IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00014/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 March 2020	**On 18 May 2020**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RESUL RAHOVA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms S Cunha, Senior Home Office Presenting Officer
For the Respondent: Ms J Wood instructed by Kilby Jones Solicitors LLP

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of a Judge of the First-tier Tribunal who allowed the appeal of the respondent against the Secretary of State's decision of 29 December 2017 to make a deportation order and revoke his refugee status. The judge allowed the appeal on asylum grounds and under Articles 2 and 3 of the European Convention on Human Rights but dismissed the appeal under Article 8 of the ECHR.

2. I shall refer hereafter to the Secretary of State as the respondent, and to Mr Rahova as the appellant, as he was before the judge.

3. The appellant has been in the United Kingdom since October 2011. Following a successful appeal against a refusal of asylum he was granted refugee status on 18 February 2012 with limited leave to remain until 17 February 2017.

4. On 7 September 2016 he was convicted of conspiracy to supply a controlled drug of Class A – cocaine, and dangerous driving. He was sentenced on 14 October 2016 to five years and six months' imprisonment for the drugs charge and six months' imprisonment consecutive for the driving charge.

5. The judge noted the sentencing remarks in respect, in particular, of the drug conviction. He also noted the earlier decision of the First-tier Judge in 2012 allowing the appellant's asylum appeal on the basis that he was at risk from a blood feud. He had been found credible by the judge.

6. The respondent relied upon the country guidance case of EH [2012] UKUT 00348 (IAC), with regard to blood feuds, noting that it had been found that attestation letters from Albanian non-governmental organisations should not in general be regarded as reliable evidence of the existence of a feud. A letter had been accepted by the judge in 2012 (the first judge), a letter from the Peace Missionaries Union, as being authentic, and attached weight to it. The judge considered however that from reading the first judge's decision as a whole the letter was not determinative but was only one of a number of sources of evidence relied on. The judge also remarked that the respondent did not place before him any specific personalised evidence obtained from enquiries in Albania to the effect that the blood feud between the appellant's family and the other family did not still exist. The judge found there was no basis upon which to deviate from the findings of the first judge.

7. The judge then took the findings of the first judge and applied the up-to-date country guidance in EH and concluded that the outcome would be the same. He considered that even if no weight were attached to the Peace Missionaries Union's letter he was satisfied that the appellant would still attract refugee status.

8. He remarked that the continued risks to the appellant were supported by an expert report from Dr Korovilas. No substantial criticism had been made of that report by the respondent's representative. The judge was satisfied as to the expert's expertise and attached weight to his report. The expert had analysed the letter previously produced by the Peace Missionaries Union and had concluded that there was no evidence to support the view that that letter was fraudulent. He otherwise analysed the appellant's position and vouched for the fact that the appellant would be a likely target.

9. The appellant gave oral evidence which was found by the judge to be credible and reliable. His brother, who was now an adult, had left Albania and was also in the United Kingdom, and the only other male family member was his elderly father who had been in hiding in Albania since 2010. The judge concluded that there was no material change which would render the appellant ceasing to require protection. He also observed that his finding on the appellant's entitlement to refugee status was consistent with the respondent's Country Policy and Information Note, Albania: blood feuds (version 3.0 October 2018), which relied largely upon a report published in 2017 by the Belgian Commissioner General for Refugees and Status Persons.

10. The judge went on then to consider whether or not the appellant had rebutted the section 72 presumption: in other words was he disqualified as a consequence of his criminal conviction although the judge had found he still required and was entitled to protection as a refugee.

11. The judge observed that the appellant had been convicted of a particularly serious crime. Somewhat surprisingly he went on to refer to the fact that it was not serious to the extent that anyone was physically harmed at the point of the appellant's own criminal behaviour; however he went on to note that the supply of drugs in such circumstances was only one small component of a much larger criminal underworld which involves exploitation, violence and that ultimately when looking at the value of drugs involved, hundreds of individuals lives would have been wrecked by misusing the drugs directly or being a family member of those who did and that the six year sentence imposed underpinned the serious nature of the offence.

12. The judge went on then to consider whether the appellant was a danger now in the context of whether the presumption arising from section 72 was rebutted. The appellant said that his involvement was not significant and he had never been involved in such criminal activity before and had been motivated by financial gain to assist his family in Albania. He had no other convictions and he stated that he was rehabilitated. The judge considered that the appellant's assertions that he was rehabilitated were supported by an OASys Report of 6 February 2019 and which was supplemented by a stand-alone letter of the appellant's probation officer Ms Fairman. It was said at section 5.2 of the OASys Report that the appellant's convictions were not indicative of serious harm. In her letter of 15 October 2019 Ms Fairman referred to an Offender Group Reconviction Scale (OGRS), a tool to assess risk of offending in respect of which the appellant's score suggested that the probability of his re-offending was low. The judge went on to say that despite the very serious nature of the offence for which the appellant was convicted, there was no up-to-date evidence to show that he was a risk to the public or a danger to the community. He was not assessed as a risk of re-offending and he was not a career criminal and there was no evidence to suggest that he had links to criminal gangs operating in the United Kingdom. The judge concluded

that the appellant had rebutted the presumption under section 72 and as such continued to be entitled to refugee protection.

13. The judge concluded that in any event on the basis of the first judge's previous findings and his own findings now even if the appellant failed to rebut the presumption under section 72 he would be entitled to protection under Articles 2 and 3 of the ECHR. He found no merit however in the Article 8 appeal and dismissed that but allowed the appeal on asylum grounds under Articles 2 and 3 of the ECHR.

14. The Secretary of State sought and was granted permission to appeal on the basis that the judge had erred in respect both in regard to risk the appellant posed to the public and also the issue of risk he faced on return and the findings in respect of the decision to revoke refugee status.

15. Ms Cunha relied on and developed the points made in the grounds.

16. As regards the cessation issue, the judge had erred at paragraph 28 in referring to the absence of specific personalised evidence placed before him from the respondent to the effect that the blood feud did not continue. It was not for the Secretary of State to put this evidence but for the appellant to show that he was still at risk and for the same reasons. He had been nearly 18 at the time of the earlier decision. With regard to what was said in KN [2019] EWCA Civ 1665, to which I referred Ms Cunha, in particular at paragraph 36 where it was said that where a person had been granted refugee status the onus of proving the circumstances in connection with which he was recognised as a refugee had ceased to exist lay on the Secretary of State, Ms Cunha argued that it was for the Secretary of State to show why the circumstances of the grant of asylum as a child in a blood feud in Albania existed but once the position had been made clear that it was different now and as he was an adult and had shown strength in how he conducted himself in the United Kingdom, he had to prove why on return he would be at risk. The burden on the Secretary of State was to show that the situation as it was at the time did not exist anymore and then the burden was on the appellant to show that it did. The judge had expected the Secretary of State to do what the appellant should have done.

17. Also, the judge had not engaged with the evidence as to why the appellant still felt he would not be protected in Albania especially given his age, and things had moved on since 2010. There was no evidence of the feud being ongoing. It seemed clear that the judge in looking at cessation first looked at the earlier judge's decision and the situation had moved on and years had passed. The situation in Albania now was an important factor. The judge had only considered risk on return in respect of the expert report on the point that endorsing the Peace Missionaries Union's letter that had been served more than nine years earlier and was not determinative as one of a number of sources of evidence before the first judge. Clearly the judge had not based his decision on this letter but more weight was attached to it by this judge. Although the reference to the

Peace Missionaries Union's letter was supported by the expert that did not explain what part of the report showed that the appellant was at risk and why more weight should be attached to a letter the earlier judge did not consider determinative. The judge had not engaged with the age aspect of the case. The appellant's father had been able to be in hiding since 2010 and had not been harmed so why would the appellant on return be at risk? No reasons had been given. Matters of weight were for the judge but he had to say why weight was attached and it was not made clear why live evidence had weight attached to it and the evidence was not engaged with in the round. It might have been different if the judge had found that there was an outstanding blood feud and so there was an ongoing risk, but the judge had just said that the appellant's claim was upheld and had not questioned aspects of the evidence.

18. The judge had also failed to take into account the seriousness of the offence. The fact that the appellant had been sentenced to six years for drug offences clearly showed the impact of that offence on the public. It seemed from paragraph 36 that the judge did not understand the offence. It was at least carelessly stated and put the judge's mind- frame in context. There was no consideration of it within section 72 and the judge seemed not to engage with it. As regards what was said at paragraph 40 about the OASys Report it was unclear why the appellant's convictions were not indicative of serious harm. There was no real consideration of why weight was attached to the OASys Report and not to the sentence. The judge had not engaged with the facts of the case.

19. In her submissions Ms Wood referred to the fact that the Secretary of State's decision was based on what was said in EH about the letter and more generally that the situation of blood feuds in Albania had changed. This was relevant to the burden in respect of the issue of fundamental and durable change. It was of course appropriate to decide whether the appellant still had asylum protection before considering section 72, contrary to what was argued in the Secretary of State's skeleton.

20. The judge had noted the earlier credibility findings by the first judge. The appellant was convicted of criminal offences but had never given a false account and had pleaded guilty. The respondent had not challenged the updating evidence referred to at paragraph 32 of the judge's decision about the family and the blood feud in Albania. As a consequence there was a proper consideration of credibility.

21. With regard to cessation it was clear that cessation according to the UNHCR had to be used restrictively and there was a high threshold of proof which was manifestly not met in this case. The burden was on the Secretary of State to show fundamental and durable changes. The Secretary of State's policy was clear that the reasons for being a refugee must have ceased to exist. Changes had to be significant and non-temporary. It was said that things had moved on and there were fewer blood feuds and fewer areas in Albania affected but that was far from

enough to meet the UNHCR criteria in the letter of 20 August 2017 where it was said that it was not a fundamental and durable change.

22. As regards the appellant's age, this did not align with the EH guidance or the CPIN. He had been at risk as a young male because he was about to become an adult. Under the Kanun rules adult males are reasonable targets for a blood feud so he would be at risk as an adult. The expert had addressed this and said that he was more likely to face a threat in the absence of other males and the self-isolation of his father. His having been abroad was a factor. The judge had not approached matters on the basis of giving weight to the Peace Missionaries Union letter. The Secretary of State sought to say that the fact of the letter meant that the appellant should lose his protected status. Letters could not be determinative in the absence of important evidence. The judge had looked carefully at how the first judge had approached the letter and the weight given to it and how it informed the overall decision. There was no evidence that the letter was fraudulent and the expert had commented on this at page 13 of his report. The judge had considered how the first judge addressed the letter and how it sat with EH and how it related to the appellant's status and noted that it was not determinative and that it was not at odds with the guidance in EH. The judge had said that even if no weight was given to the letter, on the basis of the Devaseelan guidance the first judge's decision would be sufficient.

23. As regards section 72 and whether the presumption was rebutted, it was noted that this was the appellant's first offence. It had been financially motivated. There was a question as to why weight was given to the OASys assessment and the probation officer's report and that was because they were the assessments of the experts trained to assess re-offending. As regards the lack of weight given to the sentencing remarks that was argued for it was said that there would be risk at the time of offending but the question was what the position was at the time of the hearing. Weight was therefore to be attached to the sentencing remarks but as at the date of the hearing. The appellant had been of good conduct in prison and was assessed as being at a low risk of re-offending. There were also the reports of the probation officer and the OASys Report and the appellant's own assessment and no factors indicating serious harm were ticked in the assessment.

24. With regard to the points made in the Secretary of State's skeleton about the appellant clearly not being remorseful or rehabilitated, the expert had commented on that, and the appellant had brought numerous certificates to court also and gave oral evidence of remorse and it was also in his statements and there was the fact of the guilty plea too. It was clear that he understood and regretted his behaviour. There was the reference to his nephew. He had been released on 12 December and there were no concerns of a criminal nature. As to the point in the Secretary of State's skeleton that he had not been released so he could not show rehabilitation, it was true that he was not out in the community to show that there were no problems but he could not be blamed for this. Also, the

Secretary of State's skeleton pointed to the nature of the offence by the appellant so he could not be sorry, it could not be mutually exclusive. Anyone could be sorry yet seek to explain. As regards the argument that there was a failure to consider the impact of the offences, paragraph 36 of the judge's decision was to be read as a whole. He had considered the factors going to rebuttal, at paragraph 37 and any challenge was a matter of disagreement and not one that identified an error of law.

25. As regards the points made about relocation in the Secretary of State's skeleton and the weight to be attached to the expert report which included risk on relocation, the first judge had found the appellant could not internally relocate. Up to date evidence had been given about his father. He could not be required to return to self-isolate in order to survive. EH referred to the fact that there was not yet a sufficiency of protection if there were an active feud. The appropriate starting point was paragraph 40(i) of the first judge's decision. The appellant had provided updates and the expert report also. It had been noted in EH that there was a decrease in the number of blood feuds and that was the only evidence of any aspect of change. In EH it was said that the appellant could only internally relocate where there was no risk beyond the immediate area.

26. By way of reply Ms Cunha argued that her main argument about the burden of proof was as set out at paragraph 27 in KF. There was therefore a burden on the appellant. There was an error by the judge in that regard. The Secretary of State had to show as set out at paragraph 6 and paragraph 16 of the judge's decision why she did not believe the appellant would still be at risk and it was not a matter of reliance on the report in EH but taking the whole feud into account when considering the relevant issues. It was relevant that the father was in self-isolation in Albania. The judge had not considered that the opposing family might lack the funds or the ability to pursue the family and the father had been able to live in Albania and to contact his family. The judge had not referred to the situation of the uncle in prison. There was therefore a failure to counter what had been shown by the Secretary of State and the judge had erred at paragraph 28.

27. With regard to relocation Ms Wood had expressed the matter more clearly than the judge had. The judge had not dealt with questions of relocation or sufficiency of protection. The weight given to the report was not enough to detract from the Secretary of State's decision.

28. As regards the appellant's offence and the fact that it was a first offence and the weight to be given to that, there was an error of law. It was not just about the conviction, as held in cases such as Akinyemi, but what the offence was about. The judge had not grappled with the significant nature of the offence. With regard to the rehabilitation point the Home Office skeleton was not so much about what it meant but that the judge in looking at whether the appellant posed a risk failed to bear in mind that he was in prison at the time so he had had no opportunity to show

rehabilitation. It had not been said the appellant changed because of the courses. He could not be assessed as he had not been released into the community.

29. I reserved my determination.

30. I have considered first the cessation issue. The following is set out in Article 1C of the Refugee Convention :

> "This Convention shall cease to apply to any person falling under the terms of section A if:
>
> ...
>
> (5) He can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality ..."

31. It was made clear by the Court of Appeal in MM (Zimbabwe) [2017] EWCA Civ 797 that a relevant change in circumstances for the purposes of Article 1C(5) might arise from a combination of changes in the general political conditions in the home country and some aspect of the individual's personal characteristics. It was said that the relevant change must in each case must be durable in nature. In KN, to which I have referred earlier, it was said, relying on MM (Zimbabwe), that, given that the respondent had been granted refugee status, the onus of proving that the circumstances in connection with which he was recognised as a refugee have ceased to exist lies on the Secretary of State. She must show that if there are any circumstances which would have justified a person fearing persecution then those circumstances have now ceased to exist and there are no other circumstances which would now give rise for a fear of persecution for reasons covered by the Refugee Convention. It is necessary, as set out at paragraph 339A of the Immigration Rules, that a person's grant of refugee status shall be revoked if the Secretary of State is satisfied that ...

> (v) he can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of nationality.

32. In my view it is clear from paragraph 36 of KN that the burden of proving that the circumstances in connection with which the appellant was recognised as a refugee have ceased to exist lies on the Secretary of State. I do not consider that the judge erred in observing at paragraph 28 of his decision that the respondent had not placed before him any specific personalised evidence gained from enquiries in Albania to the effect that the blood feud still exists. The judge was entitled to rely on the combination of the findings of the first judge, and the expert report which he had before him, the up-to-date evidence of the appellant and also the CPIN on Albania: blood feuds.

33. In this regard, the judge noted what had been said in EH in particular with regard to attestation letters from Albanian non-governmental organisations, and considered on the one hand that the first judge had carefully considered the authenticity of the letter and did not simply accept it at face value, but that also even if no weight were attached to it the appellant would still attract refugee status, bearing in mind all the other evidence. As a consequence, the judge was entitled to conclude as he did that the cessation decision was unlawful and the appellant remained entitled to be recognised as a refugee in the United Kingdom. As a consequence, at the very least, the decision allowing the appeal under Articles 2 and 3 of the ECHR is upheld.

34. It is however appropriate to go on to consider whether the judge's conclusions in respect of whether or not the appellant had rebutted the section 72 presumption are sound. Section 72(2) of the Nationality, Immigration and Asylum Act 2002 provides that a person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is (a) convicted in the United Kingdom of an offence, and (b) sentenced to a period of imprisonment of at least two years. At subsection (6) it is said that a presumption under subsection (2) that a person constitutes a danger to the community is rebuttable by that person.

35. In this regard the judge noted the appellant's own evidence that this was the only offence he had committed, the nature of his motivation to assist his family in Albania, that he had rehabilitated, and in support of that the OASys Report which concluded that his convictions were not indicative of serious harm and the letter from Ms Fairman the probation officer referring to the OGRS tool so that the appellant's score suggested a probability that his re-offending risk was low. The judge considered that there was no up-to-date evidence to show that the appellant was a risk to the public or a danger to the community. He was not assessed as being at risk of re-offending and was not a career criminal and there was no evidence to suggest that he had links to criminal gangs operating in the United Kingdom.

36. In my view it was relevant to make the points in the grounds that if the appellant remains incarcerated he has not shown he would not be a danger to the community, but it is also relevant to note that the judge did not make a finding on rehabilitation but rather noted the documentary evidence and as he said an absence of up-to-date evidence to show that the appellant is a risk to the public or danger to the community. That point is answered by the fact of the ongoing custody as argued by the Secretary of State.

37. In my view the judge did err in his evaluation of the section 72 rebuttal point. The offence is clearly a very serious one, and though there was evidence in the OASys Report and in Ms Fairman's evidence, that needs to be balanced in ways in which the judge did not do against the seriousness

of the offence which the judge did little more than refer to in the first sentence of paragraph 41. As a consequence, I find a material error of law in that regard.

38. I invite submissions from the representatives as to the way forward. I have found that the judge was not in error in allowing the appeal under Articles 2 and 3 of the European Convention on Human Rights and that he erred with regard to the exclusion point and in particular the rebuttal issue. It may be thought to be academic to have a further hearing in light of my findings on Articles 2 and 3, but I am very happy to receive submissions from the parties as to whether they agree that it would be academic to reconsider the exclusion point or whether the matter needs to be argued out. The appeal is allowed to the extent set out above.

No anonymity direction is made.

Signed Date 12 May 2020
Upper Tribunal Judge Allen