Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00103/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 25 June 2019	**On 18 November 2019**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

S B
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Anonymity was granted at an earlier stage of the proceedings because the case involves protection and child welfare issues. I find that it is appropriate to continue the order. Unless and until a tribunal or court directs otherwise, the appellant 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 A. Gilbert, instructed by Hersi & Co. Solicitors
For the respondent: Mr T. Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 14 June 2018 to refuse a protection claim, to purport to 'revoke' refugee status on grounds of cessation, and despite asserting that refugee status had ceased, to certify the protection claim under section 72 of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002"). The respondent also refused a human rights claim.

2. In a decision promulgated on 03 April 2019 First-tier Tribunal Judge A.H.M. Baldwin ("the judge") appeared to dismiss the appeal in so far as it was brought on Refugee Convention grounds. He found that the appellant's refugee status had not ceased with reference to Article 1C of the Refugee Convention but concluded that the appellant failed to rebut the presumption that he was a danger to the community for the purpose of section 72 NIAA 2002. The judge allowed the appeal on human rights grounds with reference to Article 8 of the European Convention.

3. The Secretary of State appealed the decision. In a decision promulgated on 09 October 2019 (annexed) the Upper Tribunal found that there was no error of law in the judge's findings relating to cessation with reference to Article 1C of the Refugee Convention [10-20]. The Upper Tribunal could not ignore a *Robinson* obvious error of law relating to the way in which the judge assessed section 72 NIAA 2002, in light of the evidence which showed that the appellant posed a low risk of reconviction [21-25]. It concluded that the judge's findings relating to Article 8 of the European Convention were within a range of reasonable responses to the evidence and did not disclose an error of law [26-30]. Having preserved the First-tier Tribunal's finding relating to cessation and Article 8 the Upper Tribunal invited further submissions on the remaking of the section 72 decision within 21 days [33].

4. The Tribunal has no record of a response to the directions from either party. Neither party has made a request for a further hearing nor made any further written submissions on the issue of remaking the decision in respect of the section 72 certificate. I am satisfied that the Upper Tribunal can proceed to determine the matter on the papers.

Decision and reasons

5. The First-tier Tribunal findings relating to cessation stand. The appellant continues to have a well-founded fear of persecution for reasons of his attributed political opinion. Article 33(2) contains an exception to the general prohibition on *refoulement* in cases where there are reasonable grounds for regarding the refugee as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

6. The Secretary of State certified the protection claim under section 72 NIAA 2002. Section 72 is said to reflect Article 33(2) of the Refugee Convention, although it inaccurately describes the effect of the provision as 'exclusion' from Refugee Status rather than framing the provision in terms of permitted *refoulement*. In *EN (Serbia) v*

SSHD [2009] EWCA Civ 630 the Court of Appeal emphasised that section 72 must be read to comply with Article 33(2) of the Refugee Convention. It is important to note that section 72 came into force before the Qualification Directive and is expressly intended to reflect the provisions of Article 33(2) of the Refugee Convention and not Article 14(4) of the Directive.

7. The Tribunal is obliged to consider section 72 NIAA 2002 where applicable. Section 72(10) was amended to reflect the new appeals provisions. It states that the Tribunal is obliged to dismiss an appeal brought on grounds relating to the Refugee Convention under sections 84(1)(a) and 83(3)(a) NIAA 2002 if the presumption that the person constitutes a danger to the community has not been rebutted.

8. The appellant was convicted in the United Kingdom of an offence and was sentenced to a period of imprisonment of at least two years. He engages the presumption that he is a danger to the community for the purpose of section 72(3) NIAA 2002.

9. I turn to consider whether the appellant has rebutted the presumption that he is a danger to the community. The appellant was convicted for his part in an organised enterprise involving deliberate road traffic collisions to make fraudulent car insurance claims. He was sentenced to periods of imprisonment of two, three and five and a half years (to be served concurrently) for conspiracy to commit fraud. On 02 October 2015 the sentencing judge described the organised nature of the offences as follows:

> "This kind of offence is prevalent. This was in my view a sophisticated, professional and carefully planned criminal enterprise. It was dishonestly run in each of its compartments effectively and efficiently. The evidence demonstrated that it is highly lucrative and it has in some instances understandably been impossible to calculate with any real precision the true extent of the actual or intended financial gains. Suffice it is to say that the financial material, the evidence the jury received from the undercover policer officer and the general set up all indicate that this was in its separate components a number of fraudulent enterprises run on a commercial basis. Each necessary dishonest aspect of the framework was in place. It is against that background that the appropriate sentences fall to be considered.
> …..
> I have already dealt with credit for plea where applicable. In [SB's] case I have taken into account his involvement in all three counts, his previous convictions an aggravating feature, and the principle of totality. …
> …..
> [SB] is now, I am told, remorseful as he realises that he could have caused injury to other road users."

10. A copy of a print out from the Police National Computer (PNC) discloses several previous convictions for offences of a relatively minor nature including driving without insurance, driving whilst disqualified and failing to surrender. The offences were sentenced by way of fines, disqualification, community orders or suspended sentences. The index offence that underpinned the respondent's decision to make a deportation order represented a serious escalation in nature of the appellant's offending behaviour.

11. The most recent OASys assessment was prepared on 25 February 2019. The professional risk assessment prepared by an Offender Manager from the National Probation Service (NPS) noted that the appellant was easily led and went along with the plan when it was suggested to him. He expressed regret for his behaviour but lack in depth awareness of the long-term impact of his behaviour on direct and indirect victims as well as the community in general. The OASys report goes on to note that the appellant's antecedents had been confused with another person in the past. The records that the NPS had of convictions relating to the appellant prior to the index offence in 2015 were (i) a theft offence in 2011; (ii) two offences relating to police/courts/prisons 2008-2015; and (iii) two miscellaneous offences in 2007. In considering whether there was an established pattern of offences, the OASys report went on to say:

> "Mr [SB's] previous offending includes motor offences (Driving whilst disqualified) and theft, which links with his current offence also being a motor offences and for the purpose of financial gain. There is a clear pattern of his offending being linked to him being dishonest which can be evidence by his current and previous fraudulent offences as well as his theft convictions. When challenged about his reasons for his previous offending, Mr [SB] was unable to identify his reasons for theft from a person however, he disclosed that he [was] driving without insurance because he was unable to afford it.
>
> In my assessment, Mr [SB's] index offence is an escalation in seriousness from previous offending. Mr [SB's] index offence can be linked to serious harm to both himself and others as serious physical harm can occur as a result of his actions. As such, future work will have to be undertaken to address this and in an attempt to increase his [victim] empathy, financial management and his thinking and behaviour."

12. The report went on to note potential financial risk factors:

> "There are currently no current issues reported concerning his motivation or attitude towards employment however, at the time of the index office, Mr [SB] was employed. As his index offence was solely for financial gain, I therefore consider employment to be linked to risk and re-offending. Periods of unemployment in the community could lead to feelings of financial frustration which will increase Mr [SB's] likelihood to further offend. Should Mr [SB] be unable to obtain employment or loses his job, I will be referring him to an ETE Advisor, who will support him in his efforts to constructively occupy his time and help him find employment.
> …..
> During interview Mr [SB] confirmed that his index offence was committed for the sole purpose of financial gain and in turn. Should Mr [SB] have limited or no access to funds, this would heighten his risk of reoffending. In my assessment the financial issues are linked to Mr [SB's] offending behaviour and the risks of serious harm and this is an area that has to be closely monitored whilst he is in the community."

13. The OASys assessment noted the following about the appellant's attitudes to offending behaviour:

> "During interview, Mr [SB] reflected on his criminal behaviour and feelings towards his previous offences as well as his index offence were not right or justified at all and feels he has been wrong in all circumstances. He has positively identified that he has been led to

> offend due to "needing extra money" (index offence) or lack of finances (previous offence). Mr [SB] has stated that he wants to stop offending and his motivation is his family.
>
> Mr [SB] has indicated being very keen to co-operate in offending behaviour programmes and evidence reduced risk. During supervision, Mr [SB] has positively complied with all offending behaviour work and has continued to show a good level of motivation which is to be maintained. By continuing to participate in offending behaviour programmes, Mr [SB] will be equipped further with the necessary skills and techniques to respond to challenging situation in a pro-social way, to reflect on his attitudes and lead life without re-offending."

14. Having conducted an overall risk assessment, the relevant Offender Manager concluded that the appellant posed a 'medium' risk of serious harm to the public because of the obvious risks arising from the nature of the offences, but his overall risk of reoffending was assessed to be 'low'.

15. The OASys assessment made clear that the main risk factor that might lead to reoffending was financial. The appellant says that he has been self-employed since his release from immigration detention on 08 August 2018. He wanted to work hard to support his family. He runs a used car dealership with his cousin. He produced some evidence from his accountant to suggest that he is registered with HMRC. Although there is little solid evidence of his income, even if the accounts for the period ending 05 April 2019 are taken at their highest, the appellant's gross profit from the business was only £4,492. I bear in mind that the evidence indicated that the appellant's wife and children were in receipt of benefits. The appellant told the First-tier Tribunal that he also worked in a pizza shop but there was no evidence of the fact because he worked cash in hand. The evidence indicates that the family is still likely to be living on a low income which is one of the potential risk factors identified in the OASys report. However, the appellant appears to be in work and the family have other means of support to which his wife is entitled.

16. The First-tier Tribunal judge heard evidence from the appellant and his wife. He was satisfied that the appellant was genuinely remorseful for the offences and had time to reflect on the significant impact that his behaviour had on his family. The OASys report noted that the appellant accepted responsibility for the offences and had some insight into his offending behaviour. The evidence shows that he engaged with the NPS during supervision and was motivated to address his offending. The First-tier Tribunal judge was correct to attach weight to the professional risk assessment conducted by the NPS. The judge concluded that the appellant "is probably not likely now to be a danger to the public" [29].

17. I bear in mind that the appellant was assessed to pose a 'medium' risk of serious harm to the public if he did reoffend. This is understandable given offences for which he was convicted involved deliberately causing collisions. The risks associated with such behaviour are obvious. However, the key indicator of whether the appellant poses a danger to the community of the serious nature required to justify the *refoulement* of a refugee is whether the appellant is likely to reoffend. Although the appellant has a history of offending behaviour relating to motoring offences, and still appears to earn a living through a business associated with cars,

the overall risk assessment made by a professional Offender Manager six months after his release from detention, indicates that the appellant poses a 'low' risk of reoffending. Like the previous judge, I find that the evidence does not show that the appellant currently poses a danger to the community of the serious kind that would justify his removal under Article 33(2). I conclude that the evidence produced by the appellant is sufficient to rebut the presumption that he is a danger to the community for the purpose of section 72(6) NIAA 2002.

18. The First-tier Tribunal found that the respondent failed to show that the appellant's Convention status had ceased with reference to Article 1C of the Refugee Convention. I remake the decision in so far as it related to section 72 NIAA 2002 and find that the appellant has rebutted the presumption that he is a danger to the community. It follows that the appeal should be allowed on Refugee Convention grounds.

19. The removal of the appellant in consequence of the decision would breach the United Kingdom's obligations under the Refugee Convention. The First-tier Tribunal decision allowing the appeal on human rights grounds shall stand.

20. The appellant has succeeded in his appeal on this occasion. However, he should be aware that if he commits any further offences, especially if they are of a similarly serious nature to the index offence, that it would be open to the Secretary of State to review the position both in relation to the Refugee Convention and/or the European Convention. The appellant is expected to abide by the laws of the United Kingdom. If he fails to do so, the outcome might be different on another occasion. Only his future good conduct can ensure stability for his family.

DECISION

The First-tier Tribunal decision to ALLOW the appeal on human rights grounds stands

The decision is remade and the appeal is ALLOWED on Refugee Convention grounds

Signed  Date 12 November 2019
Upper Tribunal Judge Canavan

ANNEX

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00103/2018

THE IMMIGRATION ACTS

Heard at Field House
On 25 June 2019

Decision Promulgated

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Before

LORD BOYD OF DUNCANSBY
(Sitting as a Judge of the Upper Tribunal)
UPPER TRIBUNAL JUDGE CANAVAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

S B
(ANONYMITY DIRECTION MADE)

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Anonymity was granted at an earlier stage of the proceedings because the case involves protection issues. We find that it is appropriate to continue the order. Unless and until a tribunal or court directs otherwise, the original appellant (SB) 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. Lindsay, Senior Home Office Presenting Officer
For the respondent: Mr A. Gilbert, instructed by Hersi & Co. Solicitors

DECISION AND REASONS

1. For the sake of continuity, we will 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.

2. The appellant (SB) was granted Indefinite Leave to Remain as a refugee in a decision dated 18 September 2003. The decision was made before the Qualification Directive (2004/83/EC) came into force on 20 October 2004. The appellant was recognised as a refugee with reference to the Refugee Convention and was granted leave to remain based on his 'Convention status'. He was not granted 'European refugee status' under the Qualification Directive.

3. On 08 October 2016 the respondent signed a deportation order in accordance with section 32(5) of the UK Borders Act 2007 ("UKBA 2007") following the appellant's conviction for criminal offences.

4. The appellant appealed the respondent's subsequent decision dated 14 June 2018 to refuse a protection claim, to purport to 'revoke' refugee status on grounds of cessation, and despite the assertion that refugee status had ceased, to certify the protection claim under section 72 of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002"). The respondent also refused a human rights claim.

5. First-tier Tribunal Judge A.J.M. Baldwin ("the judge") dismissed the appeal in a decision promulgated on 03 April 2019. The judge's findings were not all contained under the heading "My Findings"; some were made before that section of the decision. The judge noted the previous history of the case and the reasons why the appellant was recognised as a refugee following a successful appeal [12]. He considered the evidence and gave reasons for concluding that the respondent had failed to discharge the burden of showing that the appellant's Convention status had ceased [13-16]. The judge went on to consider evidence relating to the appellant's offending and made a finding at [19] that the evidence relating to his convictions give rise to a rebuttable presumption that he is a danger to the community for the purpose of section 72 albeit the judge considered that he did not pose a "'grave' danger" as argued on behalf of the respondent. Under the heading "The Oral Evidence" the judge outlined the evidence given by the witnesses [20-22]. At the end of this section he made the following findings relating to the section 72 certificate.

> "22. ….. An OASYs Report is a document which generally carries quite significant weight and there is no reason why this one should not do so. There is no doubt that the offences for which he was imprisoned were particularly serious but the question is whether the Appellant is probably still a danger to the community. Whilst I am persuaded that the risk of him re-offending within two years is probably low and that he has "seen the light", as it were, the question is whether he will continue to keep his eye on that metaphorical light – and what will happen if he does not do so. In assessing the danger he may present, I have also had regard to the fact that this Appellant is not one who went adrift as a juvenile, as his offending did not start

> until he was around 30 and married. **The risk of re-offending may be low but the question is whether he remains a danger to the community. The danger is not, I find, grave or great but it is serious, present, genuine and not fanciful. Revocation of his Refugee Status is appropriate and a change in his Leave to one where he will regularly be reminded of the need to avoid criminal activity should provide a very useful reminder of this.**" [emphasis added]

6. Having dealt with the issues relating to protection claim the judge turned to consider whether the appellant's removal in consequence of the deportation decision would amount to a breach of Article 8. Those findings were made under a subsequent heading entitled "My Findings" [27-34]. The judge summarised general principles relating to the weight that must be given to the public interest in deportation. He made clear that "very powerful weight" must be placed on the public interest [28]. He considered the nature of the offence and the length of the sentence of 66 months. He also took into account evidence in the OASYs report, which assessed the appellant to be a low risk of reoffending within two years [29]. Because this was a case where the sentence was over fours years' imprisonment, the judge rightly took into account other factors relating to the appellant's background as a refugee and his family circumstances, including the compassionate circumstances surrounding the care of his eldest child, who has significant difficulties arising from Autistic Spectrum Disorder [30]. The judge assessed the appellant as a witness and was satisfied that he was genuinely remorseful and that he had insight into the impact that his offending had on his family. He took into account the fact that the appellant played a significant role in the care of their eldest son. He noted that the appellant's son could be physically challenging and that this would be difficult for the appellants' wife to manage without the appellant [32].

7. The judge went on to consider the interests of the other children. He gave weight to the fact that there were four children who were British citizens and found that it would be unduly harsh to expect them to live in Afghanistan with the appellant [33]. The judge recognised all these factors had to be balanced against the nature and seriousness of the appellant's offending. He noted that many of the factors would not amount to very compelling circumstances if considered individually. However, he was satisfied that the combination of the appellant's family circumstances, the number of children affected, and the special needs of the eldest child was sufficient to amount to 'very compelling circumstances' which outweighed the public interest in deportation [34].

8. The Secretary of State's appealed the First-tier Tribunal decision on the following grounds:

   (i) The First-tier Tribunal erred in failing to follow the correct approach to the assessment of cessation: *SSHD v MA (Somalia)* [2018] EWCA Civ 994 referred. The judge failed to consider the most recent country guidance in *AS (Safety of Kabul) Afghanistan CG* [2018] UKUT 118 in assessing whether the appellant would be at risk on return in Kabul as a result of an incident that took place in 1996.

(ii) The First-tier Tribunal failed to give sufficient reasons to explain why the appellant's circumstances outweighed the public interest in deportation and failed to take into account the possibility of social services assistance for his wife and children: *BL (Jamaica)* [2016] EWCA Civ 357 referred. The judge speculated that the appellant's eldest son might be take into care and as to why the appellant might have received a longer sentence that his co-defendants.

Decision and reasons

Refugee Convention

9. The appeal was brought on Refugee Convention and human rights grounds in the context of an earlier decision to make a deportation order pursuant to section 32(5) of the UKBA 2007.

10. The Secretary of State asserted that the appellant's status under the Refugee Convention had ceased. The appellant's 'Convention status' was recognised before the Qualification Directive came into force. The grant of Indefinite Leave to Remain was not a grant of 'European refugee status' by a Member State under Article 13.

11. One of the crucial differences between the Refugee Convention and the Directive is that there is no provision for the revocation of refugee status under the Refugee Convention. Convention status either ceases because of the circumstances surrounding the claim (Article 1C) or the host state is permitted to remove a refugee if they constitute a danger to the community of the host state (Article 33(2)). In contrast, the mechanism under the Directive is for European refugee status granted by the Member State to be revoked in both circumstances. The effect is that European refugee status comes to an end and the person may become liable to removal.

12. In the case of cessation, the practical difference between Convention status and European refugee status is negligible. In both circumstances, the status under either provision comes to an end if the cessation criteria apply.

13. The differences are more pronounced in relation to removal of a person who poses a danger to the community of the host state. A person may retain Convention status even if European refugee status is revoked with reference to paragraph 338A and 339AC of the immigration rules and comes to an end: see *Essa (revocation of protection status appeals)* [2018] UKUT 00244.

14. Although the Secretary of State incorrectly purported to 'revoke' the appellant's Convention status, when no such principle applies, having given reasons as to why the appellant's Convention status had ceased this was sufficient for the purpose of the decision in so far as it related to Article 1C of the Refugee Convention.

15. Having concluded that the appellant ceased to be a refugee for the purpose of Article 1C of the Refugee Convention it is unclear why the respondent decided to certify the case under section 72 when it is said to reflect Article 33(2) of the Refugee Convention, which only applies to removal of a person who is a refugee. Nevertheless, in so far as section 72 was relied on by the respondent in a 'belt and braces' approach, the issue was before the First-tier Tribunal to determine.

16. The Secretary of State is right to point out that the judge's findings relating to cessation did not specifically refer to relevant case law. However, such an omission is insufficient reason to find an error of law if, in fact, the judge considered the issue of cessation in the proper way. In *MA (Somalia)* the Court of Appeal found that the assessment was broadly a mirror image of the assessment of risk on return albeit the burden is on the respondent to show that the circumstances in the person's country of origin are of significant and non-temporary nature such that the person no long has a well-founded fear of persecution.

17. The judge considered the documentary evidence, including the evidence from UNHCR [13-14]. It was open to him to also take into account the fact that the appellant is from a province the Secretary of State recognised still had significant insurgent activity. In light of this evidence, it was open to the judge to conclude that the appellant was still likely to be at risk in his home area [14]. The judge directed himself to the correct legal test [15]. He went on to consider whether the historical nature of the appellant's original claim might indicate that he was no longer at risk. However, it was open to the judge to take into account the high-profile nature of the incident described by the appellant in which 26 prominent Mujahidin commanders were killed. The judge found that matters relating to 'honour' and blood feuds may become a legacy from one generation to the next. His finding was within a range of reasonable responses to the evidence relating to Afghanistan where such feuds and long held grievances are well documented.

18. The judge went on to consider whether the appellant could relocate to Kabul. Although it would have been helpful it he had cited the most recent country guidance in *AS (Afghanistan)* (of which some findings have subsequently been set aside by the Court of Appeal) it seems clear to us from what the judge says in the second half of [16] that he was, as a matter of fact, considering the guidance. The undisturbed finding of the Upper Tribunal in *AS (Afghanistan)* was that a person of low level interest to the Taliban was not likely to be at risk from the group in Kabul. It seems clear from the judge's discussion of the risk that the appellant might face in Kabul that he was aware of the issue because he said that he accepted that there was little or no risk to low-level Taliban targets in Kabul. However, he then went on to give reasons why the appellant "could hardly fit that description despite him not having been a senior government or security services official or a spy". This is directly paraphrased from the guidance in *AS (Afghanistan)* and is further evidence that the judge assessed the issue with the country guidance firmly in mind. He went on to give reasons to explain why he considered the incident that gave rise to the appellant's fear of persecution was sufficiently high profile to indicate that it was

likely that he would still be of interest to the Taliban even in Kabul. He considered recent material relating to the security situation in Kabul and concluded that the respondent had failed to show that the appellant no longer had a well-founded fear of persecution in Kabul [16].

19. The Secretary of State's grounds, as originally drafted, only asserted that the judge failed to consider *MA (Somalia)* and *AS (Afghanistan)*. The grounds expressed a general disagreement with the judge's conclusion, asserting that the appellant would not be at risk in Kabul, without identifying any error of law in the judge's factual findings. Although Mr Lindsay sought to expand his submissions beyond the original grounds, we find that no error is disclosed. The judge was not seeking to depart from the country guidance. He accepted that the guidance stated that people who were of low-level interest to the Taliban were not likely to be at risk. However, he gave rational and sustainable reasons to explain why he considered the appellant was still likely to be of a higher level of interest to the Taliban given the high-profile nature of the incident he was perceived to have been involved in. The respondent may disagree with the conclusion, but the judge gave adequate reasons for his findings, which were open to him to make on the evidence.

20. For these reasons we conclude that there is no error of law in the First-tier Tribunal's reasons for concluding that the appellant's Convention status had not ceased under Article 1C. Those findings shall stand.

21. However, at the hearing we highlighted obvious problems with other aspects of the judge's reasons relating to Refugee Convention issues that could not be ignored. Both parties were given an opportunity to respond to our concerns at the hearing.

22. Section 72 of the NIAA 2002 is said to reflect the provisions contained in Article 33(2) of the Refugee Convention although it inaccurately describes the effect of the provision as 'exclusion' from Refugee Status rather than framing the provision in terms of permitted *refoulement*. In *EN (Serbia) v SSHD* [2009] EWCA Civ 630 the Court of Appeal emphasised that section 72 must be read to comply with Article 33(2) of the Refugee Convention. It is important to note that section 72 came into force before the Qualification Directive and is expressly intended to reflect the provisions of Article 33(2) of the Refugee Convention and <u>not</u> Article 14(4) of the Directive.

23. The Tribunal is obliged to consider section 72 of the NIAA 2002 where applicable. Section 72(10) was amended to reflect the new appeals provisions. It states that the Tribunal is obliged to dismiss an appeal brought on grounds relating to the Refugee Convention under sections 84(1)(a) and 83(3)(a) of the NIAA 2002 if the presumption that the person constitutes a danger to the community has not been rebutted.

24. Our concerns regarding the judge's findings relating to section 72 relate to two points.

(i) First, the findings relating to the section 72 certificate made at the end of [22] discloses a clear error of law. The judge found that the appellant was still a Convention refugee. Refoulement of a refugee would breach the Refugee Convention. Article 33(2) provides an exception to this fundamental principle in cases where a person, having been convicted of a particularly serious crime, constitutes a danger to the community. Section 72 is said to reflect Article 33(2) and for this reason contains a presumption that is capable of being rebutted by the refugee if he can show that he is not a danger to the community.

The judge's unchallenged findings were that the OASYs assessment should be given "quite significant weight" and assessed the risk of reoffending within two years as low. Having accepted that the risk of reoffending was low it is difficult to see how the appellant could still pose a danger to the community. The last line of [22] (highlighted above) is deeply erroneous. It discloses a misunderstanding of the difference between 'revocation' of status and the circumstances in which removal of a refugee is permitted under Article 33(2). The test is not whether the appellant poses a threat that is "serious, present, genuine and not fanciful", which seems to confuse the issue with the test for deportation under EU law and has nothing to do with the Refugee Convention. Nor is the application of section 72 a means of punishment to "remind" a person of the need to avoid criminal behaviour. The confused and somewhat incoherent test seemingly applied at the end of [22] amounts to an obvious error of law that we cannot ignore.

(ii) Second, even if the judge had not made the error in relation to the correct test to be applied in relation to the rebuttable presumption contained in section 72 he erred in purporting to allow the appeal "on asylum grounds" at the end of the decision. Section 72(10) obliges the tribunal to dismiss an appeal brought on grounds relating to the Refugee Convention if the presumption that the person constitutes a danger to the community has not been rebutted. Having upheld the section 72 certificate, the judge erred in allowing the appeal "on asylum grounds".

25. For these reasons we conclude that the judge's findings relating to section 72 NIAA 2002 must be set aside. Further directions are made below in relation to the remaking of this part of the decision.

Human rights

26. We can deal with the challenge to the judge's Article 8 findings briefly. It is clear from the judge's findings at [28-29] that he gave significant weight to the serious nature of the offence and the fact that the appellant was sentenced to a period of over four years' imprisonment. Quite rightly, the judge considered the fact that the appellant was given a higher sentence than his co-defendants to reflect past offending and failures to respond to court orders. There was nothing erroneous

about this observation. It is not arguable that the judge did not give proper weight to the public interest considerations or that he applied the wrong legal test. It is quite clear that he was aware that the test of 'very compelling circumstances' was a stringent test given the weight that must be placed on the public interest in such cases.

27. The Secretary of State's grounds outline general disagreements with the outcome without particularising any errors of law that would have made any material difference to the outcome of the judge's decision relating to Article 8. The Secretary of State cannot criticise the judge for failing to consider whether social services might be able to provide the appellant's wife with support in bringing up five children in the appellant's absence, including one child with a challenging disability and then assert that the judge was speculating when he concluded that there was at least some possibility that the appellant's wife might not be able to cope with the eldest child and a risk that he might be taken into care. Clearly the judge considered what other support might be necessary given he accepted that the appellant plays a crucial role in caring for a child with challenging behavioural difficulties.

28. It was open to the judge, and indeed he was obliged, to consider the best interests of four British children. The appellant's wife was pregnant with their fifth child at the date of the hearing. The judge made clear that none of the individual factors would be sufficient, taken alone, but it was open to him to conclude that the combination of factors presented a picture that was capable of amount to 'very compelling circumstances'. His approach accorded with the guidance given by the Court of Appeal in *NA (Pakistan) v SSHD* [2016] WLR(D) 662. The respondent disagrees with the outcome, but the judge's findings were within a range of reasonable responses to the evidence.

29. Although the judge did not take it into account as part of his overall assessment under Article 8, we note that his finding that the appellant continued to be at risk on return to Afghanistan would also have been relevant to an assessment of whether there were 'very compelling circumstances' to outweigh the public interest in deportation in the absence of any specific finding relating to Article 3 of the European Convention.

30. We conclude that the First-tier Tribunal findings relating to Article 8 did not involve the making of an error on a point of law. The findings shall stand.

Conclusion

31. The First-tier Tribunal decision did not involve the making of errors of law in relation to the findings regarding (i) cessation and (ii) Article 8. The decision shall stand in relation to those two issues.

32. The First Tier Tribunal decision involved the making of errors of law in relation to the findings regarding section 72 NIAA 2002. The decision is set aside in relation to that issue and will be remade.

DIRECTIONS

33. We are conscious of the fact that we did not invite submissions regarding the remaking the section 72 decision at the hearing and for this reason it is necessary to do so now. There was no challenge to the factual finding that the appellant presents a low risk of reoffending. It is possible that the matter could be dealt with by way of written submissions. To that end we make the following directions.

    (i) The parties are invited to make written submissions solely in relation to the remaking of the decision with reference to section 72 NIAA 2002 **within 21 days** of the date this decision is sent.

    (ii) The parties are at liberty to apply for a hearing for oral submissions to be made if considered necessary.

    (iii) If no further submissions are made within the time limit the Upper Tribunal will proceed to remake that part of the decision without a hearing on the evidence as it currently stands.

DECISION

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

The decision will be remade solely in relation to section 72 NIAA 2002

Signed  Date 07 October 2019
Upper Tribunal Judge Canavan