Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/07149/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 November 2021	**On 09 December 2021**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

L E DRIIGS-GONZALEZ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Khan, instructed by Thompson & Co Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against a decision of the First-tier Tribunal promulgated on 17 February 2021 dismissing his appeal against a decision of the Secretary of State made on 16 July 2019 to refuse his claim for asylum, to refuse his claim for humanitarian protection and to grant him discretionary leave.

2. The appellant is a citizen of Cuba. The appellant entered the United Kingdom in January 2004 with six months' leave. A subsequent humanitarian protection claim was refused and his appeal against that decision was dismissed.

3. On 15 April 2010 at Snaresbrook Crown Court the appellant was convicted of causing grievous bodily harm with intent against his then girlfriend. A decision was taken to deport him and he appealed against the decision. The Secretary of State later, however, agreed not to pursue his deportation and he was granted six months' discretionary leave to remain. An application to extend that was rejected and on 18 May 2016 he submitted a further application for leave to remain. Subsequently, on 18 June 2018, the appellant was informed that the deportation was not being pursued and that, following reconsideration of his case, grant of further discretionary leave was appropriate he was granted leave until 6 November 2019. An application to extend that leave is extant.

The appellant's case

4. The appellant's case is that he is at risk of persecution on return to Cuba on account of his political activities. It is also his contention that he should not be excluded from the protection of the Refugee Convention.

The Respondent's Case

5. The respondent's case is set out in the letter of 16 July 2019. The Secretary of State considered that the appellant was excluded from refugee status by operation of Section 72(2) of the Nationality, Immigration and Asylum Act 2002 given that he had been convicted of an offence to which he had been sentenced to a term of imprisonment of at least two years and had failed to rebut the presumption that his offence was particularly serious or that he is a danger to the community.

6. The respondent did not accept that the appellant had a well-founded fear of persecution in Cuba in any event, noting that his application in November 2004 had been refused on the grounds he was not a credible witness due to inconsistencies in his evidence and did not accept that he fell within the category of failed asylum seekers who face arrest and thus had not shown that he would be wanted for a felony in Cuba. The Secretary of State found that the appellant had not provided any reliable evidence of his activities or evidence which verified the claim that he had been persecuted in Cuba and concluded also that he would not be at risk or unlawfully killed nor of breaches of Article 3 on return to Cuba. She considered also the appellant was excluded from humanitarian protection owing to his conviction for a serious crime.

7. The respondent did, however, consider the appellant was entitled to further discretionary leave to remain given that he could not currently be returned to Cuba as he had been absent from the country for more than two years and thus would not be allowed to return. She did not, however, consider having had regard to Sections 117A to 117D of the 2002 Act that his removal would be a breach of his Article 8 rights nor satisfied that there were very compelling circumstances such that he should not be removed.

8. The refusal letter does, however, surprisingly refer to Section 82(3A) and 92(4A) of the 2002 Act which were not extant at the date of decision, nor indeed were the rights of appeal set out in paragraph [93] of the refusal letter. These were the rights of

appeal in existence prior to the changes introduced by the Immigration Act 2014. It also makes little sense for the refusal letter to state that if the appellant did not appeal or that his appeal was unsuccessful the deportation order would be enforced and he would be removed and it is unclear also why the deadline for appeal is stated to be 28 calendar days from the date of his departure from the United Kingdom.

9. The appeal was heard by First-tier Tribunal Judge Cartin and First-tier Tribunal Judge Shakespeare sitting as a panel on 2 December 2020. The panel sets out in its decision at [16] the material they considered setting out also a summary of his evidence [18] to [30] noting [25] his statement that he had been rehabilitated and felt deeply repentant and that he referred to having had two relationships since leaving prison [26]. The panel noted [31] the appellant's case that he is remorseful, has not reoffended, has learned his lesson and that the sentencing judge had concluded he was not a "dangerous offender" at the time. The panel found that:

(i) the conclusion by the sentencing judge that the appellant did not fall to be sentenced as a dangerous offender who would therefore be made the subject of an indefinite sentence or extended sentence did not equate to a finding that he was not a danger to the community in a more general sense as envisaged in Section 72;

(ii) the pre-sentence report assessed him at the time of sentences of being a high risk in the community to known adults; his offending demonstrated he represented a significant risk of serious harm to someone with whom he is in a close albeit abusive relationship;

(iii) whilst it is correct that over time an assessment of a person's risk would generally be reduced provided they do not reoffend this is no more than a logical conclusion and did not equate to rebutting the presumption that his offence and sentence gave rise to the inference that he posed a danger to the community unless he demonstrates that presumption to being correct;

(iv) though he claims to be remorseful for his actions the appellant did not in fact admit them and was thus found guilty by the jury although noting an admission to cause GBH but not an intention to cause that had been made; he had provided no evidence of offending behaviour work he had undertaken to address the problems he encountered in the relationships or issues dealing with feelings of jealousy and rejection;

(v) the appellant had not provided evidence from either his former or current partner which might be relevant in showing how he conducts himself [36].

10. The panel concluded:-

> "38. Overall, we come to the firm conclusion that in this case, there would be a passage of time where that reoffending is not enough to show that there is no real risk of a repetition of similar offending by this appellant. He has not rebutted the presumption which his conviction and sentence point to, which is that he poses a danger to the community. We are therefore

satisfied that his asylum claim must be dismissed as he is excluded from the Convention's protection".

11. The panel then went on to consider the human rights grounds noting that raised by the respondent as to the scope of the appeal [40], it being accepted by the respondent that he was entitled to pursue an "upgrade appeal".

12. The panel were unsurprisingly concerned as to the scope of any hypothetical evaluation of the situation in which the appellant would find himself if removed to Cuba, given it was not reasonably foreseeable. They did, however, conclude [44] that there would be no bar to the appellant raising human rights grounds although concluded [45] that the Article 8 case would fail as there would be no interference. They did, however, consider having had regard to Yerokun (Refusal of claim; Mujahid) [2020] UKUT 377 that the appellant had given notice which would satisfy Section 104(4)(b) and was thus only entitled to pursue asylum and humanitarian protection grounds. They did, however, consider in the alternative the arguments relating to Article 3 and Article 8. Having directed themselves in line with Devaseelan [59] the appellant's case was materially the same as previously and none of the remaining additional evidence answers the relevant discrepancies [61] stating:-

> "76. In conclusion, we take Judge Buchanan's findings as our starting point. The new evidence says nothing in our view to displace those earlier findings. We therefore consider that the issues and the evidence are more materially the same now as they were before Judge Buchanan. We regard the matters to be settled and that the appellant's claimed political activism which might give rise to an Article 3 breach is not made out even to the lower standard. But for an abundance of fairness we have to a large extent allow the claim to be relitigated in order to ensure that there is an overall fair conclusion is reached. We have ourselves highlighted further additional contradictions in the appellant's account and conclude that the earlier decision is one we confidently endorse".

13. They then went on to consider whether refusal of entry to Cuba could amount to inhuman or degrading treatment, noting [79] that the operation of Decree 302 is not that the appellant would be permitted entry and then subjected to ill-treatment because he would be considered a traitor. The evidence is that he would not be permitted entry at all. They concluded "the only foreseeable consequence for the appellant's removal from the UK for a return to Cuba, would therefore be a return to the UK. Even considering a hypothetical return therefore there is no risk of an Article 3 breach".

14. The appellant sought permission to appeal on the basis that the First-tier Tribunal had erred:

    (i) in concluding that the appellant had not rebutted the presumption he posed a danger to the community in that what was said at paragraphs 32 and 33 of the determination were insufficient reasons and they had erred in not giving sufficient weight to the findings of the sentencing judge;

    (ii) in not giving greater weight to the sentencing remarks by the sentencing judge who was better placed to form a view on the issue of dangerousness; and, in

deciding the issue almost ten years after the commission of the offence had erred in departing from the finding that the sentencing judge in finding that the appellant was not dangerous pursuant to the Criminal Justice Act Section 229(3), the test of dangerousness in the immigration jurisdiction and the criminal jurisdiction being in practical terms identical;

(iii) in finding that the appellant had not rebutted the presumption and in fact when there was no evidence provided by the Probation Service that there was a risk to the general public and that any assessment to the dangerousness appropriate weight should have been given to the evidence adduced in all the relevant circumstances;

(iv) in concluding that if returned to Cuba the authorities would not know that the appellant had applied for refugee status and failed to get it and that there was no evidence that the authorities would not know he was a failed asylum seeker as in doing so they had failed to give weight to the expert report too which indicated that he would have to be documented and this resulting in it being known that he had claimed asylum; and, in failing to assess the risk on return faced by the appellant given the finding at paragraph 38 in the previous determination that he had been imprisoned in Cuba and might be interrogated on return.

The Hearing

15. Mr Khan submitted that the test set out in Section 229(3) of the Criminal Justice Act 2003 was in effect the same as that set out in Section 72 of the 2002 Act, albeit that the former test operated on the basis of a presumption which had to be rebutted. He submitted that the test set out in Section 229 ought to have been adopted in the assessment of danger to the community in the assessment made under Section 72 of the Nationality Act and that proper regard had not been had to the probation report. He further submitted that the panel had erred in its assessment of the appellant being remorseful for his actions wrongly stated that he did not admit them [34].

16. In respect of ground (iii) he submitted that there had been no proper assessment of all the evidence including specific statements in the appellant's witness statement (paragraph [121]), that he was sincerely remorseful. I considered that this was not contained within ground (iii), that ground containing no proper detail and they refused the application made only at that point to permit an amendment of the grounds of appeal. I was not satisfied that it was in the interests of justice to do so given the lateness and lack of merit in the submissions. Further, in any event, the point is lacking in merit given that the issue was properly addressed by the Tribunal who were fully aware of his statement given the way they had set out the evidence and consideration given thereto.

17. He submitted further that the Tribunal had erred in its approach to Article 3, specifically the findings that it would not be known that he had applied for refugee status and had failed.

18. Mr Whitwell submitted that there were numerous reasons, set out in the Rule 24 letter, why the Tribunal had been entitled to conclude that the appellant had not rebutted the relevant presumptions. It is not arguable that the test applicable in the Criminal Justice Act 2003 is the same as that applicable to a Section 72 determination, these being separate provisions but directed in a different matter. He submitted that the First-tier Tribunal had been entitled to reach the conclusions made and entitled to reach the conclusions they did with respect to risk on return.

Discussion

19. Dealing first with risk of return, ground (iv), whilst I note that Judge Buchanan at paragraph [38] of his decision of 6 May 2005 accepted that the appellant had been imprisoned in 1992 he found it had nothing to do with papers for a party that had not yet been formed. Whilst he accepted [43 to 46] the appellant had been known to the police in Cuba and had previously been detained, it was notable the appellant had no difficulty leaving Cuba indicating that he was not of interest to the authorities and whilst he might [46] be interrogated on return that was not sufficient to show that he had a well-founded fear of persecution and/or breach of Article 3.

20. It is simply wrong to submit, as the grounds do at [18], that the First-tier Tribunal had not given proper weight as to findings in the previous determination. On the contrary, the judge concluded that he would be interrogated but that was all. It cannot be submitted that that was a finding that he would be then subjected to ill-treatment of sufficient severity to engage Article 3. Contrary to what is averred, at paragraph 18, the First-tier Tribunal considered the alternative positions of the appellant were thought to be a failed asylum seeker reaching the adequately and sustainably reasoned view that as he was not a person of adverse interest prior to leaving, he would not be at risk. There is also no real challenge to the finding that the real consequence of the appellant being returned to Cuba were that he would be returned immediately to the United Kingdom. There is insufficient basis to show that the expert report was not granted proper weight or that the appellant if he told the circumstances of his case would face ill-treatment given the sustainable finding that he had not been a dissident.

21. Turning then to grounds (i) to (iii), there is no merit in the submission that the First-tier Tribunal erred with respect to the issue of dangerousness. The concept of "dangerous offenders" was given statutory effect by Chapter 5 of the Criminal Justice Act 2003 which has been extensively amended since it first came into force and since the Court of Criminal Appeal considered the scheme in R v Lang [2005] EWCA Crim 2864 which is of limited relevance as a result of the changes to the Act as originally enacted. Not the least of the changes which occurred was the removal of section 229(3)) relied upon in the grounds at [13] by Paragraph 1 of Schedule 23 (2) to the Criminal Justice and Immigration Act 22008 (see R v C & Ors [2008] EWCA Crim 2790 at [6]) which had introduced a statutory presumption of dangerousness.

22. In summary, the scheme of the Act in force at the date of the offence required a court when sentencing a person convicted of a specified offence, to consider whether he presents a significant risk to members of the public of serious harm caused by his commission of further such offences; and, if so (in cases of a specified and serious

offence), whether a life sentence for the protection of the public should be imposed (section 225) or whether an extended sentence should be passed (section 227).

23. Section 229 of the Criminal Justice Act provided at the relevant time as follows:-

> **229 The assessment of dangerousness**
>
> (1) This section applies where—
> (a) a person has been convicted of a specified offence, and
> (b) it falls to a court to assess under any of sections 225 to 228 whether there is a significant risk to members of the public of serious harm occasioned by the commission by him of further such offences.
>
> (2) [The][1] court in making the assessment referred to in subsection (1)(b)—
> (a) must take into account all such information as is available to it about the nature and circumstances of the offence,
> (aa) may take into account all such information as is available to it about the nature and circumstances of any other offences of which the offender has been convicted by a court anywhere in the world,
> (b) may take into account any information which is before it about any pattern of behaviour of which [any of the offences mentioned in paragraph (a) or (aa)][3] forms part, and
> (c) may take into account any information about the offender which is before it.
>
> (2A) The reference in subsection (2)(aa) to a conviction by a court includes a reference to…

24. Section 72 of the 2002 Act provides, so far as is relevant, as follows:-

> **72 Serious criminal**
>
> (1) This section applies for the purpose of the construction and application of Article 33(2) of the Refugee Convention (exclusion from protection).
>
> (2) 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.
>
> …
> (6) A presumption under subsection (2), (3) or (4) that a person constitutes a danger to the community is rebuttable by that person.

25. Even on a cursory glance it is evident that these are entirely different provisions directed at entirely different purposes. In the dangerous offender provisions, it is for the sentencing judge to be satisfied that the relevant conditions exist and that an extended sentences is justified; in respect of Section 72 it is the appellant to show that he is no longer dangerous and that the presumption has been rebutted.

26. In addition, the triggering of section 72 is a sentence of 2 years duration or more; that is different from the triggering of the dangerousness provisions which result from

(for the most part) a conviction from a list of specified crimes of a violent or sexual nature.

27. It is simply unarguable that they are in all practical terms identical, nor can it be argued that the First-tier Tribunal did not take into account all the relevant evidence which they did. Nor can it properly be argued that a finding with respect to sentencing that a person is not a dangerous offender

28. It cannot be sensibly argued that the fact that the appellant being assessed as being of high risk of harm to anyone with whom he was in a relationship cannot be construed as relevant to the issue of whether he presents a danger to the community at large; and, for the reasons set out in the decision which go well beyond the issue of the sentencing remarks and the probation report, the Tribunal was manifestly entitled to conclude that the appellant had not rebutted the presumption that he was a dangerous offender.

29. Further, it simply cannot be argued on the basis of what is a careful and considered decision examining all the evidence that the Tribunal did not reach the proper conclusions of fact with regard to remorse and the other factors which are prayed in aid. In short, in reality this is just a disagreement. It cannot be argued the Tribunal erred in this assessment of the appellant's remorse, it is clear from the decision that they were fully aware of what the appellant had said in his witness statement as it is noted and they took notice of it. The Tribunal attached appropriate weight to the sentencing remarks which were directed to a different exercise.

30. Accordingly, for these reasons, as I announced at the end of the hearing, I am not satisfied the decision of the First-tier Tribunal involved the making of an error of law and I uphold it.

31. No anonymity order was made in the First-tier Tribunal and I am not satisfied that the need for open justice is outweighed in this case by any concerns with respect to the appellant whose conviction is a matter of public record.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Signed Date 30 November 2021

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul