Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01906/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 16 June 2014	**On 2 July 2014**

Before

UPPER TRIBUNAL JUDGE PINKERTON

Between

MR TUNCAY KURT
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Peterson
For the Respondent: Mr S Whitwell

DETERMINATION AND REASONS

1. The appellant is a Turkish citizen who was born on 5 October 1991. He is therefore now 22 years of age.

2. On 15 February 2010 the appellant then aged 18, was convicted of possession of an offensive weapon, robbery and breach of a conditional discharge committed in April 2009 when he was aged 17. He was sentenced to 30 months' imprisonment at a Young Offenders Institution.

On 28 June 2010 he was served with notice of his liability to automatic deportation. He appealed against that decision reasoning that automatic deportation should not apply to him because he had received indefinite leave to remain on the basis of family reunion with his father who was a recognised refugee. The appellant was interviewed in February 2011 in connection with his claim to be in continuing need of international protection as a refugee. Thereafter he was served with a notice of intention to cease his refugee status. His asylum claim was refused on 9 September 2013.

3. In a letter dated 7 October 2011 the appellant was informed that due to his prison sentence of 30 months duration he was presumed to have been convicted of a particularly serious crime and to constitute a danger to the community as per s.72 of the Nationality, Immigration and Asylum Act 2002. He was informed also that the presumption was rebuttable.

4. The appellant appealed to the First-tier Tribunal. The appeal came before a panel consisting of a First-tier Tribunal judge and a lay member. In a determination promulgated on 15 April 2014 the Tribunal decided that the appellant had not rebutted the s.72 presumption and that he constitutes a danger to the community of the UK. The appeal was dismissed under the Immigration Rules and also under Articles 3 and 8 of the ECHR.

5. The appellant sought permission to appeal the decision of the panel and permission was granted. The judge granting permission found it arguable that the panel erred in its approach both to the rebuttal of the s.72 presumption and in respect its assessment of the appellant's Article 8 rights it being arguable that the panel failed to take account of the fact that the appellant was under 18 when he committed the index offences in the spring of 2009 - following the principles set out in **Maslov v Austria (1683/03); [2008] ECHR 546**.

6. The judge granting permission wrote also that for the avoidance of doubt all grounds may be argued but that some of the matters set out in the grounds are "thinner", for example, it being said that the panel failed to take into account the appellant's ill-treatment in Turkey whereas all the panel found proved was that the appellant "may" have been hit once by the Turkish police as he had claimed.

The Hearing Before Me

7. Ms Peterson represented the appellant at the error of law hearing as she had done before the First-tier Tribunal. She made reference to the grounds seeking permission to appeal. The submission was to the effect that the panel depended heavily on the pre-sentence probation report that founded the panel's reasoning for concluding that the appellant has not rebutted the presumption under s.72 of the 2002 Act. However, the panel did not take into account the passage of time since that report was prepared or that the appellant committed this offence when a minor. The panel erred in giving the actual conduct of the appellant since his

offending little weight preferring that he should have been enrolled in courses to address the "defects in his personality". There was little evidence before the panel that such courses either exist or were offered to the appellant. In the absence of the offer of or the availability of such transformative tuition the appellant had demonstrated that he had worked to address positively his conduct and his motivations. Additionally Ms Peterson submitted that the panel was not qualified to conclude that the assessment of the writer of the pre-sentence report that the reasons for the appellant's offending were due to a lack of cognitive skills, poor emotional control, failure to consider the consequences of his behaviour, inability to problem solve, and inflexible thinking were "personality defects" as opposed to immaturity.

8. It was further submitted that it was incumbent upon the panel to consider the seriousness of the appellant's offending in the context of all the circumstances set out above in a matter which involves the revocation of refugee status and rebuttal of the presumption under s.72 of the 2002 Act. The submission is then made that the offending and the pre-sentence report should not have been the starting point, but instead should have been considered in the context of the appellant's circumstances, in particular in the context of his immaturity at the time of the offence and of what he witnessed as a child in Turkey, including his own ill-treatment at the hands of the Turkish authorities. The flawed assessment of the panel falls far short of a sustainable finding that he was "so dangerous" to the community that he failed to rebut the presumption under s.72 of the 2002 Act.

9. A further ground of appeal relates to the panel's findings about the appellant's private and family life in the United Kingdom. What was at issue was the proportionality of the interference that deportation represented when considering the totality of the private and family life of the appellant and his family. It is clear from the decision of the panel that its flawed analysis under s.72 prevails in the proportionality exercise. The weight given to the 4 year old pre-sentence report overrides all considerations and again no weight is given to the appellant's conduct since the offence, to the fact that the offending occurred more that five years previously, and to the fact that the appellant has been law abiding in the UK for the vast majority of the time he has resided here.

10. In his response Mr Whitwell pointed to the consideration by the panel of the appellant's argument that the s.72 presumption had been rebutted. The panel considered the social ties that the appellant still has to Turkey, the relationship between the appellant and his girlfriend and the appellant's relationship also with his family.

11. In her reply Ms Peterson submitted that the appellant has behaved in an exemplary fashion since his imprisonment. There was nothing bad to record about him. He complied with his licence terms and missed no appointments at the Probation Office as is shown in a letter at B-222 of the bundle. The appellant looks after his mother, has met a partner and he

works in the community. In essence the panel simply did not deal with setting the seriousness of the offence against the fact that the appellant was aged 17 at the time of the commission of the offences.

My Deliberations

12. It is apparent to me upon reading the determination that this was a carefully considered decision by the panel who went to considerable lengths to take into account all matters pertaining to the issues before it. The panel directed itself correctly on the law and the burden and standard of proof. The panel heard evidence from the appellant, his father, and others and gave sound reasons for finding that the appellant and his father lacked credibility. In particular the appellant stated that he has no relatives in Turkey but that information conflicted with his father's evidence in cross-examination at the hearing that he has relations living there namely "nephews, brother, paternal uncle and a niece". The panel found that the appellant's family visit Turkey for holidays and was entitled to conclude that the appellant would not be in danger if he is returned there.

13. As to the appellant's relationship with his girlfriend the appellant took part in a religious service at a mosque to mark an engagement with a British citizen in January 2014 but the panel was entitled to conclude on the evidence before it that this did not equate to a marriage. The panel found that there is nothing of substance in the relationship to elevate it to anything more than that of a boyfriend and a girlfriend. Giving reasons that were open to it the panel concluded that the appellant's claim that he is closely involved with the care of his mother and of his siblings is grossly exaggerated and there is no satisfactory evidence that he contributes financially to the family income. His claim to be employed as a barber is questionable.

14. In Part III of the determination (paras 96 onwards) the panel directs itself correctly in stating that the appellant is subject to automatic deportation as a foreign criminal. It is conducive to the public good that he be deported because he is not a British citizen, he is Turkish, and he has been sentenced to imprisonment for a period in excess of twelve months – in his case 30 months. That brings with it the presumption that the crime the appellant committed was particularly serious and his continued presence in the United Kingdom constitutes a danger to the community. Consequently he is therefore excluded from the protection of the Refugee Convention. Although the appellant can rebut the presumption and regain the protection of the Refugee Convention the burden is upon him to make that rebuttal. At paragraph 100 the panel set out the appellant's arguments that the presumption has been rebutted. The arguments are that there have been no criminal convictions since February 2010, the appellant has complied in reporting regularly to a Probation Officer, he has expressed remorse, time has passed, and he has matured. There are also various testimonials from friends and the Chair of the Kurdish Community Centre.

15. It is apparent from paragraph 100 and from paragraph 104 that the panel was wholly aware of the background circumstances and took them into account. There is reference twice to the passage of time (100(d) and 104) and to the lack of further convictions, etc. The "personality defects" of the appellant to which the panel refers may or may not be an entirely apposite description of him but is clearly meant to engage with matters that the panel found important in the pre-sentence report as summarised by the panel at paragraphs 65 onwards.

16. Although Ms Peterson refers to the fact that, at 2.5 of the probation report, the appellant expresses remorse and sorrow the panel took into account that this was mainly in respect to the negative effect it has had upon his family. As recorded in the report the appellant's lack of empathy towards the victim was "notable".

17. The panel did not go on to say anything about the fact that Mr Kurt had informed the Probation Officer that he has verbally apologised to the victim and offered to make financial reparation to him. He could have done so but the officer also said that she had not been able to validate the statement and it has not been proven that he did. I note that the paragraph goes on to state that the appellant said that he intended to live a "pro-social life" hereon in but that he has limited understanding about his motivation for offending and could offer no explanation of the practical steps he would take to address his behaviour.

18. The description of the appellant as set out in the report and indeed in the determination does not show the appellant in a good light at all. Given the other findings of fact by the panel later in the determination it is difficult to see how the mere passage of time and what is said to have occurred during that period is able to rebut the presumption that he remains a serious criminal which is the conclusion reached in paragraph 104 of the determination.

19. The panel noted at paragraph 103 that none of the courses which the appellant attended in prison have addressed his lack of cognitive skills, his poor emotional control, his lack of thinking through the consequences of his behaviour, his inability to problem solve save through aggression and his inflexible and dogmatic thought pattern.

20. In essence the appellant has simply not done enough to rebut the presumption that he remains a danger to the community. It is true that the panel did not expressly refer to **Maslov** but the facts in that case were not similar to those in this appeal other than that both committed their offences at the age of 17. It has not been shown that this appellant has reached a more mature understanding of his offending nor is there any evidence that he has begun to understand and address the emotional motivation which may have contributed to the commission of the offence. Although he expressed remorse and sorrow this was mainly in respect to the negative effect it has had upon his family but there was found to be a lack of empathy towards his victim. The panel did not find that he has

shown that he has matured and unlike in **Maslov** he is not a married man with family and nor does he have financial responsibilities for the family that he has here. It will be recalled also that the appellant in **Maslov** entered Austria at the age of 6 and he was unable to speak Bulgarian (the country to which he would be returned) and had no relatives or other social contacts there.

21. My conclusion therefore is that there has been no error of law displayed by the panel, let alone a material error.

Decision

22. It follows therefore that the decision of the First-tier Tribunal is upheld. An anonymity direction is not made as on the particular facts of this appeal none would seem to be required.

Signed Date

Upper Tribunal Judge Pinkerton