Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10504/2016

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Decision & Reasons Promulgated**
On 12th March 2018	**On 21st March 2018**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[S P]
~~**(ANONYMITY DIRECTION NOT MADE)**~~

Respondent

Representation:
For the Appellant: Mr S Polpitiya, Polpitiya & Co Solicitors
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State, I shall refer to the parties as in the First-tier Tribunal. The Appellant is a citizen of Sri Lanka born on [ ] 1981. His appeal against the refusal of his protection claim was allowed by First-tier Tribunal Judge Andonian on 15 January 2018.

2. The Secretary of State appealed on the following grounds:

> "The only issue under consideration is the section 72 certificate.
>
> It is not disputed that the Appellant has committed one of the most serious crimes reflected in a sentence where the Appellant has to

serve a minimum of 17 years. The FTTJ equates the fact that the Appellant has now been transferred to an open prison and has been given permission for home visits as an indication that the Appellant does not constitute a threat to the public.

In making this finding the FTTJ fails to take into account the Appellant is still imprisoned and subject to strict controls even if not as a rigorous as those prior to March 2017. Additionally the Appellant is still imprisoned and cannot be released prior to 9/12/18 so therefore is still deemed a risk to the public.

It is respectfully submitted that the Appellant's compliance with the regime whilst imprisoned is expected behaviour and is not a factor that should be given any weight when considering the threat to the public.

Additionally although the risk of reoffending is low the risk of harm is still medium to the public and also medium to unknown adults. It is respectfully submitted that even a slight risk that the appellant could commit acts of unnecessary violence involving weapons resulting in the loss of life again, constitutes a genuine, present and sufficiently serious threat, that has not been addressed by the FTTJ. Clearly there must be a risk of a convicted person reoffending and in the circumstances of this appeal the consequences of any such reoffending could be severe in the extreme.

It is respectfully submitted in these circumstances that the FTTJ has failed to give clear reasons as to why the appellant as rebutted the Section 72 Certificate."

3. Permission to appeal was granted by First-tier Tribunal Judge Kelly on 30 January 2018 on the grounds that: "It was arguably perverse to hold that the appellant did not constitute a danger to the community at a time when he was still serving the minimum term of a sentence of life imprisonment for murder. The reasoning at paragraph 38 of the decision is particularly difficult to follow."

4. In the Rule 24 response, the Appellant submitted that the judge correctly concluded that he had rebutted the presumption under section 72 of the Nationality, Immigration and Asylum Act 2002. The OASYS report stated that his risk in the community was medium and his minimum tariff expired on 29 November 2016 and he was eligible for parole. He was currently in a category D open prison and had started town and home visits. There was no reason to believe that the Appellant would be refused parole.

Submissions

5. Mr Jarvis submitted that on the evidence before the First-tier Tribunal judge the Appellant had failed to rebut the presumption under section 72. He had committed murder and was still serving his prison sentence. The Appellant took revenge for damaging his car and had acted in a way which was beyond comprehension. He was still within the prison system and was still being rehabilitated. Therefore, he must constitute a danger to the

public. There was also a lack of clarity in the decision. Paragraph 25 was incomprehensible, relying on a 2006 report. Paragraph 38 stated: 'A believer [sic] any risk of concern is very low'. This was a mistake of fact. The NOMS letter assessed the risk of absconding as low. The risk of harm to adults had reduced from high to medium and the parole board still had to make a decision in May 2018. The evidence, taken at its highest, was not capable of showing that the Appellant was no longer a danger to the public.

6. Mr Polpitiya submitted that there was no reason to believe that the Appellant would not be released on parole. The Appellant was currently on release for five days a month. The judge considered the progressive nature of the assessments and the indications from professionals: the parole board, probation officers and offender managers who were all of the view that the Appellant was a model prisoner who was suitable for release. The first step was his move to an open prison. The judge took into account the Appellant's progress and the lack of adverse findings in the reports in concluding that he was not a danger to the public.

7. In response, Mr Jarvis submitted that the judge had misunderstood the professional evidence and his conclusion was irrational. The professional evidence did not support the judge's finding that the Appellant was not a danger to the public.

Relevant Law

8. Section 72 of the 2002 Act provides:

> "(1) This section applies for the purpose of construction and application of Article 33(2) of the Refugee Convention (Exclusion of Protection)
>
> (2) A person shall be presumed to have been convicted by a final judgement of a particularly serious crime and to constitute a danger to the community of the UK if he is:
>
> (a) Convicted in the UK of an offence; and
>
> (b) Sentenced to a period of imprisonment of at least 2 years."

9. Paragraph 334 of the Immigration Rules provides that an applicant will be granted asylum in the UK if the Secretary of State is satisfied that: " …(iv) he does not, having been convicted by a final judgment of a particularly serious crime, constitute a danger to the community in the UK.

Discussion and Conclusion

10. The Appellant's appeal against deportation was allowed on human rights grounds by First-tier Tribunal Judge Herbert on 6 June 2017. There was no challenge to those findings which were specifically preserved by the Upper Tribunal on appeal. However, the Upper Tribunal found an error of law in respect of the decision to allow the appeal on asylum grounds and the matter was remitted to the First-tier Tribunal to consider only the section 72 certificate. That was the only issue before First-tier Tribunal Judge Andonian.

11. The relevant facts in this case are that in June 2002 the Appellant and others were involved in an attack on a car and its occupants. The Appellant's own account is that the incident arose out of a dispute that had already taken place and it was revenge for damaging his car. There was some preplanning and the Appellant admitted wielding an axe to smash the windscreen and windows of the car and cutting an ear off one of the victims.

12. On 16 October 2002 the Appellant was convicted, after a not guilty plea, of murder and four counts of wounding with intent to do grievous bodily harm. He was sentenced to a life sentence with a minimum term of 15 years for murder and 10 years imprisonment on the other four counts to run concurrently.

13. The sentencing judge noted that the attack was to some extent pre-meditated and the group used a series of weapons. The five victims were unable to defend themselves, there was one fatality and nearly a second, and two victims received disabling wounds.

14. On the evidence before the judge at the hearing on 8 December 2017, the Appellant was still serving a term of life imprisonment for murder. He was convicted in October 2002 to serve a minimum term of 15 years. He had been moved to an open prison and was awaiting a further decision by the parole board in May 2018. He was considered to be at medium risk to the public.

15. The judge's conclusion that the Appellant had rebutted the presumption was perverse. The parole board had not yet found that the Appellant was suitable for release. He was sentenced to life imprisonment with a minimum term. The expert evidence did not support the judge's conclusion that he did not constitute a danger to the public.

16. I find that the judge erred in law in finding that the Appellant had rebutted the presumption. This conclusion was not open to the judge on the evidence before him. I set aside the decision to allow the appeal and remake it. The Appellant's appeal under section 72 is dismissed.

Notice of Decision

The Secretary of State's appeal is allowed.

The decision of the First-tier Tribunal dated 15 January 2018 is set aside.

The presumption under section 72 applied. The Appellant's appeal against the refusal of asylum under paragraph 334 of the Immigration rules is dismissed.

The Appellant's appeal against the refusal his protection claim under the Refugee Convention is dismissed.

J Frances

Signed Date: 19 March 2018

Upper Tribunal Judge Frances