 2022, the Secretary of State decided to grant AA discretionary leave to remain in this country for 30 months on the basis that there was a legal barrier to his removal to Afghanistan. AA confirmed that he wished to pursue his appeal in respect of the refusal of his asylum claim.

5. AA accepts that he has been convicted of a particularly serious crime. He was convicted by a jury at Canterbury Crown Court on 26 May 2017 on three counts of rape. On 8 September 2017 he was sentenced by the Recorder of Canterbury, HHJ Norton, to seven years' imprisonment.

6. The Secretary of State appeals a decision of Judge of the First-tier Tribunal Swaney ('the Judge'), sent to the parties on 9 September 2022, allowing AA's appeal on asylum grounds. The Judge found that AA had rebutted the presumption that he posed a danger to the public.

### Facts

7. AA is a national of Afghanistan with an attributed date of birth of 2 March 2000. He is aged 23.

8. AA first arrived in the United Kingdom on 20 January 2015 and sought international protection. The respondent refused the asylum claim but granted leave to remain in this country until 2 September 2016. AA appealed the refusal of his asylum claim, and his appeal was dismissed by the First-tier Tribunal on 7 June 2016. His subsequent appeal to the Upper Tribunal was dismissed on 24 August 2016.

9. On 31 August 2016 AA made an in-time application for further leave to remain in this country.

*Conviction*

10. In the early hours of 18 September 2016, a female victim was subjected to multiple acts of rape. Four males, including AA, were subsequently convicted by a jury, each in respect of three counts of rape. At the date of the offences, the three older defendants were aged between twenty and thirty-seven. They were each sentenced to fourteen years' imprisonment.

11. AA was convicted of rape on the basis that he intended by his presence to assist, encourage, or cause the crime of rape to be carried out. He was sentenced to seven years' imprisonment. At the time of the offence, AA was aged 16.

12. AA appealed against his conviction. The Court of Appeal dismissed the appeal by a judgment dated 21 February 2020: [2020] EWCA Crim 327, [2020] Crim L.R. 1077. AA was named in the Court of Appeal judgment, but in his pre-adoption identity of 'Hamid Mohamadi'.

13. Lord Justice Leggatt observed in his judgment:

> '7. When the assaults stopped, the men left the room. [The victim] recalled gathering up her clothing and said that a man, whom she described as quite small, threw her leggings and knickers to her. She did not think that he had been part of the group, but was not sure. Once dressed, she left the room. The same small man told her how to get out and gave her directions.
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> 8. The prosecution alleged that the small man was the appellant, who fitted that description. …
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> …
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> 12. The appellant's DNA was found on a cigarette end found in the room, and his thumbprint was on a drink can. …
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> …
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> 16. His evidence was that he had been out with the other defendants and had had at least three or four shots of alcohol, which he was not used to drinking. He said that he was very drunk; that he could not remember encountering [the victim] in Margate Road; that his only memories were vague ones of walking to the pizza shop and then going up the stairs to a bedroom which had red walls (which was a different room from the one in which the rapes alleged occurred), and then waking upon the same room the following morning. He said that he was nevertheless sure that he did not have sex with [the victim], did not see anyone else having sex with her, and was not in a room with her, as he would have recalled any of those things. He said he was sure that he spent the whole night in the bedroom with the red walls.
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> …

> 27. … There was little or no evidence to suggest that the appellant had himself penetrated [the victim]. Indeed, the absence of any DNA linked to him on any of the sensitive swabs or in the mouthwash or on the mattress or duvet in contrast to the findings for the other defendants, positively suggested that the appellant had not himself raped [the victim]. There was also relatively little evidence to support a case that the appellant had done any specific act – apart from merely being present – with the intention of assisting or encouraging the other defendants to rape [the victim].'

14. The Court of Appeal's consideration is primarily directed towards the jury direction given as to the relevance of intoxication to intention.

*Adoption*

15. Whilst a minor, aged 17, and after his conviction, an application was made by AA's former foster parents to adopt him. Mrs Justice Theis, sitting in the High Court, issued an adoption order on 26 June 2018, with attendant anonymity order: [2018] EWFC 55.

*Deportation/ international protection claim*

16. The Secretary of State notified AA of her decision to deport him from the United Kingdom on 10 June 2019. She afforded him the opportunity to give reasons as to why he should not be deported, and AA responded to this opportunity on 3 July 2019.

17. By a decision dated 29 September 2020, the Secretary of State refused AA's outstanding application for further leave to remain and refused his asylum and human rights claims. It is from this decision that that the appeal before this Tribunal flows.

*First-tier Tribunal*

18. The appeal came before the Judge sitting at Taylor House on 30 August 2022. The Judge found that the appellant had rebutted the presumption that he posed a danger to the public and allowed AA's asylum appeal by means of a detailed decision running to one hundred and twenty-six (126) paragraphs over twenty-one (21) pages.

## **Grounds of Appeal**

19. The Secretary of State's grounds of appeal are very narrow, as accepted by Mr. Melvin. They run to approximately a page and a half, most of which is devoted to setting out either the relevant facts of the criminal offence or sections of the sentencing Judge's remarks.

20. The grounds of challenge are succinctly identified:

> '4. Given this continual denial, it is respectfully submitted that the FtTJ should have cast doubt on any expressions of remorse rather

than at [119] where the FtTJ finds it 'perhaps understandable that the appellant would continue to deny the offence' and thereby also undermining Her Honour Judge Norton finding's above:

> 'Given the basis on which he was convicted of rape (i.e. because he was present with the intent of assisting or encouraging others rather than because there is evidence that he actually raped the victim himself) it is perhaps understandable that the appellant continued to deny the offence. In any event, I find that the appellant has expressed remorse and contrary to what is asserted, that he in fact displays considerable empathy towards the victim. He has identified quite clearly the impact he considers she is likely to have suffered and his regret that she will continue to experience those impacts in the future.'

5. It is submitted that the reasons relied upon in the determination do not evidence that the appellant has developed insight, merely that he is compliant with expected behaviours.'

21. Upper Tribunal Judge Grubb granted permission to appeal by a decision dated 3 March 2023, reasoning, *inter alia*:

> '3. The judge's reasoning is detailed and comprehensive at [103] – [125]. However, having accepted the appellant of being a 'medium risk' of serious harm to the public at [124] and [125], it is arguably wholly outside the range of reasonable conclusions to find that the appellant does not pose a danger to the community. The 'mitigating' evidence – given his total lack of remorse as he still maintains he was 'asleep' inconsistently with the verdict and Crown Court Judge's remarks – arguably provides no sustainable basis for the judge's finding. For these reasons, permission to appeal is granted.'

22. Upper Tribunal Grubb identified the Secretary of State as advancing a perversity challenge to the decision of the Judge. Mr. Melvin accepted this to be the position before this Tribunal.

## Decision

23. Mr Melvin accepted that the Secretary of State's challenge was being advanced on a narrow basis. He identified two elements to the challenge. Firstly, that the Judge acted perversely by finding that AA was remorseful because such conclusion undermined the sentencing Judge's findings that he continued to deny his offence before her at the sentencing stage. The second ground is that the Judge was perverse in finding that AA had developed insight as to his offending behaviour.

24. The parties before me agreed that the key paragraph for this Tribunal's consideration was [119] of the Judge's decision:

> '119. I place weight on the appellant's evidence and that of his mother regarding his remorse. I also place significant weight on the

> appellant's evidence to Dr Galappathie which is set out in his report and summarised above. I find that the appellant has expressed remorse for his involvement in the offences against the victim. Given the basis on which he was convicted of rape (i.e., because he was present with the intent of assisting or encouraging others rather than because there is evidence that he actually raped the victim himself) it is perhaps understandable that the appellant would continue to deny the offence. In any event, I find that the appellant has expressed remorse and contrary to what is asserted, that he in fact displays considerable empathy towards the victim. He has identified quite clearly the impacts he considers she is likely to have suffered and his regret that she will continue to experience those impacts in the future.'

25. The Judge carefully considered an OASys assessment, dated 11 April 2022, that was before her. She noted that the report writer observed the appellant to be a medium risk to the public. However, she concluded that she could properly reduce the weight to be applied to this assessment because of various clear concerns that arose within it, for example, that it was unclear that the report writer was aware that AA was a minor at the date of the offence. Further, the assessment failed to take expressly into account the observations of the Criminal Division of the Court of Appeal as to relevant events. This was particularly of concern where the assessment stated that sexual gratification was the main driver and motivation for AA in the commission of the offence, but the Crown's case at the trial, as noted by the Court of Appeal, was that AA took no direct part in the physical elements of the multiple rapes of the victim. AA's role, as considered by the Court of Appeal, was in respect of his intent and whether he had by his presence, intentionally assisted, encouraged to cause others to rape the victim. The Crown's case was advanced on such lines because there was a multitude of DNA evidence taken from intimate samples of the victim that clearly established physical contact by the three other males, but no DNA was secured from the intimate samples relating to AA.

26. Additionally, the Judge observed that whilst the OASys assessment proceeded on the basis that AA did not have any learning difficulties, expert evidence before her identified his limited education at the time that he was imprisoned. The Judge also had the benefit of psychological expert evidence.

27. Turning to the issue of remorse, the Judge observed at [117]:

> '117. The respondent places heavy reliance on the appellant's denial of guilt and his lack of remorse. The appellant was not linked to the actual rape by any DNA evidence. There was evidence that he had been in the room where the rape took place, and the appellant was essentially found guilty of the offence because it was found by a jury that he was present with the intention of assisting or encouraging the other defendants to rape the victim. The appellant denies this categorically, stating that he was asleep in another room at the time of the offence.'

28. The Upper Tribunal is tasked to consider whether the Judge's reasoning was perverse in reaching a decision that no reasonable judge, on a proper appreciation of the evidence and the law, could have reached. The requirement(s) establishing perversity have proven difficult to formulate with clarity, though various judicial expressions were collected by Mummery J. in *Stewart v. Cleveland Guest (Engineering) Ltd* [1996] I.C.R. 535, at 542 G-H:

> '... This tribunal should only interfere with the decision of the industrial tribunal where the conclusion of that tribunal on the evidence before it is 'irrational', 'offends reason', 'is certainly wrong', or 'is very clearly wrong', or 'must be wrong', or 'is plainly wrong', or 'is not a permissible option', or 'is fundamentally wrong', or 'is outrageous', or 'makes absolutely no sense', or 'flies in the face of properly informed logic'. This variety of phraseology is taken from a number of well-known cases which describe the circumstances in which this tribunal, and higher courts, have characterised perversity. The result is that it is rare or exceptional for an appeal to succeed on the grounds of perversity. ...'

29. The Secretary of State contends that it was perverse for the Judge to conclude that the AA is remorseful as this undermines the sentencing Judge's findings. The starting point in the perversity assessment is that the sentencing Judge was considering AA's position in 2017, and whilst he continues to dispute elements of his involvement in the offence, he has, as detailed to various people including a psychologist, and as accepted by the Judge, expressed considerable remorse in respect of the circumstances in which the victim both found herself and now finds herself. One must be careful in this matter to observe that the jury rejected the appellant's contention that he was asleep throughout. However, it was not the Crown's case that he was physically involved in the serious assault upon the victim, and so it was reasonably open to the Judge on the evidence provided to conclude that AA was very remorseful in respect of the victim's circumstances whilst denying his personal involvement in the offence. He clearly understands and appreciates the continuing adverse impact of the violence inflicted by others upon the victim, as he has explained to professional experts. The Judge was entitled to consider evidence post-dating the sentencing of AA in 2017. The conclusion reached by the Judge was cogently reasoned, founded upon the evidence presented, and cannot be said to be perverse in the manner asserted by the Secretary of State.

30. Turning to the second ground advanced, the Secretary of State asserts 'that the reasons relied upon in the determination do not evidence that the appellant has developed insight merely that he is compliant with expected behaviours'.

31. Mr Melvin did not pursue this ground with vigour, which is understandable upon reading [119] of the decision. The Judge expressly found, having considered the evidence in the round, including expert evidence, that AA had shown insight into the impact of the crime upon the victim, and his regret that she will continue to experience such adverse

impact in the future. Such finding was reasonably and lawfully open to the Judge.

32. I have considerable sympathy for the victim in this matter. The physical violence, degradation and humiliation that flowed from the criminal acts conducted over several hours resulted in significant custodial sentences. This Tribunal is well-aware of the public interest that arises in such matters. However, this is not a deportation appeal. The Secretary of State has granted AA thirty months' residence in this country. The sole issue before both this Tribunal and the First-tier Tribunal is whether the appellant is a refugee for the purposes of domestic legislation and the 1951 UN Convention on the Status of Refugees. As accepted by the Secretary of State at the hearing before the First-tier Tribunal, if the relevant presumption was rebutted by AA, he was properly to be recognised as a refugee. The grounds of appeal in this matter are very narrow and rely solely upon perversity. The Secretary of State was therefore required to meet a high standard and for the reasons addressed above, she has come nowhere close to establishing her case. In the circumstances the appeal is properly to be dismissed.

**Anonymity**

33. The First-tier Tribunal issued a wide-ranging anonymity order pursuant to rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014:

> 'Unless and until this appeal is finally determined or the court/tribunal directs otherwise the appellant (and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified) 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 the appellant (and/or other person). Failure to comply with this order could amount to a contempt of court.'

34. The Supreme Court emphasised in *Kambadzi v Secretary of State for the Home Department* [2011] UKSC 23, [2011] 1 W.L.R. 1299, that anonymity must be justified on a case-by-case basis. However, as confirmed at paragraph 22 of *Presidential Guidance Note No 2 of 2022: Anonymity Orders and Directions regarding the use of documents and information in the First-tier Tribunal (Immigration and Asylum Chamber)* (21 March 2022), protection appeals are given anonymity to avoid any risk to an appellant arising from publication of details of the protection claim.

35. The Supreme Court confirmed in *re Guardian News and Media Ltd and Others* [2010] UKSC 1, [2010] 2 A.C. 697, that where both articles 8 and 10 ECHR are in play, it is for the court or tribunal to weigh the competing claims under each article. Since both article 8 and article 10 are qualified rights, the weight to be attached to the respective interests of the parties will depend on the facts.

36. Consequently, consideration as to the continuation or otherwise of an anonymity order in a protection appeal requires an intense fact-sensitive evaluation and a balancing exercise must take place when considering curtailing freedom of speech to safeguard article 8 rights. Whilst reasons for the decision can properly be brief, they must be given.

37. During the criminal proceedings, a reporting restriction was issued by the Crown Court under section 45 of the Youth Justice and Criminal Evidence Act 1999. The Recorder of Canterbury rejected an application made on behalf of the media to set aside the order following conviction and so the order continued until lapsing on 2 March 2018, his eighteenth birthday, consequent to no life-long order being made under section 45A of the 1999 Act.

38. It is appropriate to observe that the section 45 reporting restriction prevented the media from reporting AA's name during the trial and at the time of sentencing, though the substance of the offence was reported. A breach of the restriction by one media outlet was remedied by the taking down of an article from the internet. Consequently, AA does not fall within the cohort identified by Elisabeth Laing LJ in *Secretary of State for the Home Department v. Starkey* [2021] EWCA Civ 421, at [97]-[98], concerned with a deportation appeal, that defendants in criminal proceedings are usually not anonymised.

39. When considering anonymity, I am mindful that Theis J. issued an anonymity order in respect of the adoption proceedings at a time when AA was an adult, and after his criminal conviction. This order is not time-limited, as is the position with the reporting restriction issued by the Crown Court. I note that this order pre-dates the judgment of the Court of Appeal, Criminal Division, where AA's pre-adoption name is used.

40. I consider the evidence of the adopted family to have been of importance in the Judge's consideration, and ultimately conclude that the naming of AA by means of his adopted name would identify that he has been adopted and also the names of his adoptive family, contrary to the order of Theis J, which has not been set-aside. In the circumstances, AA and his adoptive family's article 8 rights outweigh those protected by article 10.

41. I have read the letters of support prepared by RS, LS, TJ and MA and conclude that if the witnesses were named, there is a significant risk of AA and his adoptive family being subject to jigsaw identification, in breach of Theis J's order. In the circumstances, they should properly be anonymised for the purpose of these proceedings.

42. The First-tier Tribunal additionally anonymised several professional experts engaged in the appeal. No explanation was given as to why such a step was considered necessary. I observe that the risk of jigsaw identification is greatly reduced in respect of expert witnesses, who usually have no connection to a party beyond their professional engagement. In

the circumstances, I set aside the First-tier Tribunal's order in respect of the experts engaged in this matter alone.

**Notice of Decision**

43. The decision of the First-tier Tribunal was sent to the parties on 9 September 2022, is not subject to material error of law. The decision of the First-tier Tribunal stands.

44. The Secretary of State's appeal is dismissed.

45. The anonymity direction is varied and confirmed.

*D O'Callaghan*
**Judge of the Upper Tribunal**
Immigration and Asylum Chamber
**3 May 2023**