



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

Appeal Number: PA/00410/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 10 August 2018**

**Decision & Reasons Promulgated
On 24 August 2018**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-and-

**K.A.W.
(ANONYMITY ORDER MAINTAINED)**

Respondent

Representation

For the Appellant:

Mr. I. Jarvis, Home Office Presenting Officer

For the Respondent:

Ms R. Head of counsel, instructing by Lupins Solicitors

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Respondent is a national of Jamaica. He first entered the United Kingdom, as a visitor, on 26 August 2001 and was subsequently granted further leave to remain until 30 July 2003. On 7 August 2003 he was convicted of possession of Class A drugs with intent to supply and

sentenced to 3 years and 6 months imprisonment. He was served with a notice of intention to deport but his appeal against this decision was allowed on 22 February 2007.

2. On 21 June 2010 he was granted limited leave to remain as the spouse of a British citizen until 21 June 2012. But his subsequent application for further leave was refused on 25 June 2013 and his appeal was struck out. On 11 February 2016 he was convicted of driving whilst disqualified, dangerous driving, failing to stop and using a vehicle when uninsured and sentenced to 12 months imprisonment.
3. A deportation order was made in relation to him on 13 December 2016 and on 20 December 2016 his protection and human rights claim were refused and section 72 of the Nationality, Immigration and Asylum Act 2002 was applied. This was on the basis that he had previously committed a particularly serious crime.
4. It is accepted that he was an informant for Operation Trident and gave information on two major arms dealers who were from Jamaica and who were operating in London between 2005 – 2007. One of them was sentenced to 12 years imprisonment. It was accepted at his previous immigration appeal that the men he informed upon were part of serious organised criminal gangs in Jamaica.
5. The Respondent appealed and First-tier Tribunal Judge Foulkes-Jones allowed his appeal in a decision promulgated on 9 February 2018. The Appellant appealed against this decision and Upper Tribunal Judge Bruce granted him permission to appeal on 30 May 2018.

ERROR OF LAW HEARING

6. The Respondent's solicitors filed and served a "reply" on 9 August 2018. Rule 24 of The Procedure (Upper Tribunal) Rules 2008 states that any response to a notice of appeal must be sent to the Upper Tribunal within one month of permission to appeal being granted. In addition, the directions given on 19 June 2018 stated that any response must be filed within one month. The "reply" was not filed until 9 August 2018. Counsel accepted that the reply should have been headed "response". She also explained that when she had realised that no such response had been filed she drafted a "reply" and arranged for it to be filed. Given the

seriousness of the issues before me, I granted an extension of time under Rule 5 (3)(a), as it is in the interests of justice for all arguments to be before the Tribunal.

7. I also granted permission for the hearing to be “in camera” due to the risks which attach to the Respondent’s status as a former police informant and for the same reasons I maintained the anonymity order.
8. Both the Home Office Presenting Officer and counsel for the Respondent made oral submissions and I have referred to the content of these submissions, where relevant, in my decision below.

ERROR OF LAW DECISION

9. When granting permission Upper Tribunal Judge Bruce found that First-tier Tribunal Judge Foulkes-Jones had properly directed herself in so far as she had applied the appropriate country guidance which is *AB (protection – criminal gangs – internal relocation) Jamaica CG* [2007] UKAIT 0018. The headnote states that:

“The authorities in Jamaica are in general willing and able to provide effective protection. However, unless reasonably likely to be admitted into the Witness Protection programme, a person targeted by a criminal gang will not normally receive effective protection in his home area.

Whether such a person will be able to achieve protection by relocating will depend on his particular circumstances, but the evidence does not support the view that internal relocation is an unsafe or unreasonable option in Jamaica in general: it is a matter for determination on the facts of each individual case”.

10. She also found that the First-tier Tribunal Judge had not erred in law when she found that the Respondent would not be eligible for a witness protection programme, would be at serious risk of harm in his home area and that in the particular circumstances of his case, as it was accepted that he was a police informer whose evidence led to the long-term imprisonment of gang members, internal flight would not be an option. The Home Office Presenting Officer did not challenge the finding by First-tier Tribunal Judge Foulkes-Jones that at the time of the

hearing before her it would be a breach of Article 3 of the European Convention on Human Rights to deport the Respondent to Jamaica.

11. Permission to appeal has not been granted in relation to grounds entitled *Risk on return* or *Material Misdirection of Law* and the Home Office Presenting Officer did not seek to rely on these grounds.
12. Upper Tribunal Judge Bruce did give permission to appeal in connection with the First-tier Tribunal Judge's decision in paragraph 19 of her determination in relation to section 72 of the Nationality, Immigration and Asylum Act 2002.
13. Section 72 states that:
 - “(1) This section applies for the purposes of the construction and application of Article 33(2) of the Refugee Convention (exclusion from protection).
 - (2) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and constitute a danger to the community of the United Kingdom if he is-
 - (a) convicted in the United Kingdom of an offence, and
 - (b) sentenced to a period of imprisonment of at least two years...
 - (6) A presumption under section (2), (3) or (4) that a person constitutes a danger to the community is rebuttable by that person...”
14. First-tier Tribunal Judge Foulkes-Jones accepted that section 72 applied, as the Respondent had previously been sentenced to three and a half years imprisonment. In paragraph 7 on page 19 of her decision the First-tier Tribunal Judge noted a number of factors which she found rebutted the presumption that the Appellant was now a danger to the community. These included that he had not committed any other offences since early 2017 and that he was committed to remaining crime free because he feared a death sentence and losing his children if he is returned to Jamaica. She found that these were strong factors which would deter him from re-offending; as his is fear of gang members in Jamaica.
15. Counsel for the Respondent noted that in paragraph 8 of page 19 of her decision, the First-tier Tribunal Judge stated that “having regard to the above I find that the presumption is rebutted” and that this was a reference to all the previous paragraphs in the decision. However, I find

that this interpretation is too wide and that the plain and obvious meaning of the sentence could as easily have been that she was just referring to the section under the heading, **Certificate under Section 72 of the 2002 Act.**

16. The Home Office Presenting Officer submitted that the First-tier Tribunal Judge had failed to take into account that the decision to deport the Respondent had been triggered by him committed a further offence in 2016, which would have caused serious harm and that, therefore, he continued to be a danger to the community. He also submitted that the reasons provided by the First-tier Tribunal Judge, for finding that the Respondent had rebutted the presumption contained in section 72 of the Nationality, Immigration and Asylum Act 2002, were insufficient and unlawful.
17. Counsel for the Respondent submitted that it was not necessary for a First-tier Tribunal Judge to refer to each and every part of the evidence before her. This may be the case when referring to individual parts of the evidence which went to prove or disprove a particular part of a claim. However, having considered the totality of the evidence before me, I find that the First-tier Tribunal Judge did fail to address the fact that the Respondent had re-offended in 2016 when he had committed four driving offences, one of which was for dangerous driving. She also failed to address other parts of the evidence which supported the case being made by the Respondent.
18. In addition, it was not sufficient to rely on the fact that there was other evidence in the file that the First-tier Tribunal Judge had not specifically referred when this evidence raised issues which needed to be analysed and weighed in the balance. The duty on the First-tier Tribunal Judge was to give a decision which indicated to both parties in sufficient detail why they had succeeded or failed in their cases and to provide them with a proper basis upon which to decide whether to appeal.
19. This was particularly the case given the complexities of the Respondent's case, and that fact that in *MK (duty to give reasons) Pakistan* [2013] UKUT 00641 (IAC) the Upper Tribunal found that:
"There is a related duty to explain the tribunal's assessment of the more important pieces of evidence and to provide reasons for choosing to give (as the case may be) no, little, moderate or substantial weight thereof".

20. Furthermore, the reasoning contained in First-tier Tribunal Judge McGinty's decision to refuse to grant permission could not stand when permission had been granted by Upper Tribunal Judge Bruce which indicated that she did not accept his view.
21. For these reasons I find that there were errors of law in the manner in which First-tier Tribunal Judge Foulkes-Jones reached her decision in relation to section 72 of the 2002 Act insofar as she did not take into account all relevant evidence.
22. However, I also find that it is not necessary to send the appeal back to the First-tier Tribunal but that it is more appropriate to retain the appeal in the Upper Tribunal and to re-make it, pursuant to section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007, This is because the factual findings made in relation to section 72 of the 2002 Act in paragraph 7 on page 19 were not challenged by the Appellant. In addition, as submitted by counsel for the Respondent, there was additional material in the file which could form the basis of a lawful decision in relation to section 72 of the 2002 Act and whose provenance and credibility had not been challenged.
23. When re-making the decision, I preserve the findings made by First-tier Tribunal Judge Foulkes-Jones in paragraph 7 of page 19 of her decision. In particular, I take into account the fact that she found that the Respondent had not committed any further offences since his release from prison early in 2017. She also found that he was committed to remain crime free because he fears he will be killed if deported to Jamaica and that this will lead to him losing the family life which he enjoys with his children. She found that this was a strong deterrent to him re-offending and causing harm to the community here.
24. When considering whether the evidence indicates that the presumption in section 72 has been rebutted, I have taken as my starting point the sentence which engaged section 72 of the 2002 Act. This arose because of a conviction for the supply of Class A drugs. In his sentencing remarks, Mr. Recorder Katz QC stated that he had taken into account the fact that the Respondent had pleaded guilty at the pleas and directions stage and that his counsel had indicated that the Respondent was determined to do something about his involvement with drugs. I have also note that it is not suggested by the Appellant that the Respondent has had any involvement with any illegal drugs since his arrest in 2003. I also note that the mandatory

drug test certificates dating from 2016 in the Appellant's Bundle also confirm that he did not return to drug use during his recent prison sentence.

25. I have also had the benefit of reading the decision of the Asylum and Immigration Tribunal, promulgated on 22 February 2007, which found at paragraph 12 that there was a low risk of serious re-offending by the Respondent. This conclusion arose in part at least from the evidence given before it on behalf of the Metropolitan Police. This led to it finding in paragraph 6 of its decision there were three occasions on which the Respondent had supplied information to the Metropolitan Police. The first was in respect of firearms, as a result of which a machine gun and ammunition were recovered and an individual sentenced to 12 years imprisonment. The second was in respect of the supply of Class A drugs in respect of which an individual was being investigated. The third was in respect of the conversion and supply of firearms in respect of which an individual was being investigated.
26. At paragraph 14 it also noted that:
- “in the first place the appellant has already given extremely valuable information on 3 occasions. In particular information in relation to illegal firearms was of supreme importance in relation to combatting gun crime in London and other cities. Secondly, we consider that it is more probable than not that the appellant will provide further valuable information in the future. Thirdly and most importantly it is essential that those with access to information on gun crime and firearms should know that they will be substantially rewarded for taking the considerable risks involved in providing such information to the authorities”.
27. I have also taken into account the fact that it was the uncontested evidence of the Appellant that he had sought out the police on his own initiative to report his knowledge of the gun crimes. It was not the case of him being involved in any crime and then agreeing to give evidence against other criminals.
28. Furthermore, in 2007, the Metropolitan Police and the Asylum and Immigration Tribunal accepted that not only had the Appellant not re-offended but that he was actively assisting the police to prosecute those committing gun and drugs offences and had placed himself at considerable risk by doing so.

29. I have also taken into account that the Respondent subsequently granted the Appellant leave to remain as the spouse of a British national between 21 June 2010 and 21 June 2012 despite his previous drugs conviction.
30. Furthermore, the fact that he had pleaded guilty in both 2003 and 2016 goes some way to rebutting the presumption that he is a danger to the community because he will re-offend. In addition, as noted by First-tier Tribunal Judge Foulkes-Jones in paragraph 6 of page 19 of her decision, the Appellant had accepted that dangerous driving did cause a danger to the public and could have led to injury or death and there is nothing to suggest that the Appellant had committed any further driving offences since his last arrest on 23 January 2016. At paragraph 15 of page 5 of First-tier Tribunal Judge Foulkes-Jones' decision it is also clear that the Appellant had apologised for his driving offences at the hearing and stated that he would not offend again.
31. The driving offences did not trigger the section 72 certification but were relevant as they indicated a disregard for the law relating to being permitted to drive on a public road and the standard of driving permitted on such roads. There is clearly a deterrent element to the importance placed on the deportation of foreign criminals. But in my view this element is somewhat off-set by the encouragement needed to ensure that individuals provide information about drug and gun crimes.
32. The contents of the Home Office file also indicate that it was not the case that the Appellant did not respond when served with a letter, dated 24 August 2016, notifying him of the section 72 certificate. The Respondent was not able to provide me with a copy of this letter but the Appellant's handwritten response, dated 1 September 2016, was in the Home Office Bundle.
33. Taking all of this evidence into account and also the fact that it was implicit in her decision that the First-tier Tribunal Judge had found the evidence given by the Appellant to be credible, I find on a balance of probabilities that the evidence provided by the Appellant both orally and in the documents in the file rebutted the presumption in section 72 of the 2002 Act that he constitutes a danger to the community.

Decision

- (1) The Appellant's appeal is allowed.
- (2) The decision of First-tier Tribunal Judge Foulkes-Jones is set aside in so far as there were material errors of law in relation to her decision on section 72 of the Nationality, Immigration and Asylum Act 2002.
- (3) The decisions reached by the First-tier Tribunal Judge in relation to the other parts of the Respondent's appeal are not set aside.
- (4) These form the basis upon which the Upper Tribunal has retained the appeal and re-made the section relating to section 72 of the 2002 Act.
- (5) It is found that the Appellant has on a balance of probabilities rebutted the presumption contained in section 72 of the Nationality, Immigration and Asylum Act 2002.

Nadine Finch

Signed

Date 14 August 2018

Upper Tribunal Judge Finch