



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/01086/2012

THE IMMIGRATION ACTS

Heard at Field House

**On 5 December 2013
Prepared 6 December 2013**

Determination

**Promulgated
On 17 January 2014**

Before

**UPPER TRIBUNAL JUDGE FREEMAN
UPPER TRIBUNAL JUDGE MCGEACHY**

Between

DANDI KOSOVA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C H Hulse, Counsel instructed by Messrs Duncan Lewis & Company

For the Respondent: Mr E Tufan, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Kosovo born on 15 April 1982 who appealed against a decision of the Secretary of State to revoke his refugee status and make a deportation order against him under the provisions of Section

32 of the UK Borders Act 2007. His appeal was allowed in the First-tier. That decision was appealed to the Upper Tribunal by the respondent and on 29 July 2013 I heard submissions thereon. I set aside the determination of the First-tier Tribunal in a decision dated 6 August 2013. I directed that there be a hearing afresh. At a “for mention” hearing on 9 October 2013 I directed that the appeal remain in the Upper Tribunal and noted that the respondent’s representative stated that there would be likely to be fifteen witnesses but that no interpreter was required for the further hearing.

2. My detailed decision setting aside the determination of the First-tier Tribunal is annexed to this determination.
3. At the beginning of the hearing before us Ms Hulse requested an adjournment on two grounds. Firstly, that she wished the appeal to be re-heard in the First-tier on the basis that it is easier to obtain permission to appeal to the Upper Tribunal than it is to obtain permission to appeal from the Upper Tribunal to the Court of Appeal. Secondly she stated that the OASys Report had not been obtained by either representative and that those instructing her had been informed the day before the hearing that in order to obtain the report a freedom of information request would have to be made by the appellant.
4. We refused the application. It had already been decided that it was appropriate that this appeal should proceed in the Upper Tribunal given the complexity of the issues raised. Secondly, at the “for mention” hearing the respondent’s representatives had indicated that the respondent was not able to obtain the OASys Report from the Probation service as it was confidential to the appellant and it was only he who was entitled to receive a copy.
5. The appellant is a citizen of Kosovo who was born on 15 April 1982. He entered Britain in December 1988 after the Serbian forces had entered Kosovo. In his asylum application he gave details of his parents and his brother who lived in Ramoc, Gjakova and said that he was claiming asylum because, although he was not a member of any political party, he supported all Kosovan movements who were fighting for Kosovan rights and independence, and that he had therefore distributed leaflets, and written slogans on street walls against the Serbians. He said that he had been beaten up by Serbian policemen after he had been seen at an LDK demonstration in August 1998 and that Serbian police had come to the family home on 8 December, beat up his father and himself and fired at the house and burnt it down. He and his father were told to report to the police station. His father had made arrangements for him to leave the country with the help of an agent.
6. In May 1999 the appellant was granted refugee status.
7. From November 2003 onwards the appellant committed and was sentenced for a series of petty crimes as follows:-

12 November 2003 - Criminal damage, failing to surrender to custody, battery. For these he received community punishment orders.

In February 2004 he received a fine for a breach of a community punishment order and in August that year he was fined for driving a motor vehicle with excess alcohol.

In January 2005 he received a 60 hour community punishment for theft and in August that year a twelve month community order for theft from a person and a twelve month community order for attempted theft of a vehicle.

He received three months' imprisonment for battery on 1 April 2008 and on 10 June 2010 was fined for using a licence with intent to deceive.

In November 2010 he received a community order for driving while disqualified and using a vehicle while uninsured.

On 14 September 2011 and 3 October 2011 he was sentenced to 30 months' imprisonment for burglary with intent to steal from a dwellinghouse - four counts in all. In sentencing the appellant His Honour Judge Gratwicke stated:-

"You have pleaded guilty to four dwelling house burglaries, the first of which occurred on 19 July in Lewisham. Two days later you committed three further burglaries in the Essex area. Those three burglaries were committed in an area that you had some attachment to, which you clearly had travelled up from London with the intention of committing burglaries.

In the course of that day you come along it appears with others, committed three. In the course of all these burglaries electric goods and jewellery were stolen. Any householder, whether they own the property or rent it, is entitled, when they leave it, to expect that when they return the property will be intact and their possessions will remain there. The effect of a burglary as indeed this Court has noted from one of the victims of your dishonesty, can vary. One thing that this Court consistently sees is that people are shocked by virtue of the fact that someone has been into their property when are they not there and, of course, has then taken their goods. You have done this on four occasions. You have, quite simply, broken into people's homes in order to take their property. Property that you had absolutely no right to. It is for that reason that the Courts have always regarded offences of domestic burglary as serious. These burglaries are aggravated by the fact they were committed whilst on bail. There were clearly not in my judgment, certainly so far as the Essex ones are concerned, opportunist. Those three houses were targeted by you.

In passing sentence upon you I, of course, give you credit for your guilty plea, I bear in mind the realistic submissions made by your Counsel but in relation to each of these burglaries the very least sentence I can impose upon you is one of two and a half years' imprisonment. All those sentences

to run concurrently. You will know that you will serve one half of that and thereafter you will, subject to one further matter be released on licence.

These being sentences in excess of 12 months the automatic deportation considerations will apply. It seems to me that those, in fact, charged with that will no doubt look very closely as to whether or not your continued presence in this country is something that each citizen should have to put up with."

8. Following the sentence the Secretary of State wrote to the appellant on 21 December 2011 seeking reasons why he should not be deported from the United Kingdom following his convictions for burglary. In particular he was asked if there was any reason why he should fall within one of the exceptions to automatic deportation under Section 32(5) of the UK Borders Act 2007 following his convictions. The appellant was requested to complete a document giving personal details. In completing that document the appellant indicated that he had a British passport and that he had been made a British citizen in 2004. That was clearly incorrect. He stated that both his parents were dead and the family home had been blown up. When asked about his current health he said that he had been wounded in Kosovo and still had pains in his leg but other than that had no health issues. On 10 August 2012 the appellant's solicitors wrote to the respondent setting out the appellant's background and stating that the only family in Britain he had was an aunt, uncles and cousins, his aunt being his late father's sister. They stated that in 2011 he had met Miss Beverley Hill, a British citizen, in a pub and that they had started dating and that she visited him in prison. The letter argued that the appellant should not be deprived of refugee status by the operation of Section 72 of the Immigration, Nationality and Asylum Act 2002 and that he was still at risk on return to Kosovo. It was stated that his mother had been of Roma descent. The family had therefore experienced prejudice because his father was of Albanian descent and he had been harassed for marrying the appellant's mother. It was argued that his Article 8 rights would be infringed by his removal.
9. The Secretary of State issued a decision that Section 32(5) of the UK Borders Act 2007 applied stating that it had not been concluded that the appellant fell within one of the exceptions in Section 33 of that Act.
10. The letter referred to a request made to UNCHR on 28 September 2012 regarding the proposal to cease/revoke the appellant's refugee status and their response of 12 October 2012 and to representations that had been made on the appellant's behalf by his solicitors.
11. With regard to Section 72 of the NIA Act 2002 it was stated that the provisions of Section 72(2) applied where the appellant had been convicted in Britain of an offence and sentenced to a period of imprisonment of at least two years and that therefore the consequence was that his status was revoked under paragraph 339(A)(x) of the Immigration Rules. It was stated that the appellant had been invited to

rebut the presumption that the crimes for which he had been convicted were particularly serious and that his continued presence in Britain would constitute a danger to the community. It was noted that his solicitors had stated that he had taken various courses here including courses in the English language and drug and alcohol support and that he was likely to complete further courses in prison. It was said that no attempt had been made to rebut the presumption that he had been convicted of a particular serious crime and although his good conduct in prison was noted that was considered to be a minimum expectation and might not be indicative of his behaviour if he were allowed to rejoin the community in Britain. Reference was made to his convictions for sixteen offences between November 2003 and October 2011 and to the National Offender Management Service (NOMS) Report which had assessed the appellant as posing a high risk of serious harm to women, ex-partners and the public and assessed him as presenting a medium risk of re-conviction. It was stated that he had not shown that he would not be a danger to the community if he were to remain in Britain on the face of his “lengthy and escalating criminal record and the recent findings made by NOMS”.

12. In accordance with the provisions Section 72(9)(b) of the NIA Act 2002 the Secretary of State certified that the presumption under sub-Section 72(2) applied to the appellant. Having referred to the terms of paragraph 339A of the Rules the letter stated that his asylum claim would not prevent his removal from Britain in line with Article 33(2) of the Refugee Convention.
13. Turning to the issue of Article 1C of the Refugee Convention the letter went on to say that, irrespective of the position under Section 72, the appellant came within one of the six cessation clauses in Article 1C of the 1951 Convention. Having noted the basis of the appellant’s claim for asylum the letter maintained that the circumstances under which he had been granted asylum had ceased to exist.
14. The writer of the letter referred to the Country of Origin Key Document Report of 27 October 2009 which referred to an estimated 250,000 Kosovan Albanians fleeing their homes in 1998 as Serbian forces had begun a programme of systematic reprisals and village clearances. NATO had acted to prevent a humanitarian crisis, air strikes on Serbia continuing until 9 June 1999. It was stated that 850,000 Kosovan Albanians had been driven out of Kosovo by the Serbs during this period but that on 10 June 1999 Milosevic had agreed to the withdrawal of Serbian troops from Kosovo enabling those who had left to return. Kosovo had then been placed under a transitional administration under the UN Interim Administration Mission in Kosovo (UNMIK), a new Kosovan constitution had come into force in June 2008 and the administration had been handed over to the authorities under Kosovo’s independence constitution.
15. Reference was made to the US State Department Report of 8 April 2011 which stated that Kosovo was a parliamentary democracy with a population of approximately 2.2 million, independence having been

declared in 2008. It was clear that Kosovo was no longer administered by the Serbian authorities who had presided over the situation which led to the appellant's claim for asylum and that therefore there had been a fundamental and durable change in Kosovo since the appellant had been recognised as a refugee.

16. It was accepted that some ethnic tensions remained, particularly around Mitrovica, and certain minority groups suffered discrimination. Given, however, that the appellant had lived in Gjakova, it was stated there were no known reports of ongoing inter-ethnic violence there as no Serbs remained in that municipality.
17. In paragraph 58 of the decision it was noted that the appellant claimed to be of mixed Roma/Kosovan Albanian ethnicity but it was pointed out he had made no such claim previously and had not been recognised as a refugee as a result of such a claim. He had not made any other mention of that claim either in representations made by himself or through his solicitors and instead submitted that he was an ethnic Kosovan Albanian. It was therefore not accepted that the appellant was of mixed Kosovan Albanian/ Roma ethnicity. It was pointed out that he had made other false claims such as having been brought to Britain by the British Armed Forces and having been issued with a British passport.
18. The Secretary of State then considered conditions in Kosovo. It was concluded that there was nothing to indicate that the appellant would face persecution or treatment contrary to his rights under Article 3 of the ECHR there. In particular it was stated there was no independent evidence to demonstrate that he would be destitute upon his return.
19. It was not accepted that he had no remaining family in Kosovo and in particular it was stated that although he had stated after his arrival that his parents had been killed, there was no evidence that that was the case.
20. With regard to the appellant's rights under Article 8 of the ECHR the Secretary of State set out the provisions of paragraphs 398 and 399 of the Rules and stated that the appellant did not qualify for leave to remain on human rights grounds under those paragraphs. His family life was considered. It was noted that he had a girlfriend, Miss Beverley Hill, and he had said that he had met Miss Hill's children and went on social outings with them he had no paternal relationship with them and they had not co-habited as a family.
21. It was not considered that the appellant's rights under the ECHR would be infringed by his removal.
22. The appellant appealed and after the history set out in paragraph 1 above, came before us for a substantive hearing .

23. The appellant gave evidence relying on a witness statement which referred to the ill-treatment which he and his father had suffered at the hands of the Serb forces and his arrival in Britain by lorry in December 1998. He referred to his family here and his girlfriend and went on to say that he was sorry for the offences he had committed and he wished to have the opportunity to stay in Britain and live an honest and happy life. He claimed that he would be at risk on return to Kosovo and would not be able to obtain protection from the police. His second statement stated:-

“I am not an inherently bad person but I fell into alcoholism. I started drinking when I came to the United Kingdom because of everything that happened back in Kosovo. I had lost my family, and found comfort in alcohol. I was drunk when committing the offences which are listed on my record. And it did not help that I associated with bad people, who were telling me that I should not worry about anything, as life was too short to worry, and so I ended up drinking and committing crimes whilst drunk. I also used to smoke cannabis.”

24. He referred to rehabilitation courses for alcohol and drugs which he had undertaken in prison and said that he was now more grounded. He emphasised that he could no longer feel part of Kosovo as he had been in Britain for fourteen years.

25. In his oral evidence he repeated what he had stated in his statements, referred to his certificates for the courses in drug and alcohol rehabilitation which he had taken and said that he would live a normal life here.

26. In reply to questions from Mr Tufan, he stated that Kosovo was not ready for normal life. He was asked about the claim that his mother was Roma and why he had not mentioned that before 2012. He stated merely that he had a new life here. He was asked why Beverley Hill was not at court and he said that she had difficulties with childcare and work. He has a flat near to her and he would see her once a week. He could not see her where he lived because he was sharing a room with an Indian man.

27. Mr Sahab Sokolaj then gave evidence. In his statement he said that he was willing to find the appellant a job and emphasised the appellant had nothing in Kosovo. Although he had known the appellant for some time he had not known that he had committed burglary. He said that he himself was Albanian and had come to Britain as a refugee from Albania in 1998. His wife was a cousin of the appellant.

28. The appellant's aunt, Albina Byberi, then gave evidence stating that she was very close to the appellant having fed him and washed his clothes since he was very young, as he had not had a good relationship with his father. She set out all that she had done for the appellant here and added that when he had arrived he had been upset about what had happened to his family and would have nightmares about what had happened in Kosovo. She would then tell him that he was safe. She had not been aware of his offence when he had been sent to prison for the first time and

could not remember who had told her that he had been sent to prison. The appellant had called her from there. She stated how close her children were to him. She emphasised, however, that she did not believe that he would commit any other offence.

29. In evidence she stated the appellant was a brother of her stepsister. She and his father had the same father. His mother's mother had been a gipsy.
30. When cross-examined she stated that she had not known about the appellant's crimes until the police had come to her house. She was asked why she had not stated that the appellant's mother was a Roma, and she said that was because they did not share a mother. It was put to her that she was saying the appellant had one Roma grandparent and she stated that that was his mother's mother. She confirmed that she and the appellant would speak Albanian together.
31. Sokol Pebibaj then gave evidence. He said that he is a friend of the appellant's uncle and that he had worked with the appellant at a car wash where the appellant had been hardworking and fun to be around. He said he was sure that the appellant regretted his actions. Mr Pebibaj had been back to Kosovo but he felt uncomfortable there because his mother was a gipsy. He was reluctant to return as he had built up his life here.
32. Mr Tufan asked him when he had heard about the appellant's crime and he said that he had heard as soon as it had happened because they had strong contact. He had known that the appellant had been in prison before and was very surprised that he had committed a further offence.
33. Mr Tufan put to Mr Pebibaj that he had a surprisingly light complexion if his mother had been a gipsy and he said that his mother had not been dark or was not "fully white". Mr Tufan pointed out to him that he had not mentioned that he was only partially gipsy.
34. Isa Byberi then gave evidence. He said that he was a cousin of the appellant's aunt, Albina Byberi. He said that he would not wish to return to Kosovo because he had seen so much war there.
35. In summing up Mr Tufan relied on the Reasons for Refusal Letter and asked us to uphold the Section 72 certificate and find that the appellant had committed a particularly serious offence. He referred to paragraph 47 of the judgment of the Court of Appeal in **EN (Serbia) v SSHD [2009] EWCA Civ 630** when Stanley Burnton LJ had stated that offences against property were capable of being particularly serious crimes as well as to the importance placed on respect for statute in that judgment.
36. He pointed out that it was for the appellant to rebut the presumption and argued that had not been done. Moreover, he argued that under the provisions of Article 1(C)(5) of the Refugee Convention the changes in

Kosovo were such that the circumstances which caused the appellant to flee were no longer in existence.

37. Having referred to the judge's sentencing remarks, and the terms of the NOMS report he asked us to find that it would be appropriate to return the appellant. With regard to the appellant's claimed rights under Article 8 of the ECHR he pointed out that the appellant's girlfriend had not attended court and indeed had not been present at the hearing before the First-tier Tribunal. The appellant had said that he only saw her once a week and Mr Tufan argued that there was no subsisting relationship. He referred to the appellant's long list of crimes and stated that he was a criminal recidivist and it was in the public interest that he be deported.
38. In reply Ms Hulse argued that the appellant fell within the exception to removal under Section 33 of the UK Borders Act 2007 as the deportation of the appellant would be in breach of his rights under both the European Convention on Human Rights and the Refugee Convention.
39. She argued that the situation in Kosovo was particularly difficult because of very high rates of unemployment and it would be disproportionately harsh to return the appellant. He would not be returning to a stable environment. There was not a pattern of offending which showed escalating levels of more serious crime and she argued that the offences for which the appellant had been imprisoned were merely a blip in his record. They were not, she argued, sufficient to cause the removal of his refugee status. She referred to the way in which the appellant had behaved in prison and emphasised that he was not a danger to society. She referred to the terms of UNHCR Handbook and stated it was important to consider the proportionality of removal.
40. With regard to the issue of the appellant's rights under Article 8 of the ECHR she emphasised that he had lived in Britain for fourteen years having come here at the age of 16 and that those he regarded as his close family were all here. He had expressed a clear fear of return and his fears had been supported by the other witnesses. She stated that he had worked in Britain and that applying the criteria set out in **Maslov** [2008] ECHR 546 his deportation would be a disproportionate interference with his Article 8 rights here.

Discussion

41. The appellant is aged 31. He arrived in Britain in 1998 and, having been granted refugee status and indefinite leave to remain has lived in Britain ever since. While there is no independent evidence that the appellant's parents and brother are no longer alive, we will accept that that is the case, and also accept that his father arranged for his departure from Kosovo after the Serbs had invaded and that he and his father were ill-treated by the Serb police. We accept that when he arrived in Britain he turned to his aunt for support and, although she arranged separate

accommodation for him, he has particularly close ties with her and her family. He has a number of close friends and a girlfriend, Beverley Hill, here.

42. It was not until the appellant's solicitors wrote to the Home Office after the deportation process had been initiated that it was alleged that the appellant was a Roma and for that reason would face discrimination in Kosovo. The reality is however that the appellant's mother was half Roma - his maternal grandmother was Roma. His father was not nor his paternal grandparents or his maternal grandfather. We consider it unlikely that the appellant would therefore be classified as Roma; indeed, he did not seek to classify himself in that way till a very late stage of his life as an asylum seeker in this country: see paragraph 26. The appellant had no satisfactory explanation for that failure, and we regard it as equally significant in terms of how others would see him. Even if the appellant were seen as a Roma, while we accept that there is discrimination against Roma in Kosovo that discrimination does not amount to persecution. Although parties to mixed marriages where one partner is Roma and the other is an ethnic Albanian do face problems which in the past have been characterised as persecution that is clearly not the case of this appellant. Given his particular ethnic mix, noting that in neither of his statements did he claim to be Roma and therefore would have difficulties on return and indeed noting that Ms Hulse did not, in her submissions, rely on the appellant's ethnicity, we find that the fact that the appellant had a Roma grandmother is not significant in terms of any risk on return. We would add that we accept that the appellant's return to Kosovo would be likely to mean that he would face some hardship but the reality is he has learned some skills here which he could put to use there. Apart from his complaint that he can still sense the injury to his leg he is in good health.
43. The Secretary of State has invoked the provisions of Section 72(2) of the Nationality, Immigration and Asylum Act 2002 which states that for the purposes of Article 33(2) of the Refugee Convention a person is presumed to have been convicted by a final judgment of a particularly serious crime and constitute a danger to the community of the UK where he has been convicted in Britain of an offence and sentenced to a period of imprisonment of at least two years. It was therefore considered that the appellant's refugee status should be revoked under paragraph 339(A)(x) of the Immigration Rules.
44. The issue for us is whether or not the four burglaries for which the appellant was sentenced to a period of imprisonment of 30 months bring the appellant within the provisions of Section 72. The presumption is rebuttable. We are assisted by the judgment of Stanley Burnton LJ in **EN (Serbia)**. He makes it clear in paragraph 47 that offences against property are capable of being a particularly serious crime. He points out that, if that statute was "unambiguously in conflict with the Convention" then subject to any statutory or equivalent authorities the courts must enforce the statute.

45. Since Stanley Burton LJ's judgment in **EN (Serbia)** the Court of Appeal have issued judgments in **SS (Nigeria) [2013] EWCA Civ 550** and **MF (Nigeria) [2013] EWCA Civ 1192**. Both of those judgments emphasise the respect that must be paid to statute. In paragraph 48 of the judgment of Laws LJ in **SS (Nigeria)** he, in the context of a claim under Article 8 of the ECHR states:-

“I think with respect that insufficient attention has been paid to the weight to be attached, in virtue of its origin in primary legislation, to the policy of deporting foreign criminals.”

46. We note the terms of a letter from UNHCR dated 12 October 2012 which deals with the application of Article 33 and states that UNHCR is of the view that the burden is on UKBA to establish that the appellant has committed a “particularly serious crime” and states that all circumstances surrounding the crime should be considered. They suggest that these include the nature of the act, the actual harm inflicted, the intention of the perpetrator and the circumstances of the crime, the form procedure used to prosecute the crime, the nature of the penalty imposed, and whether most jurisdictions would consider it a particularly serious crime.
47. The reality is that the serious nature of the crime was shown by the sentence imposed and indeed the comments of the judge in his sentencing remarks are apt. There is nothing to indicate that the intention of the appellant was to do anything other than seek economic gain without regard to the rights of others not to be burgled in their own homes. A burglary is a danger to the community, affecting as it does the rights of those in the community to enjoy their property.
48. We consider that it is particularly important to respect the definition of “particularly serious crime” set out in Section 72. The reality is moreover that the appellant has shown nothing to rebut the presumption that what he did was a particularly serious crime. While the First-tier Tribunal stated that the fact that the occupants of the homes which the appellant burgled were not at home when the burglaries were carried out we do not consider that that could possibly be thought to lessen the seriousness of the crime or to refute the presumption. We refer below to the NOMS Report, and to the various letters of support from the appellant's prison officers but we would not consider that there is anything therein that discharges the burden on the appellant in this regard. In particular we do not consider that the fact that the crimes which he committed prior to the four burglaries were relatively minor offences only one of which had led to a prison sentence is capable of refuting the presumption. We consider that we should look mainly at the appellant's sentence for the four burglaries and what the sentencing Judge said about them, and on that basis conclude that the Secretary of State was entitled to invoke the provisions of Section 72.
49. However even if we are wrong in that regard we have considered the provisions of Article 1C of the Refugee Convention and consider that the

appellant is no longer entitled to asylum. That Article states that the Convention shall cease to apply to any person who:-

“5. He can no longer, because of 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.”

50. The situation in Kosovo has changed radically since 1998 when the appellant came to Britain. When he came as he made clear in his application for asylum that he feared persecution from the Serbian authorities. The reality is that that fear no longer runs in Kosovo. Kosovo was placed under the UN Interim Administration in 1999 and in 2008 after the new Kosovan Constitution was in place, the administration of Kosovo was handed over to the authorities set up under it. It is now described in the US State Department Report on Human Rights Practices as a parliamentary democracy. That report sets out in some detail the climate for human rights in Kosovo. There is nothing therein to indicate that ordinary Kosovo Albanians such as the appellant would face persecution or treatment contrary to their rights under Article 3 of the ECHR in Kosovo. There is a properly functioning police service and courts which provides a sufficiency of protection to the **Horvath** standard. While there is certainly corruption and discrimination against ethnic minorities there was nothing to indicate that such treatment would amount to persecution. We have already set out above why we have found that the appellant would not suffer discrimination amounting to Article 3 ill-treatment because of his claimed Roma descent.
51. We have considered the terms of the expert report prepared by Dr James Korovilas. We note that Ms Hulse did not refer to the report in her submissions, though it formed part of the material put in by her instructing solicitors. Having referred to Kosovo’s Declaration of Independence in 2008 Dr Korovilas considered the issue of whether or not there had been fundamental and durable changes in Kosovo since 1998. He states that, while it is certainly the case there have been a number of fundamental changes in Kosovo since 1998, and the forced removal of the Serbian security forces in Kosovo in 1999 “certainly means that ethnic Albanians in Kosovo are no longer at risk of being persecuted by the agents of the Serbian state” there are other risks faced by forced returnees to Kosovo. He then refers to the position of ethnic minorities and the dramatic increase in property-related incidents owing to the difficulty in resolving numerous outstanding property disputes. The reality of course is that this appellant has not claimed that he has any property to which he could claim on return to Kosovo.
52. Dr Korovilas states that there is insufficient support for IDPs returning to Kosovo and that the municipal offices for communities and returns (MOCR) are the only potential source of support for returning internally displaced persons and were chronically underfunded. He goes on, however, to state:-

“Thirdly there is far too much emphasis in addressing the needs of ethnic minority IDPs returning to Kosovo, and far too little emphasis on addressing needs of ethnic Albanians returning to Kosovo”.

That comment in itself shows an emphasis placed on the position of minorities such as Roma, when they return, rather than those such as this appellant but of course that does mean that the appellant, if he were to emphasise his Roma ethnicity might be able to turn that to his advantage.

53. The report goes on to state that the appellant would find a very high level of economic hardship because of high levels of unemployment. The reality is, however, that the appellant has friends and family in Britain one of whom at least has been back to Kosovo on one occasion, who might well be able to assist him through their own contacts on return.

54. The conclusions of Dr Korovilas are:-

“Having considered the documents associated with this case I have reached the following conclusions:

Firstly whilst I accept that Mr Kosova would no longer face any threat from the Serbian security forces in Kosovo, I am however of the opinion that some of the other changes which have taken place in Kosovo since 1999 would impose severe difficulties upon returning IDPs such as Mr Kosova. For example, Mr Kosova would find it extremely difficult to reclaim any property which he left behind in 1998 and the Kosovo state would be unable to offer him any useful assistance on this matter. Secondly in the absence of a family network to support him in Kosovo and the absence of any family property Mr Kosova would face an unacceptable level of economic hardship in Kosovo. Indeed the extent of the changes which have occurred in Kosovo since 1999 would most likely make it harder for him, since he would be returning to a country which has changed almost beyond recognition. Finally I do not believe that relocation within Kosovo would be an effective solution to the potential problems that Mr Kosova would face should he be forcibly returned to Kosovo.

In conclusion, I am firmly of the opinion Mr Kosova would find it extremely difficult to effectively re-establish himself in Kosovo, and he would most likely face an unacceptable level of hardship if returned to Kosovo. Therefore it would be unreasonable for him to be forcibly returned to Kosovo.”

55. We would comment that that Dr Korovilas’ report does not indicate that the appellant would face persecution or treatment contrary to his rights under Article 3 of the ECHR on return. He might well face hardship but that is quite simply not the same as persecution nor is there anything to indicate that it would cross the high threshold of Article 3 ill-treatment.

56. We have considered the letter from UNHCR dated 12 October 2012 regarding the revocation of the appellant’s refugee status under Article 1(C)(5). After general comments the letter states that that there had not been a “fundamental and durable change to the circumstances under which the appellant is recognised as a refugee”. The basis for that

conclusion appears to be that there is evidence that the situation in Kosovo is unstable, but that of course does not deal with the fundamental change which has taken place which is that the Serbian authorities no longer have any power within Kosovo. The fact that they do not is surely a fundamental and durable change in the circumstances on which the appellant based his claim to asylum.

57. The letter emphasises that a UN Security Council Report of 31 January 2012 had stated that the situation in northern Kosovo continued to be tense and politically unstable and there were clashes between groups of Kosovo Albanians and Kosovo Serbs during the year. However the appellant's home area was that around Gjakova which is to the west of Kosovo. It is not near the north part of Kosovo, around Mitrovica, where the clashes between the Serb and Albanian communities may well have continued. There is nothing to indicate that there are any Serbs left in the area around Gjakova.
58. We have considered the terms of the UNHCR Handbook where at paragraph 135 a gloss is put on the terms of Article 1(C)(5). That makes it clear that where there is a mere or transitory change in the facts surrounding the individual's refugee fear which does not entail a major change of circumstances that is not sufficient to make Article 1(C)(5) applicable. It goes on to emphasise the second part of Article 1(C)(5) which states:-

"Provided that this paragraph shall not apply to a refugee falling under Section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality."
59. We have considered whether or not that paragraph would apply to the appellant. The reality is, however, that the appellant, who claimed to have been beaten up by the Serbs and to have received a wound in the leg was sent to Britain by his father. He was not present when he claims his family were killed - there is indeed some confusion in his evidence as to whether or not they were killed when the house was burnt or whether or not the house was first burnt before they died. There is indeed no independent evidence that the appellant's parents were killed, Although we have accepted for present purposes that they were. But more particularly, however, there is nothing to indicate that the appellant suffered such trauma or continues to suffer such trauma that it would be wrong for him to be returned.
60. We therefore find that the Secretary of State was correct to conclude that the appellant is no longer entitled to refugee status firstly because of the application of Section 72, and secondly because of the application of Article 1(C)(5) of the Refugee Convention.
61. We now turn to the issue of whether or not the appellant's rights under the ECHR would be infringed by his removal. We note the terms of Rules 398 and 399. The appellant comes within the provisions of paragraph 398B of

the Rules because he had been sentenced to a period of imprisonment of less than four years but over twelve months. Therefore the provisions of paragraph 399 apply. The only relevant part of that Rule would be the issue of whether or not the appellant is in a genuine subsisting relationship with a partner in Britain and who is a British citizen. The reality is that Miss Hill did not give evidence before us and it was the evidence of the appellant that he has never lived with her and sees her only once a week. We do not consider that that can be termed as a genuine subsisting relationship. Moreover, under the provisions of paragraph 399A it is of note that the appellant has not lived continuously in Britain for twenty years, and therefore cannot benefit from sub-paragraph (a). He cannot benefit from sub-paragraph (b) as he is not under the age of 25. The only issue is whether or not there are such exceptional circumstances as would mean that the removal of the appellant would be disproportionate amounting to the very compelling reasons “ referred to in MF ((Nigeria) [2013] EWCA Civ 1192 at paragraph 43. In effect that test is the same as that under the fifth of the **Razgar** questions.

62. We accept that the appellant has enjoyed private and family life here in that he has a number of close relatives (but not, of course, his parents or sibling) here, good friends and a girlfriend. He has also worked here, at times in a car wash and at times, it appears, for Everest Double Glazing. Aside from those factors he does not appear to have put down roots here and the reality is that his English is still not particularly fluent. It is obvious that Albanian would be the language which he would most likely speak here and indeed we noted that an interpreter was required for the appellant’s aunt when she gave evidence.
63. We then consider the fact that the appellant has been sentenced to 30 months for four burglaries and that that sentence came after a previous, short, period in prison and that he has committed other offences such as driving offences and battery.
64. We take into account the NOMS Report which sets out an offence summary which included two offences against the person in 2003 and 2008, one against property in 2003, one of fraud in 2010, eight theft and kindred offences between 2005 and 2011 and two offences relating to police/courts and prisons in 2003/2004 plus three miscellaneous offences. Twelve “non-convictions” were listed which included two offences against the person, one sexual offence in 2008, one fraud and kindred offence in 2009, three theft and kindred offences in 2005 to 2011 and two public order offences in 2009 as well as a drug offence in 2007 and three miscellaneous offences in 2008. A number of not guilty disposals were also recorded although we are not concerned with those.
65. The risk of re-conviction predictor gave a risk of re-conviction within two years, 65% for OGRS, 44% OGP and 30% OVP. The risk of serious harm level to women, ex-partners and the public was considered as high.

66. We note that the protect-personal part of the form stated that “17 Heston House, Tanner Hill, London SE8 is the home address of Elson Byberi and Tahir Krasniqi. Previous intelligence suggests that the Byberi and Krasniqi families are well-known for drug supply in and around Bromley”.
67. We would emphasise that we only take into account the crimes of which the appellant has been convicted and ignore the comments made regarding the home of his aunt and cousins. We bear in mind that the levels of risk predicted may be based to some extent on those comments, and discount them to that extent, including any risk of violence on this appellant’s part. However, we also bear very much in mind what the sentencing judge said about the circumstances of the appellant’s four convictions for burglary; and we consider that the appellant’s protestations that he will now no longer commit crimes here cannot be relied on, given those and his previous convictions. Taking all these factors into consideration we consider not only that the Secretary of State was correct to decide that the deportation of the appellant was conducive to the public good but further that, notwithstanding the length of time he has lived in Britain and the difficulties he would face on return to Kosovo that it would not be disproportionate for him to be removed there now.
68. Accordingly, having set aside the decision of the First-tier Tribunal we re-make the decision and dismiss this appeal on immigration, asylum and human rights grounds.

Decision.

This appeal is dismissed on immigration grounds.

This appeal is dismissed on human rights grounds

This appeal is dismissed on asylum grounds.

Signed

Date

Upper Tribunal Judge McGeachy

ANNEX.

DECISION and DIRECTIONS

1. The Secretary of State appeals, with permission, against a determination of the First-tier Tribunal (Judge of the First-tier Tribunal Freestone and Mr H G Jones MBE JP (Legal Member) who in a determination promulgated on 30 May 2013 allowed the appellant's appeal against a decision of the Secretary of State to revoke the appellant's refugee status and make a deportation order against him under the provisions of Section 32(5) of the UK Borders Act 2007.
2. Although the Secretary of State is the appellant in the appeal before me I will, for ease of reference, refer to her as the respondent as she was the respondent before the First-tier Tribunal. Similarly, although Mr Dandi Kosova is the respondent in the appeal before me I will again for ease of reference refer to him as the appellant, he having been the appellant before the Tribunal.

3. The appellant is a citizen of Kosovo born on 15 April 1982. He arrived in Britain in 1998 and the following year was granted refugee status and indefinite leave to remain. He has committed a number of offences in Britain starting in November 2003 and finally on 3 October 2011 was given an immediate custodial sentence of 30 months for four offences of burglary.
4. The Secretary of State considered that he had committed a particularly serious crime and therefore decided, under the provisions of Section 72 of the Nationality, Immigration and Asylum Act 2002 to revoke the appellant's refugee status on the basis that he had been convicted by a final judgment of a particularly serious crime and constituted a danger to the community of the United Kingdom, that being evidenced by the fact that he had been sentenced to a period of imprisonment for at least two years.
5. The appellant argued that not only was it wrong that a deportation order should be made against him but that he still had a well-founded fear of persecution in Kosovo. He also argued that his rights under the ECHR would be infringed by his removal.
6. In paragraph 22 of their determination the Tribunal stated that:

"22. The appellant has been convicted of four offences of dwelling house burglaries. As the sentencing judge pointed out these are serious offences. However it would appear that when they were committed the properties were unoccupied and the fact that the judge found them not to be opportunist burglaries would indicate that the appellant was aware that the householders were not at home at the time. That would reduce the seriousness of the offending. The judge did not refer to any other aggravating features apart from the offences being committed whilst on bail. Whilst it can be argued that the seriousness of the Appellant's offending is increasing, he does not have a history of this type of offence. Accordingly it seems to us that, whilst these are serious crimes, they cannot be regarded as particularly serious crimes of the sort envisaged in *EN (Serbia)*."
7. In reaching that conclusion the Tribunal referred to the judgment of the Court of Appeal in **EN (Serbia) [2009] EWCA Civ 630** where at paragraph 45 it was stated:-

"The words 'particularly serious crime' are clear, and themselves restrict drastically the offences to which the Article applies. So far as 'danger to the community' is concerned, the danger must be real, but if a person is convicted of a particularly serious crime, and there is a real risk of its repetition, he is likely to constitute a danger to the community."
8. The Tribunal went on in paragraph 23 of the determination to state:-

"In any event, in addition to the nature of the crime being 'particularly serious' there must also be a danger to the community. The Request for

Offender Management Information on a Foreign National Prisoner (NOMS) report states that the Appellant is a high risk of causing serious harm to women, ex partners and the public. It assesses him of medium risk of reconviction. As Ms Sirikanda pointed out to us, the assessment contains little detail. It is based on unsubstantiated information provided by the police, probation records and records of previous convictions. There does not appear to be any independent assessment based on personal knowledge. There does not appear to have been any interview conducted with the Appellant. In those circumstances we place little weight on the risk assessment.”

9. Having stated that they considered that the presumption in Section 72 had been rebutted the Tribunal then went on to consider whether or not it was correct to revoke the appellant’s refugee status on the grounds there had been a change of circumstances in his country of origin.
10. They had before them the COIS Report from 2009 and US State Department Report on Human Rights Practices from 2011. They noted that the report indicated that “some issues including ethnic tensions remain ongoing in Kosovo”. They also had before them a report from UNHCR which stated that it was not accepted that there had been a fundamental and durable change in Kosovo.
11. They noted that the appellant’s representatives had submitted a UN security report of 31 January 2012 which said that “the situation in northern Kosovo continues to be dense and potentially unstable, influencing much of the present political discourse”.
12. The Tribunal therefore found that the Secretary of State did not discharge the burden of proof upon her to show that there had been an appropriate adequate change of circumstances in Kosovo which would mean that the appellant could return there without fear of persecution.
13. They therefore allowed the appeal.
14. The Secretary of State appealed referring to the terms of Section 72 of the 2002 Act and arguing that the Tribunal had given inadequate reasons for concluding that the appellant had not been convicted of a particularly serious crime or that he was not a danger to the community. He also argued that the Tribunal had given inadequate reasons for finding that the Secretary of State had failed to show that there had been a fundamental change in country circumstances.
15. A detailed reply under Rule 24 was submitted on behalf of the appellant which argued that the Tribunal had properly considered the ratio of the judgment in **EN (Serbia)**, stating that the Tribunal were correct to take into account the fact that this had been the first time of offending of this particular type and that they had properly considered what weight to place on the NOMS report. The reply placed particular weight on the determination of the Tribunal in **Farquharson (removal - proof of**

conduct) Jamaica [2013] UKUT 146 (IAC) which stated that if the respondent wished to rely upon police reports then the respondent should provide such material in good time in order for the appellant to prepare his case. It was claimed that sufficient reasons were given by the Tribunal to show that they had properly considered all relevant factors. Again the reply emphasised the importance to be placed on the UNHCR Report.

16. At the hearing of the appeal before me Mr Nath relied on the grounds of appeal referring to the details in the NOMS Report regarding various offences committed by the appellant. He argued that insufficient reasoning had been given both with regard to the decision under Section 72 and the issue of whether or not there had been a fundament change in the situation in Kosovo such that it was safe for the appellant to return.
17. In reply Mr Cheng who had produced a detailed and well thought out argument argued that although the appellant had been convicted of a crime it was not a particularly serious crime. He referred to the spectrum of crimes which might be committed and argued that as this was not a particularly serious crime as there was no one present when the appellant burgled the houses, the Tribunal had been correct to consider that the Secretary of State had not shown that the crime was one which crossed the specific threshold of being a particularly serious crime.
18. He referred to various mitigating factors such as the appellant's reliance on alcohol and cannabis and said that there was clear evidence in the bundle that he had sought to address his reliance on those. He emphasised that as no one had been in the houses which had been burgled they would not have had the immediate fear of those who are present when a burglar breaks into the house. He argued moreover that there was no evidence that the appellant was a danger to society.
19. He argued that the respondent had not discharged the burden of proof upon her to show that there had been a change of circumstances in Kosovo such that the appellant would no longer have a well-founded fear of persecution there.

Discussion

20. I stated that I considered there were material errors of law in the determination of the Tribunal. In considering whether or not the appellant had committed a particularly serious crime the Tribunal did not place sufficient weight on the length of the appellant's sentence. He was sentenced to 30 months' imprisonment for each of the four burglaries, the sentences running concurrently. Taking into account the terms of Section 72(2) of the Nationality, Immigration and Asylum Act 2002 I consider that the Tribunal should have found that the appellant had been convicted of a particularly serious crime – weight should be placed on the clear guidance in an Act of Parliament which itself reflects the public's concern at the commission of serious crimes by foreign nationals.

21. Moreover I consider that there were aggravating factors as the appellant had committed these offences while on bail. I also do not understand the weight placed by the Tribunal on the fact that no one was in the houses when they were burgled. The fact that these crimes were considered to be premeditated does, in my view, aggravate the serious nature of the offences. I also note the sentencing remarks of His Honour Judge Gratwicke who stated:-

“Any householder, whether they own the property or rent it, is entitled, when they leave it, to expect that when they return the property will be intact and their possessions will remain there. The effect of a burglary, as indeed this court has noted from one of the victims of your dishonesty, can vary. One thing that this court consistently sees is that people are shocked by virtue of the fact that someone has been into their property when they are not there and, of course, has taken their goods.”

22. I consider that taking these factors into account it was not open to the Tribunal to consider that the appellant had not been convicted of a particularly serious crime.

23. With regard to the NOMS Report, I consider that their attitude to that was somewhat cavalier. They appear to dismiss what is stated in the report because the documents on which it was based were not before the Tribunal. It was incompetent of the respondent not to ensure that these documents were before the Tribunal - there most certainly had been a pre-sentence report and an OASys Report as mentioned in the NOMS Report. However, I consider that it was simply wrong not to take into account the terms of that report or at least to place some weight thereon. The reality is that the appellant's history of offending is a relevant factor when considering whether or not he is a danger to the community of the United Kingdom and the terms of the report clearly indicate that he is such a danger unless it could be shown that what was written on the report was simply not true. I would point out that the report itself lists the appellant's offences and state that the level of risk of serious harm level is high. The offences listed show two offences against the person, an offence against property, a fraud offence, eight theft and kindred offences, two offences relating to police/courts/prison and three miscellaneous offences. There were also a number of matters on which the appellant had been charged but not convicted.

24. The Tribunal should surely have considered those offences in detail.

25. Finally, with regard to the issue of the safety of the appellant on return to Kosovo I consider that the Tribunal have not given sufficient reasons for finding that he would still face persecution there. While the UNHCR Report states that there has been no change in the situation in Kosovo that is surely incorrect given the outcome of the war there.

26. I therefore consider that it is appropriate for me to set aside this decision as there are material errors of law in the determination. I further consider that the appeal should be heard afresh.
27. I asked both representatives which forum they considered appropriate for the re-hearing to take place. Mr Cheng argued persuasively that given that there had been no findings on the appellant's Article 8 claim and given that I had set aside the finding of the Tribunal with regard to Section 72 notice and that that issue would need to be considered in detail it is appropriate that the appeal should return to be remitted to the First-tier Tribunal. Mr Nath argued that it would be appropriate for the appeal to remain in the Upper Tribunal.
28. I stated that I would find out in which forum the appeal could be dealt with most quickly but that in the meantime I would issue directions for appropriate documentary evidence to be produced and for the further conduct of the appeal and that I would ensure that the appeal be brought out for a for mention hearing as soon as possible after 21 days to ensure that the directions be complied with before the appeal was set down for a final hearing.

Decision

I set aside the determination of the First-tier tribunal. The appeal will proceed to a hearing afresh.

Signed
Upper Tribunal Judge McGeachy