Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01515/2014

THE IMMIGRATION ACTS

Heard at Cardiff Crown Court	**Decision & Reasons Promulgated**
On 27 July 2015	**On 4 September 2015**

Before

UPPER TRIBUNAL JUDGE GRUBB
DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

MD
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Chelvan instructed by South West Law
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. Both MD and the Secretary of State appeal to the Upper Tribunal against the decision of the First-tier Tribunal (Judge Burnett) allowing the appellant's appeal under Art 3 of the ECHR but dismissing his appeal on

asylum grounds against a decision to deport him pursuant to the automatic deportation provisions in the UK Borders Act 2007.

2. For convenience, we will continue to refer to the parties as they appeared before the First-tier Tribunal.

Background

3. The appellant is a citizen of Pakistan. He is 40 years old. He first arrived in the UK on 26th January 2004 as a visitor. Subsequently he returned to Pakistan and then again came to the UK being granted leave until 30 June 2005. His leave was subsequently extended first as a work permit holder until 1 August 2006 and then as a visitor until 15 September 2006. On 14 September 2006 he made an application for leave to remain outside the Rules but this was refused on 4 October 2006. The decision was reviewed and upheld on 22 December 2006. Consequently, the appellant has overstayed in the UK since 15 September 2006.

4. Between 2 December 2008 and 11 February 2010 the appellant was convicted of a number of offences. On 18 April 2011, he was convicted at Coventry Crown Court of a number of sexual offences involving men and, in relation to the most serious, he was sentenced to an indeterminate sentence of imprisonment for public protection with a determinate period of eight years' imprisonment.

5. On 15 June 2011, the appellant was informed that he was liable to automatic deportation which was followed by a questionnaire and an invitation to make representations why he should not be deported. He did not respond.

6. On 9 April 2014, the appellant was informed by letter that the Secretary of State considered that s.72 of the Nationality, Immigration and Asylum Act 2002 ("NIA Act 2002") applied on the basis that the appellant had committed a particularly serious crime and constituted a risk to the community. Representations were then made on his behalf on a number of dates in April 2014 including that the appellant claimed to be at risk on return to Pakistan because he is a gay man and because he has converted from Islam to Christianity.

7. On 14 July 2014, the Secretary of State made a decision that s.32(5) of the UK (Borders) Act 2007 applied as the appellant was a foreign criminal and his return to Pakistan would not breach his human rights or the Refugee Convention. The Secretary of State also issued a certificate under s.72(9) of the NIA Act 2002 that the presumptions in s.72(2) applied namely that the appellant had been convicted of a particularly serious crime and constituted a danger to the community in the UK.

The Appeal to the First-tier Tribunal

8. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 25 November 2014, Judge Burnett accepted that the appellant would be at risk on return to Pakistan because he was a gay man

and a Christian convert. As a consequence he allowed the appellant's appeal under Art 3 of the ECHR. However, Judge Burnett considered that the appellant had not rebutted the presumptions in s.72(2) that he had been convicted of a particularly serious crime and that he constituted a danger to the community. As a result, he upheld the certificate under s.72(9) and dismissed the asylum appeal without substantive consideration in accordance with s.72(10) of the NIA Act 2002.

The Appeals to the Upper Tribunal

9. The appellant sought permission to appeal to the Upper Tribunal against the judge's decision to uphold the s.72 certificate on the basis that the judge finding that the appellant constituted a danger to the community in the UK was contrary to the evidence and irrational.

10. On 16 December 2014, the First-tier Tribunal (Judge V A Osborne) granted the appellant permission to appeal on that ground. The respondent filed a rule 24 reply dated 9 January 2015 seeking to uphold the Judge's decision on the s.72 certification. Finally, the appellant served a rule 25 reply to that notice dated 1 February 2015.

11. In addition, the Secretary of State sought permission to appeal to the Upper Tribunal against the judge's decision to allow the appeal under Art 3. The Secretary of State argued that the judge had been wrong to find that the appellant was at risk on return as a gay man or Christian convert in accordance with the objective evidence. Further, in relation to the risk to the appellant as a gay man, the judge had failed to make any finding as to whether the appellant would live "openly" in Pakistan.

12. The appeal was initially listed for hearing before UTJ Grubb on 28 April 2015. However, at that time the respondent's application for permission to appeal to the First-tier Tribunal had not been decided. As a result, the appeal was adjourned in order that the respondent's application for permission could be decided.

13. On 5 June 2015, the First-tier Tribunal (UTJ Roberts) granted the respondent permission to appeal against Judge Burnett's decision to allow the appeal under Art 3. The appellant served a rule 24 reply dated21 July 2015 seeking to maintain the Judge's favourable decision under Art 3.

14. The appeal was subsequently listed before the Upper Tribunal in its current constitution on 27 July 2015.

The Respondent's Appeal

15. We will deal first with the respondent's appeal as that matter can be dealt with relatively shortly given the position taken by both representatives before us.

16. Mr Mills, who represented the Secretary of State did not seek to pursue the respondent's challenge to Judge Burnett's decision to allow the appellant's appeal under Art 3. He acknowledged that it was accepted

that the appellant was a gay man. At the First-tier Tribunal hearing, the Presenting Officer indicated that he had no submissions to add beyond the refusal letter and accepted that that letter acknowledged that the appellant was at risk in his home area. Further, he accepted that the Presenting Officer had not sought to make any representations in the light of the *Operational Guidance Notes* in respect of Pakistan for July 2014 relating to risk based upon sexual orientation and as a Christian convert.

17. In addition, Mr Mills accepted the position put forward by Mr Chelvan (who represented the appellant) that it was no longer relevant to enquire whether the appellant would behave "discreetly" in Pakistan. If he would be at risk, if he behaved openly, then he was entitled to international protection, at least in this case under Art 3 and, subject to any s.72 certificate point, asylum. Mr Mills accepted that the recent decision of the Upper Tribunal in MSM (dated 3 July 2015 and contained in the appellant's UT bundle at pages 74 *et seq* and subsequently reported as MSM (journalists; political opinion; risk) Somalia [2015] UKUT 413 (IAC)), relying on the CJEC's decision in X, Y and Z (C-199/12 to C-201/12) [2014] Imm AR 440, had removed the requirement recognised in HJ (Iran) v SSHD [2010] UKSC 31 that, in order to succeed in an international protection claim, the appellant must establish that at least one of the reasons why he would behave "discreetly" would be out of fear of persecution or serious ill-treatment.

18. In the light of Mr Mills' position it is not necessary for us to explore further the impact of X, Y and Z upon HJ (Iran) as recognised by the UT in MSM. Mr Mills did not actively pursue the Secretary of State's appeal against Judge Burnett's decision to allow the appeal under Art 3 and in the light of that we dismissed the Secretary of State's appeal. Judge Burnett's decision to allow the appeal under Art 3 stands.

The Appellant's Appeal

19. The focus of the arguments before us concern the judge's decision to uphold the s.72 certificate.

20. Mr Chelvan's submissions set out in the grounds, his rule 25 reply and in further detail at the hearing can be summarised as follows. At the hearing before Judge Burnett, the Presenting Officer did not challenge any of the evidence of the witnesses who gave evidence about the rehabilitation and lowering of risk that the appellant posed since his imprisonment. In particular, Mr Chelvan relied upon a statement by Mr David Shepherd the appellant's offender supervisor at his prison dated 27 August 2014 (at para 11.2 at page 31 of the appellant's FTT bundle) that: "at this time he is stable and will not reoffend unless there is a change in his circumstances." Mr Chelvan submitted that the only change of circumstances posited by the judge at para 57 of his determination was that the appellant might lose his accommodation. However, that was contrary to the evidence of one witness AE, with whom the appellant had lived between 2009 and 2011, that she would provide accommodation on the appellant's release from prison.

21. Mr Chelvan submitted that this case was an example of rehabilitation working and on the basis of that evidence it was irrational for the judge to conclude that the appellant continued to present a real risk of danger to the community by reoffending. He invited us to set aside the s.72 certificate and, in the light of the decision in relation to Art 3, to allow the appellant's appeal on asylum grounds.

22. We do not accept Mr Chelvan's submissions.

23. We first note that the appellant does not challenge the judge's finding that the appellant has not rebutted the presumption that he committed a particularly serious crime.

24. The presumption that, having committed that offence, he is a danger to the community is also rebuttable. The burden is upon the appellant to establish on a balance of probabilities that he is not a "danger to the community". That latter requirement must be understood as follows. The danger must be "real" and if, as is the case, he has been "convicted of a particular serious crime and there is a real risk of its repetition, he is likely to constitute a danger to the community" (see EN (Serbia) v SSHD [2009] EWCA Civ 630 at [45] *per* Stanley Burnton LJ).

25. There were a number of relevant documents before Judge Burnett which he took into account at paras 47–66 in concluding that the appellant had not rebutted the presumption that he constituted a danger to the community. First, there were the sentencing judge's remarks which Judge Burnett referred to at paras 47–48 setting out the circumstances of the appellant's offending and that the judge had imposed an IPP on the basis that the appellant was a dangerous offender. Secondly, there was a Structured Assessment of Risk in Need (SARN) Report in relation to the appellant's offending dated 21 March 2014 prepared by a clinical Psychologist. The judge dealt with this at paras 49–51 as follows.

> "49. There is a report ... dated 21st March 2014. This is a structured assessment of risk and need (SARN) (sexual offending). The report refers to an introductory framework which sets out the appellant's background and information about his life history. I note that this report states that the appellant had his first relationship with a male while training to be a doctor. It is stated that he was then forced by his family into a marriage with his wife. The appellant is assessed in this report as a high rate of reconviction of a sexual offence. (see 2.3 of the report).
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> 50. The report goes on to consider an assessment according to SARN (Structured assessment and need) TNA (treatment and need analysis). The author records that there are carefully defined risk factors which must be considered in applying the framework. The author identities a number of risk factors.
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> 51. At 5.1 it states that the appellant remains within the high risk group. This means that the appellant has a high number of psychological factors associated with increased risk of recidivism. The author states that she feels though that the current level of risk is likely to be overestimated by the RM2000 (the framework). This was because she was of the view that the appellant had engaged well with the recommended treatment for his risk profile and that he had good insight

> and is managing the identified risks positively. It is stated that the appellant is a high risk of harm to the public which takes into account that if the appellant were to re-offend, his offence would likely involve intrusive contact and offending against vulnerable individuals."

26. Thirdly, there was a report from the appellant's offender supervisor (upon which Mr Chelvan placed considerable weight), David Shepherd dated 27 August 2014. The judge dealt with this report at para 52 in the following terms

> "52. There is a report by the appellant's offender supervisor dated 22nd August 2014. It refers to a report of 12th May 2014, which assessed the appellant as a medium risk. It is stated that having seen the SARN report, the assessment now made is that the appellant is a medium risk of serious harm. It is stated that he will not re-offend unless there is a change in his circumstances."

27. Fourthly, there was a NOMS report dated 20 September 2014 at pages 26 – 29 of the bundle. The judge dealt with this report at paras 53-55 as follows.

> "53. I note a further report dated 20th September 2014. This is a NOMS report. I note that it states that at the time of offence the appellant was a medium risk of re-offending and is still a medium risk of re-offending. He was assessed as a high risk of harm to the public and was now assessed as a medium risk of harm. The ORGS scores were 46% and 64%.
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> 54. The report states that the appellant is a medium risk. This is said to be characteristic as, there being identifiable indicators of risk of serious harm present and the potential to cause harm but the appellant is unlikely to do so either in custody or in the community unless there is a significant change in circumstances.
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> 55. I note that it states that no further progress could be made to rehabilitate the appellant as the appellant's immigration status and the deportation decision, remains a bar to progress. If the decision to deport is confirmed, then he could not move to open conditions. I should also note that the risk assessment is based upon a plan to move the appellant to open conditions to continue treatment and rehabilitation. It is stated though that progressive move to open conditions would be the most productive means of continuing to reinforce and further develop the reduction in the risks posed. This move, it is stated, is so the appellant can demonstrate his learning and behavioural changes."

28. As regards those assessments, Judge Burnett said this at paras 56–57:

> "56. I do note that the professional assessments take account of the appellant's attitude and behaviour in prison and the undertaking of courses and programmes. I consider that the character references that have been provided and support letters do not cause me to diverge from this professional assessment. These reinforce those assessments.
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> 57. I note Mr Chelvan has quoted from the parts of the report which I have also identified above. He emphasises the "will not re-offend". The report does not state that the appellant will not re-offend. It states he will not re-offend "unless" there is a change in his circumstances. This "change" could be a loss of accommodation. It is very difficult to assess

these sorts of changes in circumstances, as the appellant is not as yet in open conditions in prison."

29. It is what the judge said in para 57 which attracted the focus of Mr Chelvan's submission that the judge was simply not entitled to reject the offender supervisor's conclusion that the appellant "will not reoffend" on the basis that there would be a change of circumstances since none were established on the evidence.

30. Fifthly there was a letter dated 22 May 2014 from the appellant's probation officer, Mr Whitehurst which the judge dealt with at para 58 as follows:

> "58. Mr Chelvan also places emphasise on a recent letter from the appellant's offender manager, Mr Whitehurst, that the appellant's level of risk of harm is assessed as medium. This indicates that there is no perceived immediate risk of serious harm at the present, either in custody or the community. The probation officer goes on to state that there should be on going monitoring of sexual factors and the opportunity for the appellant to develop his learning. It is also stated that the progress and reduced risk, would be jeopardised if the ongoing needs are not addressed."

31. Finally, the judge (at para 59) referred to the appellant's "static re-offending risk scores" in an OASys Report dated 12 May 2014 referred to in Mr Shepherd's report of 27 August 2014 at para 11.1 as follows:

> "59. I note the static re-offending risk scores (OGRS) OF 46% AND 64%. This is the likelihood of re-offending within the first and second years after release. I understand that this is used when there is no OASys assessment. OASys is said to be a dynamic assessment which include social economic factors such as employment and accommodation."

32. Having set out that evidence Judge Burnett gave his reasons for finding that the appellant has not rebutted the presumption that he was a danger to the community at paras 60–66 as follows:-

> "60. Based upon all of the above, it is clear that the appellant committed a number of serious crimes. The description of the offences above and the fact that the appellant received a sentence of indeterminate length, shows he committed a particularly serious crime. I do not find that the appellant has rebutted this presumption contained within section 72. It is therefore necessary to turn to whether the appellant represents a danger to the public/community.
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> 61. I have considered carefully the submissions of Mr Chelvan and the reports I have referred to above. It is clear that the appellant is assessed as posing a medium risk to the public (OASys assessment). These assessments are a judgment of the dynamic factors by the individual probation officer combined with a statistical analysis of the likelihood of re-offending.
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> 62. I do not consider that the reports are stating that the appellant will not re-offend. The reports are a management risk by applying statistical formula and social economic factors. The medium assessment does not mean there is no risk of the repetition of his offending. If the appellant reoffends, there is a real risk it will include serious harm.

> 63. The words of section 72 state that the appellant "constitutes a danger to the community".
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> 64. Mr Chelvan argues that the appellant is not a danger to the public as there is no real risk. I do not agree. It is clear that the appellant originally did not accept his crimes and there was described a level of deception in his thinking. Given the serious risk to the public and for the protection of the public, an indeterminate sentence was passed. The appellant is eligible for parole after 4 years, less any time spent on remand. He has not yet reached that 4 year period, which as passed to protect the public from the appellant. It should also be acknowledged that he appellant is working through his sentence plan and the courses set as required and is rehabilitating himself. However, further work is still needed. It is not suggested that the appellant can be released now without any supervision or plans in place or can be released without his learning being tested first in open conditions in prison. This all shows he still presents a danger but that the risk and danger is being managed at the moment by the probation service. It does not mean he will not re-offend but the continued assessment and steps are to manage the risk he still poses to the public and the community.
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> 65. I note that the appellant is not assessed as a low risk where such an argument by Mr Chelvan would have much greater force.
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> 66. I consider that the section 72 presumptions have not been rebutted in this case. As a result and by virtue of section 72(6) I must dismiss the appeal on asylum grounds."

33. Whilst we accept that the Presenting Officer did not challenge the evidence of any of the witnesses that is not tantamount, in our judgment, to an acceptance that the appellant on the basis of all the evidence had rebutted the presumption that he was a danger to the community. That was an assessment which the judge properly had to make on the basis of all the evidence, professional and otherwise. The genuineness of the personal witnesses as to the appellant's behaviour since imprisonment including his conversion to Christianity was not called into question. However, that evidence had to be seen in the light of the professional evidence as to the risk, if any, he continued to pose to the community.

34. With the exception of what is said in para 11.2 of Mr Shepherd's report of 27 August 2014, nothing in the professional material suggests that the appellant no longer poses a danger to the community. The reports state, as Judge Burnett noted, that the appellant continues to present a medium risk of serious harm to the community. The reports speak about continued support and rehabilitative interventions to continue the undoubted improvement in the appellant's awareness of his offending and responsibility for it and behavioural changes that he needs to make in order not to reoffend. The appellant is, at present, of course in prison and not in the community. The NOMS report, for example, states that the appellant is a "medium risk" of causing serious harm. There is no suggestion that, despite the progress being made by the appellant, further is not required. For example that report states that a move to a category D prison would be important as:

> "the most productive means of continuing to reinforce and <u>further develop the reduction in risks</u> posed." (our emphasis)

35. There is no suggestion here that the appellant presents no risk of reoffending. Likewise, the Clinical Psychologist notes that the OASys Report states that the appellant is a "high risk of harm to the public in the community" but that his risk to known adults, children and staff is assessed to be "low". At para 6, the report sets out a number of factors which might reduce the risk in the future or raise the risk in the future. Again, there is no suggestion, in our judgment, that the appellant can be said not to pose a risk to the public bearing in mind that his offending was extremely serious directed against vulnerable males.

36. In our judgment, the passage in Mr Shepherd's report upon which Mr Chelvan places much reliance must be seen first in the context in which it is said and also as being only part of the evidence before the judge. We have already set out the gist of the other evidence. As regards para 11.2, Mr Shepherd says this:

> "Although [the appellant] has not had the opportunity of practising his skills in the community, I am of the opinion that he could now be assessed as medium risk of serious harm, namely that there are identifying factors which will contribute to his offending, but at this time he is stable and will not reoffend unless there is a change in his circumstances."

37. As that quotation makes plain, Mr Shepherd continues to believe that the appellant presents a "medium risk of serious harm". Further, at para 8.4 Mr Shepherd had earlier stated that :

> "[the appellant] has worked extremely well in developing skills and strategies which will lower the risk that he had previously represented and is now aware of his own personal risk factors and how he should address these when they become live issues."

38. The appellant had, of course, previously been assessed as presenting a high risk. Mr Shepherd recognises that the appellant has improved through developing skills and strategies and that the risk is now lower. That is, of course, consistent with his conclusion that the appellant presents a "medium risk of serious harm".

39. In the NOMS report, which postdates Mr Shepherd's report, the offender officer notes at para 12 that, as a result of the behaviour and attitudes displayed by the appellant as seen by the writer and Mr Shepherd at the prison where the appellant is held:

> "The risk of serious harm assessment has been reduced to a minimum level. This is characterised as there being identifiable indicators of risk of serious harm present and the potential to cause harm but [the appellant] is unlikely to do so either in custody or in the community unless a significant change in circumstances should arise."

40. As this makes clear, the writer together with Mr Shepherd has now placed the appellant's risk as reduced to "medium level". The fact that he is "unlikely" to reoffend either in custody or the community unless there is a significant change in circumstances is not the same as saying either that there is no risk that he will reoffend or that there is not a real risk that he

will reoffend. It is simply unlikely unless there is a change of circumstances.

41. Further, the letter from Mr Whitehurst, a probation officer dated 22 May 2014 also notes that the appellant having undergone a number of treatment programmes and that:

> "the overall assessments [is] that his a risk of harm is considered to be reduced to a Medium Level."

Mr Whitehurst goes on to state:

> "[t]his indicates there is no perceived immediate risk of serious harm at the present time, either when in custody or the community."

42. He then concludes that:

> "[i]t is my opinion that his progress and reduced risk will be jeopardised if the on going needs are not addressed."

43. Again, here the appellant is being assessed as presenting a "medium risk" to the community and also that he has made progress and the risk he once presented has been reduced. It is not, in our judgment, inconsistent for the judge to take the view that even if there is "no perceived immediate risk of serious harm" the appellant does not represent a danger to the public. Given his history and in the light of the professional evidence read as a whole and being at a time when the appellant has not lived in the community but is in prison and therefore his response to his offending behaviour in the community remains largely speculative, the Judge's finding was one properly open to him on the evidence. When all these matters are taken into account, and they were by Judge Burnett, despite Mr Chelvan's forceful submissions, we are simply unable to conclude that it was irrational for Judge Burnett to take the view that the appellant had failed to rebut the presumption in s.72(2) that he continued to present a real danger to the community through the risk of him reoffending even if he would be accommodated and supported when he left prison. His finding was not one which no reasonable judge could reach on the evidence.

44. For these reasons, we are satisfied that the judge did not err in law in reaching his finding that the appellant had not rebutted the presumptions in s.72(2) of the NIA Act 2002 and to uphold the certificate under s.72.

Decision

45. The First-tier Tribunal's decision to allow the appellant's appeal under Art 3 did not involve an error of law. That decision stands.

46. Accordingly, the Secretary of State's appeal to the Upper Tribunal is dismissed.

47. The First-tier Tribunal's decision to dismiss the appellant's appeal on asylum grounds and uphold the s.72 certificate did not involve the making of an error of law. That decision stands.

48. Accordingly the appellant's appeal to the Upper Tribunal is also dismissed.

Signed

A Grubb
Judge of the Upper Tribunal