Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00093/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 18 December 2018	**On 10 January 2019**

Before

MRS JUSTICE COCKERILL
UPPER TRIBUNAL JUDGE CANAVAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

H D
(ANONYMITY DIRECTION MADE)

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Anonymity should have been granted at an earlier stage of the proceedings because the case involves protection issues. We find that it is appropriate to make an order. Unless and until a tribunal or court directs otherwise, the original appellant (HD) is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent.

Representation:
For the appellant: Mr T. Wilding, Senior Home Office Presenting Officer
For the respondent: Ms S. Walker, instructed by Duncan Lewis & Co. (Harrow)

DECISION AND REASONS

1. For the sake of continuity, we shall refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.

Decision to refuse a protection and human rights claim

2. The appellant (HD) appealed the Secretary of State's decision dated 27 April 2018 to refuse a protection and human rights claim in the context of deportation proceedings. The Secretary of State noted that the appellant fled Vietnam in 1986. He was issued with refugee status and a settlement visa in Hong Kong on 20 July 1990 and entered the UK on 31 July 1990. He was issued with a Refugee Convention travel document in 1994. In 2005 he applied for and was issued with a Home Office travel document (Certificate of Identity) to visit Vietnam due to compassionate family circumstances. The Secretary of State records that he made three visits to Vietnam in 2005 and 2006. Between 03 July 1995 and 19 September 2011 the appellant received 16 convictions for 28 offences including theft, possession of a controlled drug, attempting to obtain property by deception, failing to surrender and possession of a listed false instrument. On 07 February 2008 the appellant was convicted of producing cannabis and sentenced to 15 months' imprisonment. On 09 May 2008 the Secretary of State issued him with a warning letter stating that deportation action might be taken if he committed another offence.

3. On 31 August 2011 the appellant was convicted of kidnapping, false imprisonment and wounding with intent to do grievous bodily harm. On 19 September 2011 he was sentenced to 3 years' concurrent imprisonment for kidnapping, 5 years' concurrent imprisonment for false imprisonment and 14 years' imprisonment for wounding with intent to do grievous bodily harm. The Secretary of State quoted from the judge's sentencing remarks. A fuller extract is as follows:

> "The facts of the matters for which you find yourself convicted today are that on 28 February and after that date, you and others abducted the person who turned out to be the victim in this matter, a man called Mr [F]. He was abducted from the place he was working which was a Chinese supermarket in South London. He was taken initially to your wife's house in East London and then taken on to your own bed-sit flat which you occupied at the time or owned at the time and it was there that he was in fact viciously assaulted. After that, he was trussed up in a plastic bag and left deposited in a car park, probably left for dead by the way that he looked when he was found by the police.
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> I say initially that the truth of what was going on here is probably unlikely ever to come to light, as counsel has pointed out. There were lots of wheels within wheels going on. It is clearly a criminal background, a retribution of some sort, probably for bad behaviour in a

criminal sense and it looks like Mr [F] was the victim of that retribution from a criminal gang with which you must have been involved.

Mr [F] is the victim. He is also Vietnamese, like yourself, originally. Mr [F] it seems, was smuggled in from his home country, Vietnam, and it is likely that as a result of that smuggling he was expected to work for the gang who were involved in the smuggling. It seems from what one could glean from the facts in this case that the work he was allocated was to be a member of staff in a cannabis factory, of course the sort of place that we in these criminal courts hear so much about, probably a converted house or commercial premises being used to grow cannabis using hydroponics and all the rest of it.

Mr [F] said that he did work in the cannabis factory as ordered, that he received nothing for it and that after a while decided he did not want to continue. He refused to continue and left the factory. As far as one can tell, just looking at motive for a moment, and as I say it is very foggy and difficult to ascertain, but it seems that those who expected him to work for them were not pleased about his departure and therefore became involved in this violent episode which, as I have said earlier, was probably punishment for his failing to conform with the requirements of the gang.

You were obviously involved in this one way or another. I know not whether it was because you were involved in the gang as a member or whether it was because you knew Mr [F] or whether it was because, as you hinted, you were a sort of father figure who was seen as someone who could negotiate, et cetera. Whatever your background, you certainly became involved and involved in a criminal way.

As I said earlier, what happened was that Mr [F], having upset the gang, was visited by you initially, two or three weeks before it seems, and refused to come with you. You then returned with a number of men and made sure that he came. He was bundled off from the supermarket he was working at, put into a car driven by you, taken initially to your wife'[s premises where there was a lot going on and it seems a number of men. Counsel on your behalf described it as possible negotiations. One knows not what was going on there, although it is fair to say that somebody independent had visited that house during the time you were there and there was no sign at that time of you being assaulted or treated in that sense violently.

But whatever happened in that house did not go as planned so far as the gang were concerned, it seems, and at this point the gang with which you were involved and group of men in which you were involved, although I know not whether you were actually one of those, took Mr [F] off to premises which you owned or rented, a small bed-sit near your wife's house, and there he was kept and that was the false imprisonment.

So, going back to the indictment of kidnapping, it was the taking of Mr [F] from the supermarket by force and the false imprisonment was the keeping of Mr [F] in the second premises against his will.

By that point things had become violent. He was trussed up and tied up with cable and his mouth was sealed with a tape of some sort. He was kept for a day and a night, left tied up, as I say, with cable ties, and it was at this point that the most serious part of this crime was

> perpetrated, namely the wounding with intent. You were directly involved in that, according to the evidence and according to the conviction, in that Mr [F] was beaten and hit with probably two hammers but at least one hammer and you were one of those who hit him with the hammer. He was very badly assaulted indeed and injured to the extent that his legs were broken. … [a lengthy description of the victim's extensive injuries ensued]
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> You are now 53 years of age. As far as previous convictions are concerned, I have noted a list of previous convictions. Nothing really is anything near this sort of offending. There is towards the end of the matters an interesting matter involving cannabis but, again, cannabis was fleetingly part of this case. It is not entirely clear how you are linked with the world of cannabis but you do have a conviction noted in your record.
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> … it is clear that you were seen to be either a main perpetrator or involved in knowingly and actively being one of the gang members and committing these crimes in that sense, so you have to take full responsibility for the convictions that have been recorded against you.
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> I have considered dangerousness in this case and I take the view that it does not apply. I said that initially. This is a single incident, a gang-based background and you have no history of violence. Therefore, I do not think that the dangerousness provisions apply in this case."

4. In light of the serious nature of the offence, the Secretary of State was obliged to make a deportation order pursuant to section 32 of the UK Borders Act 2007 ("the UKBA 2007"). The Secretary of State certified the case with reference to section 72 of the Nationality, Immigration and Asylum Act 2002 ("the NIAA 2002") because the appellant was convicted of an offence in the United Kingdom attracting a sentence of more than two years' imprisonment. The Secretary of State considered the representations made by the appellant on 22 November 2017 but concluded that nothing in those representations rebutted the presumption that he was a danger to the community in the UK. The respondent went on to revoke the appellant's refugee status on the ground that Article 1C(5) of the Refugee Convention applied because the appellant could no longer, because the circumstances in connection with which he was recognised as a refugee had ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality. The Secretary of State considered the views expressed by UNHCR but concluded that there was a significant and durable change in the circumstances since he left the country. There was no evidence to suggest that he would be at risk at the current time due to his political opinion.

First-tier Tribunal decision

5. First-tier Tribunal Judge Hodgkinson ("the judge") allowed the appeal in a decision promulgated on 03 September 2018. He began by considering the terms of section 72 of the NIAA 2002 and summarised the correct legal framework. He quoted a large part of the judge's sentencing remarks as outlined above. His core findings on this issue were:

"35. Bearing in mind the above, it is beyond doubt that the appellant has been convicted of particularly serious crimes.

36. The second question is whether he currently constitutes a danger to the community of the UK. The appellant's assertion is that he does not, that he feels remorse for his offending, that his criminal history is due to his former dependency upon drugs and that he has no intention of offending in the future. Such evidence is essentially reiterated by his witnesses. However, I do not find credible the appellant's contention, that his serious 2011 offences were the result of his dependency upon drugs, bearing in mind that it is his evidence that he ceased to take drugs in 2006 and that and that his determination to stay away from drugs was reinforced following his wife's stroke in 2009. Thus, his former drugtaking is no excuse, or reason, at all for the commission of the 2011 offences.

37. In his submissions, Mr Grennan noted that the appellant had previously used a large number of aliases and different dates of birth. In cross-examination, the appellant acknowledged that he had done so and essentially acknowledged that this was for the purpose of seeking to avoid being identified as a person who had previously committed various offences. Thus, it demonstrates the appellant's propensity to be untruthful in the past. I have taken that factor into account when assessing whether he currently constitutes a danger to the community, although I do not find it to be determinative.

38. There is a recent Offender Assessment System (OASys) report, of relevant to the question of the appellant's propensity to reoffend. It commences at page 61 of AB2. The report is dated 17 July 2018 and is written by one Hannah de Jonk, a Probation Officer. The numbers in brackets below refer to the paragraph numbers in the report. The report appears to be based upon an assessment undertaken on 18 May 2017. Indication is given therein that the victim was a friend of the appellant's brother [2.4]. At [2.11], indication is given that the appellant "denies any involvement in the offence", which indication, I find, is consistent with the fact that he pleaded not guilty to the changes and was found guilty by a jury. That fact, I find, does not in itself suggest remorse. It is confirmed that the appellant's previous offences "revolve around drug use" [2.12]. At [R4.4], the risk of reoffending is assessed as being low. However, indication is given that the appellant presents a medium risk of serious harm to people involved in the Vietnamese drug culture; specifically, a known adult, which appears to be a reference to the victim in the 2011 offences, who would now appear to be living back in the appellant's home area in Vietnam.

39. Apart from the OaSys report, I have no further independent evidence with reference to the appellant's propensity to reoffend. His solicitors have obtained a psychiatrist's report (Dr Olufadejimi Jegede, dated 20 July 2018) with reference to the appellant's mental health. One of the questions asked of Dr Jegede was for him to comment on the appellant's propensity to reoffend but Dr Jegede has indicated that such not within his professional remit.

40. The appellant's unchallenged evidence is that he has not been involved in the use of heroin or crack cocaine, or any other Class A drugs, since 2009, although the OaSys report does make reference to him having a positive drugs test of 16 April 2014, it would appear in relation to him smoking cannabis, which resulted in an adjudication. Further, Dr Jegede's report makes reference to the appellant informing him that he does not use any drugs except occasionally smoking cannabis. In oral evidence, the appellant confirmed that, whilst in prison, he had occasionally smoked cannabis but that he had not done so since. That said, there is no suggestion that he has, in fact, used what might be described as any 'hard drugs' since about 2009, which is when he recommenced residing with his wife.

41. I have taken into account the content of the OaSys report which, I reiterate, is the only independent evidence in relation to the appellant's propensity to reoffend. I have also taken into account the essentially unchallenged evidence, that he has not participated in the use of heroin or cocaine for several years. The OaSys report indicates that his former offending was essentially the result of drug dependency and that the very serious 2011 offences appear to have been an isolated escalation in the appellant's offending. I link this to the appellant's own assertion that he has no intention of committing offences in the future, which indication, having had the opportunity of hearing the appellant give oral evidence, I accept as being a truthful one. The OaSys report indicates that the appellant's risk of reoffending is a low one.

42. In the circumstances, and on a balance of probability I accept that it has been established that he no longer constitutes a danger to the community of the United Kingdom. Consequently, I find that the appellant has rebutted the s.72 presumption in that regard."

6. The judge went on to consider the issue of cessation of refugee status. He quoted the UNHCR response in detail and outlined what was said in the decision letter. The judge noted the appellant's claim that he continued to fear persecution because of his desertion from the Vietnamese army during the war as well as an additional fear of retribution from the family of the victim of the serious crime he committed in the UK. The judge outlined the respondent's assertion that the appellant is no longer at risk in Vietnam given the passage of time, the changes in the situation there and the fact that he visited Vietnam on several occasions. The judge took into account the appellant's explanation about the nature and extent of those visits. He bore in mind that it was for the respondent to show that there had been a significant and non-temporary change in the situation in Vietnam. No evidence was produced to show that deserters from the army would no longer be at risk. The respondent failed to show that the circumstances in connection with which he was recognised as a refugee had ceased to exist.

Grounds of appeal

7. The Secretary of State appeals the First-tier Tribunal decision on the following grounds:

   (i) The judge failed to conduct an adequate assessment, and failed to give sufficiently clear reasons, for his finding that the appellant rebutted the presumption that he was a danger to the community in the UK.

   (ii) In assessing the cessation clause, the judge failed to have proper regard to the test set out by the Court of Appeal in *MA (Somalia)* [2018] EWCA Civ 994 and failed to have regard to (a) the fact that peacetime regulations would now apply and "penalties for desertion would be less severe"; (b) the appellant has visited Vietnam on several occasions; (c) the penal code was replaced in 2015 and it was submitted that the penalty for desertion was now "non custodial reform" that would not meet the definition of persecution.

Decision and reasons

8. We have considered the grounds of appeal and the submissions made by both parties. It is a borderline decision, but we conclude that the First-tier Tribunal decision involved the making of an error of law in relation to the first ground of appeal.

9. It is axiomatic that a judge must give reasons for his or her decision. It is not necessary for a judge to deal with every aspect of a case if sufficient reasons are given for the parties, particularly the losing party, to understand the basis of the decision in respect of the key elements that need to be determined: see *MK (duty to give reasons) Pakistan* [2013] UKUT 00641.

10. Our summary of the judge's findings relating to his assessment under section 72 of the NIAA 2002 shows that he considered the sentencing remarks, the seriousness of the offence, the credibility of the appellant's evidence and the risk assessment contained in the OASys report in assessing whether the appellant rebutted the presumption that he was a danger to the community. These were all relevant matters. However, having considered his findings as a whole, and in particular the overarching findings in [41] of the decision, we conclude that First-tier Tribunal did not explain adequately why the appellant had rebutted the presumption that he was a danger to the community in light of the evidence before the First-tier Tribunal. We come to this conclusion for the following reasons:

   (i) The judge quoted the sentencing remarks. We also quoted them in some detail because they contained important information about the sentencing judge's views of the appellant's criminality. In particular, the sentencing judge thought that the appellant must be involved at some level in Vietnamese organised crime gangs. The evidence surrounding the commission of the offence suggested that the gang was likely to be involved in human trafficking and exploitation in cannabis factories in the UK. The fact that the appellant was

convicted and sentenced to 15 months' imprisonment for producing cannabis in 2008, which on the face of it was not an offence relating to his own drug use, was relevant to the overall assessment of whether the appellant had a history of offending linked to organised crime and was likely to pose a danger to the community. Although it was open to the judge to find that the lesser offences committed prior to 2008 were likely to be linked to the appellant's personal drug use, the evidence indicated that the more serious offences of 2008 and 2011 were likely to be linked to organised criminal activities surrounding the production of cannabis and were not necessarily "an isolated escalation in the appellant's offending". The fact that the appellant claimed that he no longer took drugs was not necessarily relevant to the more serious offences. In the circumstances, it was not sufficient for the judge simply to quote the sentencing remarks without tackling the import of the sentencing judge's findings. The First-tier Tribunal judge's findings at [40-41] lacked any meaningful analysis of relevant considerations that should have formed part of the assessment.

(ii) We agree with Mr Wilding's submission that the finding at [41] relating to the appellant's assertion that "he had no intention of committing offences in the future" lacked sufficient reasoning. It is open to a judge who has heard evidence from a witness to assess their credibility and state whether they find them to be truthful. However, the level of reasoning required to explain why a judge finds a witness credible will depend on the circumstances of each case. If there has been little challenge to the credibility of a witness perhaps little more needs to be said than a brief statement of the kind made at [41] of the First-tier Tribunal decision. However, in this case, the judge had already made findings that undermined the overall credibility of the appellant as a witness. At [36] the judge did not accept the appellant's explanation as to why he committed the serious offences in 2011. At [37] the judge noted that the appellant had a history of using aliases and false instruments. He concluded that the appellant had a "propensity to be untruthful in the past". In light of those findings we conclude that the judge needed to give adequate reasons to explain why he then accepted the appellant's assurance that he would not commit further offences. The bare finding at [41] failed to explain why he found the appellant to be sincere on this matter when he found him to be untruthful in relation to other matters.

(iii) We make clear that the third reason why the judge's findings were inadequate does not form a central plank of our reasoning because it was not argued or canvassed at the hearing. However, having noted this point we do not think that we can ignore it because it is a relevant matter. On more detailed consideration of the OASys report that was referred to at the hearing we find that the judge also made a factual error relating to the risk of reoffending. It is unsurprising given the rather dense and technical nature of OASys assessments. We

know the exact sections of the report the judge considered because he crossed referenced them at [38] of the decision. He correctly identified the fact that the appellant was recently assessed to present a 'low' risk of reoffending and a 'medium' risk of serious harm to known adults involved in "Vietnamese drug culture". Closer inspection of section R4.4 of the OASys report shows that the low risk assessment related to the "OVP risk of reoffending", which relates to the probability of violent reoffending. However, the summary sheet on pg.35 of the OASys report outlined the predictor scores for other types of offending. The "OGRS3 probability of proven reoffending" was assessed to be 'medium' with a 56% probability of reoffending within two years. The "OGP probability of proven non-violent reoffending" was also assessed to be 'medium' with a 62% probability of reoffending within two years. In other words, the judge made his findings on a partial assessment of the risk of reoffending without reference to the summary of conclusions in the OASys report which showed that the appellant posed a 'medium' risk of reoffending in relation to non-violent crime.

11. Having found that the First-tier Tribunal judge failed to give adequate reasons to explain why the appellant rebutted the presumption that he was a danger to the community it is not necessary for us to consider the second ground of appeal in any detail. We simply note that the second ground, as originally drafted, did not demonstrate an error of law. Mr Wilding accepted that the assertions about the penal code in Vietnam were not argued before the First-tier Tribunal or supported by evidence. Although he made submissions on the judge's findings relating to cessation at the hearing, none of the points were pleaded in the original grounds of appeal.

12. We therefore conclude that the findings relating to the section 72 certificate are unsustainable and will need to be remade. The outcome of the decision on the section 72 certificate will determine whether Refugee Convention issues can be determined. Because the judge found that the presumption under section 72 was rebutted he did not make alternative findings with reference to Article 3 so the whole decision must be set aside. The extent of the judicial fact finding necessary for the decision to be re-made is such that, having regard to the overriding objective, it is appropriate to remit the case to the First-tier Tribunal for a fresh hearing.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The case is remitted to the First-tier Tribunal for a fresh hearing

Signed  Date 07 January 2019
Upper Tribunal Judge Canavan