IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-001660

First-tier Tribunal No: PA/04606/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 13th June 2024

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

PG
(ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Ms A Ahmed, Senior Home Office Presenting Officer
For the Respondent: Mr A Mackenzie, instructed by Duncan Lewis Solicitors

Heard at Field House on 26 March 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and any member of his family, is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant and any member of his family. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellant, a Sri Lankan national, came to the UK aged 15 years in 1999 and was convicted of a series of offences from 2002 to 2012 (driving offences, including driving without insurance and whilst disqualified, and common assault). On 25th July 2016 at Harrow Crown Court, he was convicted of supplying a controlled drug, Class A, cocaine and sentenced on the same day to a period of 10 years in prison. He was also sentenced for an earlier conviction for conspiring/

supplying Class B drugs to a period of 12 months in prison to run concurrently. The appellant was served with a deportation order and he appealed the subsequent refusal of his protection and human rights claim on 21st October 2020. The immigration history is set out in the error of law decision attached and I shall not repeat this in detail save to record extracts. Essentially the appellant's appeal on both protection and human rights' grounds was allowed by the First-tier Tribunal judge, who also found the Section 72 certificate, issued under the Nationality Immigration and Asylum Act 2002, was rebutted and thus the appellant's asylum claim succeeded. The judge found the appellant did not constitute a danger to the community. The judge also allowed the claim on article 3 grounds.

2. On 16th June 2023, I set aside the decision in relation to the findings on the Section 72 certificate but upheld the decision on article 3 grounds in the following terms:

'*The Judge erred materially for the reasons identified. I set aside only the findings and conclusion in relation to the Section 72 certificate (and by extension the conclusion on the Refugee Convention) pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). The findings and conclusion in relation to Article 3 will stand.*'

3. The sole issue before me was whether the appellant had managed to rebut the presumption under Section 72 bearing in mind the appellant had been convicted of a particularly serious crime (signified by his conviction and imprisonment for 10 years) and that he constituted a danger to the community. The appellant was released from prison in 2021.

4. The appellant had been granted Indefinite Leave to Remain on 4th June 2010. He had married in 2013 to AC and on 19th June 2015 his son KG was born. Subsequently another child has been born.

5. The Secretary of State's refusal letter dated 21st October 2020 included a reference to an undated statement made to the Home Office that the appellant had previously run a successful business until his imprisonment, maintained his remorse over his convictions (his appeal to the Court of Appeal was unsuccessful) and that his behaviour in prison had been exemplary and had done his best to help others and worked hard in prison.

6. The following extract is taken from paragraphs [5] to [15] of the error of law decision dated 16th June 2023 in relation to the Secretary of State reasons for refusal letter

> 'The Secretary of State's refusal letter set out that the OASYS report (dated June 2020) represented a thorough detailed consideration of an individual's personal circumstances undertaken by the National Offender Management Service ("NOMS") which had particular expertise in making nuanced assessments.
>
> The refusal letter set out a number of reasons why the appellant was considered to constitute a danger to the community.
>
> First, the judge's sentencing remarks reflected the seriousness of supplying a Class A drug and noted that having been released on bail in connection

with supply of drugs, the appellant in the same year was 'involved in 'a far more serious drugs enterprise, that of supplying cocaine a Class A drug and an enterprise that culminated in arrest on 30th September and involved the seizure of two kilograms of cocaine'…'in all the circumstances I regard you as far as blame is concerned as falling in to the leading role…'…'…what is severely aggravating is the fact that you were on bail for the previous drugs offence when you were committing this offence…'.

Secondly**,** the OASys report dated 14th June 2020 and the letter from your [the appellant's] Offender Supervisor dated 20th September 2020, (NOMS) assessed the appellant as a medium risk of harm to the community.

Thirdly, although NOMS had assessed his [the appellant's] risk of re-offending as low, a low risk indicates a risk 'no matter how small that risk might be, more so given your identified risk factors'. Citing the OASys report the refusal stated, '[t]he offender has the potential to cause serious harm but is unlikely to do so unless there is a change in circumstances, for example, failure to take medication, loss of accommodation, relationship breakdown, drug or alcohol misuse'.

Fourth, his release on temporary licence (ROTL) would be subject to ongoing review and stringent restrictions until 20th April 2026.

Fifth, his behaviour in prison whilst to be commended was in a controlled environment and not necessarily a persuasive argument when related to behaviour outside.

Sixth, he committed the index offence purely for financial gain. In his OASys report it was noted he had debts through his catering business of £24,000 and was borrowing money to gamble. He went to a loan shark and ended in more trouble and that he was kidnapped for not paying the debt and got involved in the offence to pay off the debt. Financial issues were linked to the offending behaviour and there was no guarantee that he would not become susceptible to outside influences and pressures on release, and he would find himself in a similar situation in the future, more so given his history of drug abuse. Although the appellant asserted that he had never taken Class A drugs he failed a Class A drugs test upon being taken to the police station.

Seventh, since being in the UK he had amassed 7 convictions the nature of which clearly indicated an escalation in seriousness. His index offence had been committed whilst on bail which indicated very little if any concern for the safety and well being of the UK public. His 'persistent offending' clearly indicated he failed to address his offending behaviour despite the past penalties imposed by the courts.

Eighth, his private and family life submissions did not rebut the presumption he was a danger to the community.

Ninth, the additional letters of support were based on personal opinions and did not rebut the presumption that he was a danger to the community.'

The Hearing

7. The appellant attended the hearing and gave oral evidence confirming that he had another child born in March 2023. He confirmed he was working in a car rental business. Ms Ahmed questioned the appellant about the information that he gave to Ms Davies, consultant forensic psychologist, on 15th December 2023, in relation to his work. He denied he was aware that the previous Judge had found him not completely truthful. He agreed with the record of his offending and that each time it became more serious. Sections of Ms Davies' report dated 5th March 2024 were cited (for example 3.2.10) but the appellant denied that he had told her the offence of assault was linked to alcohol. He also advised that the OASys report was incorrect when referring to the link with alcohol and offending. He confirmed he was working for a banqueting suite when he was convicted for the most serious offence. He denied being untruthful when previously claiming he had not taken drugs but then failed a drug test. He asserted this was a different incident when he failed a drug test in prison in 2016. It was pointed out that he also had a proven adjudication on 15th May 2011 for failing a cannabis test in prison. The appellant again denied he was culpable (it was his cell mate who was then moved out) and asserted this was shown by the leniency of his sentence in the adjudication.

8. The appellant asserted that he had accepted responsibility for his offences and pleaded guilty. For the last offence however he advanced he was kidnapped and effectively forced to commit the crime. The appellant confirmed that he had no mental health difficulties although it was a struggle during the war and after he came to the UK.

9. He confirmed that he had seen Ms Davies once in a zoom call which lasted all day. He saw the probation officer once a month and last on 17th March 2024. No fresh letter had been provided by the probation office.

10. The appellant's wife attended and gave oral testimony. She confirmed that they had been in a relationship since 2004 and they married in 2013. In relation to his offending she did not consider that it was her 'thing' to stop him. Her husband had not committed further offences.

11. In submissions, Ms Ahmed advanced that his index offence attracted a 10 year sentence which was well beyond the statutory benchmark (at the time) of 2 years for a particularly serious offence. He committed the offence on bail and was occupying a more important role than that of his co-defendants and directing and influencing events from a distance. The judge noted the aggravated circumstances owing to the previous drugs' offence. His evidence was neither reliable nor credible. He denied taking drugs and yet had tested positive in a police cell. The appellant did not accept his offence of assault in the public house over the football match was linked to alcohol although that was recorded in the OASys report.

12. The detailed OASys report was to be preferred to a six line letter from a probation officer issued six months after his release. His family could not prevent his offending and financial issues were identified as a motive for his offending albeit at the time he was a director of a banqueting suite. Despite his assertion of kidnap to explain the index offence he was still sentenced at the higher end of the scale for such an offence.

13. Ms C's, the appellant's wife, evidence that it was out of character was simply contrived. As set out in MA (Pakistan) v SSHD [2014] EWCA Civ 163 at [19] low risk is not no risk.

14. I was invited to give little weight to the report of Ms Davies which was based on a 3 hour assessment and on self reporting; because she did not factor in the at the previous judge did not find him truthful or reliable. She had not worked with the appellant on a long term basis. The appellant made excuses to her for each offence and she had not factored in the escalation of offending. She had stated at 5.2.13 that support from his family was protective but she did not properly consider that the index offence was committed *after* the first child was born. At parts of the report, for example 4.0.14 she simply advocated on behalf of the appellant and had gone outside her remit.

15. Mr Mackenzie relied on his detailed skeleton argument. It was not accurate to say the appellant had been found not to be credible. Ms Davies reached her own view on his presentation. She had had extensive experience and had worked in Broadmoor and was aware of how offenders could manipulate. There was not a shred of evidence to suggest his remorse was contrived. It was no longer the case that he was recently released nor that his behaviour was simply dependent on him being in a controlled environment. I was being asked to go behind the OASys report which assessed the risk as low. His offender manager had moved the risk to low and this was supported by Ms Davies, who was aware of the escalation in offending. There was no suggestion he had mental health difficulties even if he had them in the past. The appellant had learned his lesson and taken courses in prison the threshold was high.

16. I was then addressed by Mr Mackenzie on the issue of the application for costs against the respondent owing to the adjournment of a hearing by UTJ Frances and DUTJ Joliffe on 20th February 2023. There were directions on 27th February 2023 which included that a record of proceedings was to be agreed. The grant of permission had been in March 2022 and the error of law sent out 11 months after the grant of permission. There had already been delay. The respondent was responsible for the adjournment and the appellant should recover his costs.

17. Ms Ahmed referred to the test for an award of costs in these circumstances which included unreasonable behaviour on the part of the Secretary of State. There was, however, no ambush at the adjournment hearing and the issues were raised in writing not merely at the hearing. The issues were not completely new and more clarifying of the original grounds of appeal. The application was made to assist the Upper Tribunal. A costs award was the exception. It was not accurate to state that the Secretary of State raised the issue of the record of proceedings and it was Mr Mackenzie who did so when suggesting that the judge's record was wrong. It was not accurate to state that an additional point was raised by the respondent.

18. Mr Mackenzie submitted that it was not obvious that the later grounds did not require a response.

Conclusions

19. SB (cessation and exclusion) Haiti [2005] UKIAT 00036 at [81] confirms that there is no balance to be struck in Article 33(2) between the risk to the refugee

upon refoulement and the danger which an appellant's continued presence poses to the community, because Article 33(2) on its face is absolute. SB (Haiti) at [84] emphasises that the effect of there being no balance is that the test for 'danger' must be higher than if there were no balance and emphasised the tests for "a particularly serious crime" and "danger" must be higher than they would be if there were a balance to be undertaken. Section 72 of the Nationality Immigration and Asylum Act 2002, however, *presumes* that the person convicted of a particularly serious crime *does* constitute a danger to the community and I am not persuaded that there is flexibility in relation to the Section 72 presumption as to the threshold for danger which is set in statute Moreover, the appellant was plainly judged to have committed a particularly serious crime by virtue of the sentence handed down by the Crown Court.

20. It is for the appellant to rebut the presumption he poses a danger to the community. For the reasons given below I find the risk of danger to the community was not merely a remote possibility even within the SB (Haiti) parameters. I have considered the evidence in the round.

21. Although Mr Mackenzie submitted that the previous judge had not found the appellant lacking in credibility, such that I am bound by Devaseelan v The Secretary of State for the Home Department [2002] UTIAC 00702, I note that the judge said this at [33] 'I did not consider Mr G to be an entirely reliable or truthful witness.' The judge gave specific examples but nonetheless this was a general finding albeit made within the asylum context. That finding was not set aside.

22. That said, on my own assessment, I find the appellant an unreliable witness. The appellant confirmed in an undated statement as recorded in the refusal decision that he was running a successful catering business prior to the index offence. By contrast he told the National Offender Management Service ('NOMs') for his OASys report that it was ongoing debts of that business which caused him to be involved in offending (page 12 of the report). He denied to NOMS ever having taken any Class A drugs although it was noted in the OASys report that a police interview recorded he was tested positive in a police cell for exactly that (page 18 of the OASys report). He denied to the Tribunal and to Ms Davies any link to alcohol in relation to the assault during his visit to a public house and for which he was convicted of assault but that link was noted in the OASys report. The appellant also denied that the OASys record was correct on that point. He told Ms Davies that he 'last used drugs many years ago and prior to his detention in prison' [3.2.11]. He was however given an adjudication for cannabis use whilst in prison. On the oral evidence before me, in relation to his offending I found the appellant unpersuasive. For example, he told the Tribunal that he had been given a lighter sentence on the adjudication for using cannabis in a cell whilst in detention because it was accepted it was his cell mate not him. That is simply not credible in the light of the adjudication recorded.

23. The OASys report identified that the appellant was assessed as being a medium risk of causing serious harm to the public if he were released but also recorded that that the appellant was unlikely to do so 'unless there is a change of circumstances, for example failure to take medication, loss of accommodation, relationship breakdown, drug or alcohol misuse'. The risk of the appellant's future reoffending was categorised as 'low' albeit the OASYS recorded the possibility of 'proven reoffending' in those categories over a 2 year period as follows:

OGRS3	22%
OGP	14%
OVP	15%

24. This does not show that 'no' risk exists. MA (Pakistan) at [19] explained that 'what may be an assessment of low risk for the purposes of criminal sentencing is not necessarily to be considered a low risk when looking at the future behaviour of this applicant. A risk of 17% re-offending over a 2 year period is not…in the context of a deportation case a matter which can be treated as insignificant'. The OASys report represents a thorough detailed assessment of the appellant's personal circumstances by NOMS which has particular expertise in making such nuanced assessments. It was clear from the OASys report that any potential risk would be substantially heightened by the appellant getting into debt, gambling or association with pro criminal peers. Although released in 2021, which I consider to be recent, the appellant is also likely to be compliant particularly given his period of licence until 2026 and the recent threat of deportation. In essence, the appellant has kept out of trouble at a time when he knows he is under close scrutiny. Bearing in mind the extent of the appellant's previous convictions and the length of time over which they were committed the risk is not rebutted on the basis of a lack of offending since release.

25. I considered carefully the report of Ms Davies. I accept she is well qualified and has experience. I remark particularly that the tools of assessment administered, and as confirmed by Mr Mackenzie, were geared towards violence. I appreciate that the appellant has been convicted of offences of assault but the real mischiefs are the drug offences, and that committed whilst on bail indicates a disregard for the law. It is not necessarily the risk from violence which is key here but the risk to the public from the drugs' offences. Although clearly it was an overall assessment the underlying assessment tools used stemmed from HCR-20 and SAPROF. These are both tools for predicting a prevalence to future violent offending. I appreciate that Ms Davies gave her conclusions on reoffending in general terms but the underlying assessment tools which were administered influenced the conclusions. She gave no consideration in her report to the fact that the previous judge had found the appellant not to be a reliable witness although I appreciate, as submitted by Mr Mackenzie that she must with her experience be used to manipulative individuals. The appellant during his evidence also denied stating certain matters included in her report and thus if the content is incorrect (albeit in part) this rather undermines the conclusions. For example the reporting the appellant's statements on substance abuse and she noted t 3.2.10 that 'at interview, PG, did not indicate that he would have been heavily intoxicated at the time of these offences' and at '3.2.11 'he denied committing any offences when under the influence of alcohol and did not consider that his past use of violence was a result of him being intoxicated although he did report being in the pub at the time'. At the hearing the appellant stated that he did not state that he was under the influence of drink to those compiling the OASys report. Even if the reference to alcohol was not one made to Ms Davies, he clearly stated that he 'last used drugs many years ago and prior to his detention in prison'. That was clearly not the case. He also told Ms Davies that after his offence in March 2003 he met his current partner and refrained fom driving and was being more responsible after commencing his relationship'. This assurance is at odds with his offending post his marriage. I thus find his protestations of remorse somewhat undermined and self serving. The appellant emphasised the debts as instrumental in his subsequent drug offences but that again is at odds with his submissions to the Home Office.

26. Ms Davis considers that the OGRS-3 scores (probability of reconviction) are a useful reference but different from an analysis of serious harm, and she points to the dynamic factors and the importance of the individual circumstances. As I have indicated I am not persuaded that all the information given to Ms Davies was reliable. Not least she undertook only a three hour assessment of the appellant via zoom (even that he said lasted a day although it may have seemed like it) on one occasion. That said she noted that reconviction or reoffending was different from an assessment of risk of serious harm but she herself identified at 4.0.15 that PG was assessed as presenting a medium risk of serious harm to the public. Thereafter at section 5 she appears to concentrate on a violence risk assessment albeit I have noted the protective factors she describes below.

27. I accept there is a letter from the head of residence and services at HM Prison High Point dated 2nd April 2021 identifying 'no adjudications' since arrival at High Point and 'numerous positive entries' and 3 people's awards for raising money and exceptional work 'as a person mental with the substance misuse team'. Further letters from prison officers and the prison chaplain vouched for the appellant's good conduct and positive attitude. Additionally there were two letters from Phoenix Futures (both dated 2019) referring to his 'peer monitor' work assisting offenders to recover from drug and alcohol abuse and his work on 'stop supplying' and gambling. I find these assessments were largely whilst the appellant in a controlled environment and again he would be aware of the scrutiny. The weight attached is therefore limited.

28. There was also a letter dated 19th November 2021 from Ms E Ekundayo of HM Prison and Probation Service the appellant's offender manager in the community. She confirmed that the appellant was 'currently deemed as a low-risk of harm to children, staff known adults and the general public' and that 'there are no risk concerns at present and Mr G engages well with probation services. Mr G is currently on licence until 9 February 2026'.

29. The appellant had been assessed in the detailed and comprehensive 50 page OASys report, rather than the six line letter from Ms Ekundayo dated merely six months after his release, as having a 22% possibility of reoffending over a two year period and notwithstanding the risk to members of the public was described as being medium it was stated to be unlikely unless there was a change of circumstances. The full risk of serious harm analysis indicated a medium risk to the public.

30. I appreciate that the appellant has undertaken various courses but what is particularly relevant, in my view, is that there have been significant gaps between incidents of past offending, and the appellant had only been recently released in April 2021, that is just three years ago. He is still on licence and will be until 2026 and subject to stringent restrictions and has an incentive not to reoffend otherwise he will be recalled. Until the decision was issued in 2023 upholding the article 3 claim and the appellant was also facing possible deportation.

31. I note there was no updating letter from probation about possible reoffending even though the appellant confirmed that he visited the probation officer once a month. The report from Ms Davies was detailed but based, as I have said, on a one off interview and reading the relevant documents and not working with the appellant over time.

32. Ms Davies, having reviewed the evidence, considered the appellant to be a low risk but that still contains risks. Ms Davies identified a high level of protective factors which included his self control but gaps between offending undermine this assertion. She also identifies motivational factor as including the maintenance of a stable relationship with his partner and family but the relationship, even the knowledge of the forthcoming child, did not constrain the appellant previously . The report in part is focused on the prospect of his removal from the UK which is not relevant at present. He has no option but to comply with his licence conditions and this does not in my view reduce the risk of serious harm.

33. Since 2002 and the appellant's offending has, as Ms Ahmed pointed out, escalated. The index offence was committed whilst on bail. The sentencing judge at Harrow Crown Court on 25th July 2016 found the fact that the appellant committed the index offence whilst on bail for other drugs' offences was severely aggravating; it was also identified that the appellant was engaged in a leading role. Not least the appellant's offending covers a range of offences with the most serious being the supply of Class A drugs for which he was sentenced in 2016. The OASys report identified financial motivation as the motive for offending and financial management problems linked to offending. The OASys report, however, specifically states that the appellant reported choosing 'to help friends deal in drugs to make money instead of finding more work'. As I noted, by contrast, the appellant made representations (as recorded in the refusal letter) that he was running a *successful* business *prior* to his imprisonment. I also note that his wife was working full time until the appellant's commission of the index offence on 16th April 2015.

34. I also note the personal testimonies of friends and relatives including his wife. I am not persuaded that the evidence of friends and relatives, save for his wife, have an in depth knowledge of the appellant's offending or advance the assessment of his risk to the community.

35. His family does not have an ameliorating effect on his offending. He married his wife in 2013 well before the index offence. She states in her witness statement that she has a number of properties and worked until the commission of the index offence. That is despite the appellant's asserted financial difficulties linked to offending. The appellant's child was expected prior to the commission of the index offence and being incarcerated. Even the prospect of a child did not have an affect on reducing his offending.

36. Overall, taking the evidence in the round, I consider the appellant has not rebutted the presumption of him being a danger to the public and the Section 72 certificate stands. The appellant's appeal on refugee and humanitarian protection grounds is therefore dismissed.

Notice of Decision

The appeal remains allowed on human rights grounds (article 3) only. All other grounds are dismissed.

Helen Rimington
Judge of the Upper Tribunal Rimington
Immigration and Asylum Chamber
Signed 14th April 2023