IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2024-003797

First-tier Tribunal No:
PA/53194/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 23rd of January 2025

Before

UPPER TRIBUNAL JUDGE NORTON TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE J K SWANEY

Between

HQ
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr T Bahja, counsel, instructed by Duncan Lewis Solicitors
For the Respondent: Ms H Gilmour, senior presenting officer

Heard at Field House on 15 January 2025

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant 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. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Background

1. The background to the appellant's appeal is contained in the Upper Tribunal's decision dated 28 November 2024 which is set out in Annex A to this decision and is not repeated here.

2. At the hearing on 14 November 2024, it was held that the decision of Judge Wilding (the Judge) involved the making of a material error of law, solely on the basis that the Judge had failed to engage in any consideration of section 72 of the 2002 Act. Given the narrow issue to be determined and the limited need for fact finding, the matter was retained in the Upper Tribunal for the remaking decision.

3. In setting aside the Judge's decision, the Upper Tribunal preserved the following:

   (i) the findings in relation to the appellant's credibility;
   (ii) the findings of fact in relation to the appellant's account; and
   (iii) the conclusion in respect of article 3 of the European Convention on Human Rights (the ECHR).

4. It was confirmed on behalf of the appellant at the hearing on 14 November 2024 that the appellant does not seek to rely on article 8 of the ECHR and that the Judge's failure to deal with this aspect of his case, which was pleaded in the First-tier Tribunal, has no bearing on the remaking of the Judge's decision.

The law

5. Section 72 of the 2002 Act provides where relevant:

> (1) This section applies for the purpose of the construction and application of Article 33(2) of the Refugee Convention (exclusion from prohibition of expulsion or return).
>
> (2) A person is convicted by a final judgment of a particularly serious crime if he is—
>
> (a) convicted in the United Kingdom of an offence, and
>
> (b) sentenced to a period of imprisonment of at least 12 months.
>
> (5A) A person convicted by a final judgment of a particularly serious crime (whether within or outside the United Kingdom) is to be presumed to constitute a danger to the community of the United Kingdom.

(6) A presumption under subsection (5A) that a person constitutes a danger to the community is rebuttable by that person.

Submissions

6. Mr Bahja relied on his skeleton argument, which did not comply with the direction limiting it to 8 pages, but which we admitted with a reminder that either a direction must be complied with, or an application to vary it must be made. Ms Gilmour apologised for the lack of a skeleton argument from the respondent.

7. We heard oral submissions from Mr Bahja and Ms Gilmour and are grateful to them.

8. Mr Bahja helpfully confirmed that it is only the second limb of the test in section 72 in issue. He accepted that the appellant's offence is one that can properly be described as very serious. He submitted however that the appellant can demonstrate that he no longer poses a danger to the community and that he has rebutted the presumption in the second limb of the test.

9. Both Mr Bahja and Ms Gilmour drew our attention to various aspects of the evidence, in particular the appellant's undated witness statement, the judge's sentencing remarks, and the OASys report which was completed on 28 January 2020.

10. The appellant's witness statement was both undated and unsigned. Mr Bahja indicated that it was prepared in 2023; that the appellant had adopted it at his appeal hearing in the First-tier Tribunal; and that he was cross-examined in relation to it. We accept that this was the case.

11. Mr Bahja submitted that the appellant has rebutted the presumption that he poses a danger to the community for the following reasons:

(i) The appellant has spent a clear period in the community since his release from prison and subsequent periods of immigration detention since 3 December 2021 when he was released on bail and has not reoffended.

(ii) The appellant has refrained from gambling since the index offence.

(iii) The appellant has not taken drugs or consumed alcohol since he went to prison.

(iv) The appellant is accommodated.

(v) The appellant pleaded guilty and has shown remorse for his offending.

(vi) The appellant's previous offences should be given little weight because they are not relevant to the index offence.

(vii) If a risk assessment were to be carried out today, based on the appellant's current circumstances, the risk of serious harm would be assessed as low.

12. Ms Gilmour submitted that the appellant has failed to rebut the presumption that he poses a danger to the community and relied on the following:

(i) The sentencing judge's remarks about the seriousness of the offence.

(ii) The fact that the index offence represented an escalation in the appellant's offending.

(iii) The assessment that the appellant poses a high risk of serious harm to the public. She also submitted that the assessment he posed a medium risk to other prisoners in custody could not be ignored.

(iv) Although the appellant pleaded guilty, this came at a late stage of proceedings and indicates that the appellant did not fully accept the seriousness of his offending.

(v) Although the appellant is currently accommodated, difficulties with accommodation are identified as a risk factor and should he be in a position of trying to find accommodation in the future, this risk factor may become active given his offending history. Ms Gilmour accepted that we are assessing whether or not the presumption has been rebutted (and the level of risk) as at the date of hearing and that this submission can only take the respondent so far.

(vi) Ms Gilmour accepted that the evidence that the appellant does not have an ongoing problem with drugs and alcohol is not challenged, but submitted that this is a future risk factor. Again, she accepted that in an assessment of the current risk, this submission only takes the respondent so far.

Findings

13. We note by way of a preliminary matter that Mr Bahja suggested in his skeleton argument that it is the version of section 72 of the 2002 Act in force before it was amended on 28 June 2022 that applies. We do not agree. The provision was amended prior to the making of the decision under appeal and while the decision did not consider section 72, it is the date of that decision which is relevant and not the date of conviction. In any event, it is not material, as it is accepted that the appellant was in fact convicted of a particularly serious crime.

14. We find that the appellant has rebutted the presumption that he poses a danger to the community for the following reasons.

15. The focus of the submissions before us was the risk of serious harm posed by the appellant. In addition, we have also considered the risk of reoffending. The OASys report finds that the (OASys Violence Predictor (OVP) risk of proven violent type reoffending was low as at 28 January 2020. The OVP estimates the likelihood of nonsexual violent offending including homicide and assault, threats and harassment, violent acquisitive offences (e.g., robbery and aggravated burglary), public order, non-arson criminal damage and weapon possession offences.

16. The OGP probability of proven non-violent reoffending was assessed as medium. OGP covers all offences, except violence, sexual offending and rare, harmful offences such as arson, child neglect or terrorist offences. This assessment therefore does *not* include the risk that the appellant will commit further offences similar to the index offence.

17. The Offender Group Reconviction Scale (OGRS) estimates the likelihood of reoffending. The appellant's probability of proven reoffending was assessed as low.

18. The only score which causes us some concern is the OGP score, however, we find that with the lapse of time since the assessment, this is likely to have changed, not least because the appellant has not reoffended since 2017 when the index offence was committed. The appellant has had a clear period of more than seven years since he last offended, which is not in dispute. We give the OGP score some limited weight.

19. We accept that the appellant was assessed as posing a high risk of serious harm to the public as at 28 January 2020 when the OASys assessment was completed. We give weight to the OASys report because it is a detailed risk and needs assessment, taking into account both static and dynamic risk factors and is completed by someone qualified to do so.

20. We have taken into account the fact that a high risk of serious harm means that there are identifiable indicators of risk of serious harm and that the potential event could happen at any time and the impact would be serious.

21. We do not ignore the medium risk of serious harm the appellant was stated to pose towards other prisoners while in custody, but for the purposes of our assessment we give it no weight. This is because the appellant is not in custody and we accept that the assessed risk that he will reoffend (thereby leading to his imprisonment) is low.

22. There was no evidence before us that any of the indicators of risk identified in the OASys report have become active since the appellant was released on bail on 3 December 2021.

23. The OASys report records the appellant's clear intention to remain abstinent from substance use and gambling. There is no evidence before us that the appellant has resumed gambling since his release from detention.

24. The sentencing remarks record that prior to sentencing the appellant had made efforts to control his drug and alcohol use and that he had made considerable progress off his own back. The OASys report addresses the use of both drugs and alcohol. It records that there were no current issues relating to either drug use or alcohol consumption and that there were no problems with the appellant's motivation to tackle his problems with drugs or alcohol. There was no evidence that the appellant has misused either drugs or alcohol since he was in prison and that this is the case was not challenged by the respondent. We find that the appellant has abstained from drug and alcohol misuse and that there is no evidence this is an active risk factor.

25. The identification of accommodation as a risk factor in the assessment of the risk of serious harm was predicated on the fact that the appellant would be street homeless on release and because of the seriousness of his offence. In addition, the appellant's circumstances are now different to what they were at the time of assessment. He is currently accommodated by the respondent and there is nothing to indicate that he has had any issues arising from a lack of accommodation since his release from detention on 3 December 2021.

26. We give limited weight to this issue on the basis that it is not a current risk factor. While we accept that the appellant will not be able to remain in accommodation provided by the respondent once his immigration matter is resolved, we find that it is speculative to suggest that he is reasonably likely to have problems with accommodation giving rise to him re-offending/acting in a way such that he may cause serious harm to the public in the future. The appellant has been able to access legal advice regarding his immigration and criminal matters and we find that it more likely than not that his experiences mean that he will understand the need to seek advice and support and have the ability to do so in the event he finds himself in difficulty. In addition, it is noted in the OASys report that prior to sentencing (i.e. after conviction), the appellant had managed to secure accommodation, suggesting that it was not an insurmountable problem.

27. In respect of the index offence being an escalation of the appellant's offending behaviour, we accept that this is the case. The offence that led to the decision to deport him is clearly much more serious than his earlier offences. In terms of how it impacts on our assessment today, we give it little weight. This is because the offence arose as a result of a particular set of circumstances including the appellant's poor mental health, his gambling and consequent financial problems, and his drug and alcohol misuse. As we have already set out above, drug and alcohol misuse are no longer an issue and there is no evidence that the appellant continues to have financial problems linked to gambling.

28. In addition to the factors considered above, we note that the appellant was found to have engaged well in the pre-sentence report and initial assessment process and that he displayed no concerning behaviours. We

accept that he has shown remorse for his offending and an understanding of the impact of his offending on others. There is nothing before us to suggest that his remorse is anything other than genuine and we find that it is.

29. The OASys report records that the appellant had undertaken programmes while in custody to address his thinking and behavioural issues contributing to his offending behaviour with positive feedback. It appears that he did not complete one course only because he was transferred to another establishment, and we infer he was not able to continue the course after transfer.

30. We did not have any evidence of the appellant's engagement with any licence requirements relating to addressing his offending behaviour which may have been in effect. We note however that there is no evidence of any failure to comply with the terms of his licence and there is no evidence that the appellant has come to the adverse attention of the probation service or the police since his release. It was not disputed that the appellant has not reoffended.

31. We note that the appellant's mental health and an inability to deal with any difficulties appropriately was identified as a risk factor in the OASys report. We had no up to date evidence as to the appellant's mental health. We accept that it is something which is capable of contributing to the risk of serious harm but there is nothing before us to suggest that it has deteriorated such that we should regard it as a current risk factor. We give it limited weight.

32. Having considered all of the evidence before us, we find that the appellant does not continue to pose a high risk of serious harm to the public in the United Kingdom. We are of course not qualified to make our own assessment of the risk and we do not do so. It is however open to us to find that the risk has reduced in the five years since the OASys report was completed based on our findings above.

Conclusion

33. We find that the appellant no longer poses a high risk of serious harm to the public in the United Kingdom. We find that the appellant has shown that there is no real risk that he will repeat his offending and accordingly that he has rebutted the presumption that he poses a danger to the community.

34. Accordingly, the appellant is a refugee who is entitled to the protection of the Refugee Convention in light of the preserved findings made by Judge Wilding.

Notice of Decision

35. The appeal is allowed.

J K Swaney

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
16 January 2025

ANNEX A

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003797

First-tier Tribunal No:
PA/53194/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

.....

Before
UPPER TRIBUNAL JUDGE NORTON-TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE IQBAL

Between
HQ
(ANONYMITY ORDER MADE)

Appellant

and
SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr T Bahja, Counsel, instructed by Duncan Lewis Solicitors
For the Respondent: Mr S Walker, Senior Presenting Officer

Heard at Field House on 14 November 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant 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. Failure to comply with this order could amount to a contempt of court.

EXTEMPORE DECISION AND REASONS

1. For the purposes of continuity, we shall refer to the parties as they were before the First-tier Tribunal: thus, the Secretary of State is once again "the Respondent" and Mr HQ is "the Appellant".

2. The Respondent appeals with permission against the decision of First-tier Tribunal Judge Wilding ("the Judge"), who allowed the Appellant's appeal against the Respondent's decision to refuse protection and human rights claims.

3. The Appellant is a national of Afghanistan born in 1988. Having arrived in the United Kingdom in 2002 as a minor he claimed asylum. That claim was refused, but he was granted what was then exceptional leave to remain on the basis of his age. Subsequent applications were made to extend leave, resulting in further periods being granted.

4. Over the course of time, the Appellant accrued a number of convictions. The most significant of which was in 2018 for arson with intent to endanger life, for which the Appellant was sentenced to 3 ½ years' imprisonment. The Respondent then made a decision to deport the Appellant. This resulted in a human rights claim being made and refused

on 19 October 2018. That refusal letter addressed not simply Article 8, but also protection issues under Articles 2 and 3.

5. The subsequent appeal was dismissed by Judge Fisher in a decision promulgated on 20 March 2019 (PA/12790/2018). It is worth noting that in that appeal the Respondent had not raised the issue of section 72 of the Nationality, Immigration and Asylum Act 2002, as amended. Judge Fisher rejected the Appellant's contention that he was at risk on return to Afghanistan.

6. Time passed and the Appellant then made further submissions to the Respondent. These were refused by a decision dated 3 August 2022 and the Appellant afforded a right of appeal, which he duly exercised. The essence of his case, when it came before the First-tier Tribunal, was that he would be at risk on return to Afghanistan by virtue of having an adverse profile with the Taliban, who at that point had of course taken full control of his home country. It is again worthy of note that the Secretary of State had not raised section 72 of the 2002 Act in respect of the asylum aspect of the protection claim. Indeed, as we understand it, the Refugee Convention had not been considered at all or in any detail by the Respondent in respect of the 2022 decision.

7. In any event, the Judge did address the asylum claim together with Article 3 insofar as it related to protection issues. In summary, he found the Appellant to be credible: see for example [18]. The Judge took account of current country information contained in the Respondent's CPIN and an expert report from Tim Foxley.

8. The Judge accepted that the Appellant's brother had worked for western Allied Forces in Afghanistan and this constituted a link to those perceived as enemies of the Taliban: see [26].

9. At [27] the Judge rejected the submission made by the Respondent that the fact of the Appellant having returned to Afghanistan on several occasions since arriving in the United Kingdom meant that that there was no risk to him as at the date of hearing. The Judge found that the visits had occurred before a significant change in the circumstances of that country in relation to the Taliban's control.

10. At [28], the Judge took it to be relevant that the Appellant had also spent a significant period of time in the United Kingdom and that that would be reasonably likely to cause him significant difficulties.

11. At [30], the Judge ultimately concluded that the Appellant was at risk of persecution for a Refugee Convention reason as someone perceived to be against the Taliban and perceived as being anti-Islamic. In the alternative, the Judge concluded there was a real risk of serious harm pursuant to Article 3. The appeal was allowed "on protection grounds". The Judge did not deal with Article 8. Importantly, nor did the Judge consider section 72 of the 2002 Act.

12. Unhappy with that decision, the Secretary of State put forward two grounds of appeal. First, it was contended that the Judge erred in failing to consider section 72 of the 2002 Act, notwithstanding the fact that it had not been raised by the Respondent. Second, it was contended that the Judge erred by failing to be aware of or take into account the fact that the Appellant had made a number of journeys to Afghanistan over the course of time.

13. Permission was refused by the First-tier Tribunal, but then granted on renewal. The focus of the permission decision was on the first ground of appeal, with a number of authorities being cited in support of the proposition that section 72 must be looked at by a tribunal if there is a sufficient factual basis to warrant this and despite the Respondent not having relied on it.

14. Following the grant of permission, the Appellant provided a lengthy rule 24 response.

15. At the error of law hearing we received concise and helpful submissions from both representatives, for which we are grateful. We intend no disrespect by not setting these out here. We confirm that we have taken them fully into account, in particular we have considered with care the rule 24 response.

16. At the end of the hearing we rose to consider our decision.

17. We conclude that the Judge did materially err in law, but only in respect of the first ground of appeal as it relates to the section 72 issue. Our reasons for this conclusion are as follows.

18. It is, to say the very least, unfortunate that the Respondent had failed to engage with the section 72 issue, not only in the course of the present appeal but also in respect of that which took place in 2019. It does not reflect well on her decision-making process and we can appreciate the Appellant's frustration at her course of conduct over the considerable period of time.

19. However, it is clear to us from the relevant authorities, including in particular MS (Somalia) v SSHD [2019] EWCA Civ 1345, that where the facts of a case give rise to an appropriate basis for so doing, a tribunal is obliged to consider section 72, whether or not the Respondent has issued a certificate, or indeed referred to that provision at all.

20. In the present case, it is clear that the Judge did not engage with section 72 in any way. We cannot be certain as to what was or was not said at the hearing itself, there being no evidence either way and nothing being recorded on the face of the decision.

21. It is clear to us that the circumstances of the Appellant's case before the Judge were such that section 72 was an issue which required addressing, in light of the Appellant's offending history, the Sentencing Remarks, the OASys Report, and what was said in the two refusal decisions from 2018 and 2022 (notwithstanding the absence of specific reliance on section 72 therein).

22. In light of the foregoing, the Judge erred in law.

23. The next question is whether that error was material. Mr Bahja submitted that it was not in light of the underlying evidence before the Judge. Whilst we understand why that argument has been put forward, we do not accept it. It is right that the OASys Report contains certain elements which could be favourable to the Appellant in terms of rebutting the presumptions under section 72; for example, the low risk of reoffending (although the figures are not particularly low). However, other aspects of that report could be adverse to the Appellant, namely the attribution of high and medium risk of harm to the public as a result of the nature of the arson offence.

24. The important fact here is that the Judge made no findings on any of this evidence; nor had Judge Fisher in 2019. Thus there was no judicial evaluation of any relevant evidence going to the section 72 issue. It simply cannot be said that the underlying evidence would have resulted in any reasonable Judge concluding that the presumptions were rebutted. Given that the Judge allowed the appeal in part on Refugee Convention grounds, the error we have identified and the absence of any findings on the underlying evidence, makes it material.

25. A further argument put forward on the Appellant's behalf is that the principle of "finality" should apply in this case. In essence, it is said that the Respondent has had her chance to rely on section 72 and has failed

to do so in respect of two separate appellate proceedings. Again, we express a degree of sympathy with the Appellant in terms of his frustration, but the point here is that Judge Fisher did not address section 72 and it therefore is not a case in which the Respondent is now seeking to rely on matters which have been judicially determined in the past; there has been no such judicial determination. *Res judicata* simply cannot apply in these circumstances. In light of that and the authorities on section 72, the Judge was obliged to deal with that provision.

26. Turning to the second ground of appeal, we find that there is no merit to it following further scrutiny. It is clear to us that the Judge was not only aware of the Appellant's returns to Afghanistan, but addressed it adequately at [27] of his decision. He was entitled to conclude that the change in the country circumstances since those visits was sufficient to render those previous visits effectively immaterial, or of insufficient weight to reduce any risk to the Appellant on return now.

27. For the reasons set out above, the Judge's decision will be set aside. We make it clear that the findings of fact relating to the Appellant's credibility and his account are to be preserved. The Judge's conclusion on Article 3 is also to be preserved, given that the section 72 issue has no bearing on that aspect of the outcome. It has now been confirmed on the Appellant's behalf that he is not, and would not in future be, relying on Article 8 and therefore the Judge's failure to have addressed this particular issue in his decision has no bearing on the future conduct of this appeal.

28. We have considered whether the case should be remitted to the First-tier Tribunal or retained in the Upper Tribunal. Both parties contended that it should be retained in light of the narrow issue now in play, namely section 72, and the relatively limited fact-finding exercise involved in a consideration of that issue.

29. With reference to paragraph 7.2 of the Practice Directions and having regard to what was said by the Court of Appeal in AEB v SSHD [2022], Civ 1512, we agree with that position. This case will be retained in the Upper Tribunal for a resumed hearing in due course.

30. Further case management directions will be issued in respect of that resumed hearing.

Notice of Decision

The decision of the First-tier Tribunal involve the making of an error of law and that decision is set aside to the extent set out in this Error of Law decision.

The appeal is retained in the Upper Tribunal for a resumed hearing in due course following which the decision in the Appellant's appeal will be re-made.

Directions to the parties

(1) No later than 28 days after this Error of Law decision is sent out, the Appellant shall file and serve a consolidated bundle containing all evidence relied on for the resumed hearing. The bundle must be as concise as possible, having regard to what is said in this Error of Law decision and the narrow issue which now falls to be determined (section 72 of the 2002 Act);

(2) At the same time, the Appellant shall confirm whether or not it is intended to call oral evidence at the resumed hearing and, if it is, whether an interpreter will be required;

(3) No later than 42 days after this Error of Law decision is sent out, the Respondent shall file and serve any further evidence relied on;

(4) No later than 10 days before the resumed hearing, the Appellant shall file and serve a concise skeleton argument,

consisting of no more than 8 pages, addressing the section 72 issue;

(5) No later than 5 days before the resumed hearing, the Respondent shall file and serve a concise skeleton argument, consisting of no more than 8 pages, addressing the same issue;

(6) The parties may apply to vary these directions. Any such application must be made promptly and marked for the urgent attention of Upper Tribunal Judge Norton-Taylor.

H Norton-Taylor

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 15 November 2024