IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Extempore decision

Case No: UI-2022-006040

First-tier Tribunal Nos: RP/50025/2020
LP/00356/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

2nd November 2023

Before

THE HONOURABLE MR JUSTICE DOVE, PRESIDENT
UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RK
(ANONYMITY ORDER IN FORCE)

Respondent

Representation:
For the Appellant: Mr E. Terrell, Senior Home Office Presenting Officer
For the Respondent: Mr M. Allison, Counsel

Heard at Field House on 27 July 2023

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

1. By a decision dated 30 August 2022 First-tier Tribunal Judge Herlihy ("the judge") allowed an appeal brought by the appellant, a citizen of Iran born in 1971, against a decision of the Secretary of State dated 8 October 2020 to revoke the refugee status that was granted to the appellant on 10 September 2002. The judge heard the appeal under Section 82(1)(c) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

2. The Secretary of State now appeals against the decision of the judge with the permission to appeal of Upper Tribunal Judge O'Callaghan. For ease of reference, we will refer to the appellant before the First-tier Tribunal as the appellant in these proceedings.

Factual background

3. On 7 September 2017 the appellant was sentenced in the Crown Court at Southwark to a total of six years' imprisonment for five counts of the supply of a Class A drug, and a single account of possession with intent to supply of a Class A drug, committed between June and December 2016. The appellant was sentenced to a total of four years' imprisonment for the first five counts, to be served concurrently. He was sentenced to two further years' imprisonment for a separate incident of possession later in 2016. The convictions followed a trial.

4. In the Crown Court Judge's sentencing remarks, the appellant was found to have performed "a significant role" for the purposes of the relevant sentencing guidelines. The sentencing judge noted that the purity of the drugs with which the appellant was concerned in the supply was high. That was an aggravating feature.

5. For those convictions, the Secretary of State informed the appellant that she was minded to revoke his refugee status. Thereafter an exchange of correspondence with those representing the appellant followed. The UNHCR was invited to comment. That process culminated in the decision under challenge before the judge below.

6. The Secretary of State's decision addressed the revocation of the appellant's refugee status under paragraph 339AC(ii) of the Immigration Rules. Paragraph 339AC(ii) provides, where relevant:

> "A person may have their refugee status revoked where
>
> (ii) having been convicted by a final judgment of a particularly serious crime, the person constitutes a danger to the community of the United Kingdom".

7. That paragraph is also replicated in statutory form in section 72 of the 2002 Act. Section 72 additionally permits the Secretary of State to issue a certificate where she concludes that the relevant criteria, which broadly correspond to those outlined in para. 339AC(ii), are met. The effect of the certificate is to require the tribunal hearing an appeal against a refusal of an asylum claim, or a decision to revoke asylum status, to deal first with the matters raised in the certificate. Section 72 provides that the subject of the certificate will be presumed to constitute a danger to the community of the United Kingdom. That is a presumption which may be rebutted. If the presumption is not rebutted, the

tribunal must dismiss the appeal insofar as it relates to the refusal or revocation of protection status.

8. The appellant appealed to the First-tier Tribunal. The issue which occupied most of the proceedings before the judge related to a new account which the appellant relied upon, having not sought to do so during pre-decision correspondence with the Secretary of State or in his trial before the Crown Court. The appellant's new narrative related to an individual, AT. The appellant's case was that his convictions for the drugs offences were attributable to AT's coercion and control over him. He was exploited by AT, he claimed. He was forced to engage in the conduct which led to his convictions.

9. To support that claim, the appellant relied on the accounts that he had given to various medical professionals since 2016, including Drs Singh, Giordano and MacRae. He also relied on a so-called "reasonable grounds" decision that had been issued by the Single Competent Authority, and a report from Lisa Davies, a forensic psychologist.

The decision of the First-tier Tribunal

10. The decision of the judge was structured in the following way. Having set out the procedural context, the judge directed herself concerning the burden and standard of proof, and outlined the submissions that each party had advanced. She commenced her operative reasoning at para.18, summarising the appellant's case in relation to AT.

11. AT was, on the appellant's case, a dangerous man. He had moved into the appellant's accommodation, forcing his way in despite the protestations of the appellant. This took place, on the appellant's case, immediately following AT's release from prison for attempted murder. AT was dangerous; he was willing and able to use violence in order to secure his aims. As a result, AT effectively controlled the appellant. That led him to commit the offences in question for which the Secretary of State sought to revoke his refugee status. His culpability was diminished, and he did not pose a risk of reoffending; in short, he had rebutted the section 72 presumption.

12. The judge considered that account, taking into account the sentencing remarks and the OASys Report, in particular its passages concerning the appellant's risk assessment. She discussed extracts from the forensic psychologist's report, having had available to her a large quantity of medical evidence relating to the mental health conditions experienced by the appellant.

13. It was against that background that the judge concluded her operative analysis at paras 30 and 31. In light of the Secretary of State's grounds of appeal, it is necessary to quote those paragraphs in full:

> "30. In considering the totality of the evidence I find that the Appellant has given a consistent and credible account that he has been the victim of coercion and pressure from [AT]. I found his various accounts to be largely consistent and credible and that there is evidence of trafficking which is supported by the extensive report of Ms Davies and the reasonable grounds decision. I find that the OASys report which assessed the Appellant as posing a medium risk of harm was based almost entirely upon threats, he had made to harm another prisoner in May and September 2017, and there

> were no further behaviours of concern identified in the OASys report. The Appellant was released from prison on 6/12/2019 and is currently on licence until 12/2022; there was no evidence that he had breached the terms of his licence or that there had been any further offending since his release. Further I note that there is no record of violent offences or known use of violence by the Appellant. Also of significance is the complete lack of any previous criminality and that the Appellant was aged 46 at the time of the commission of the offences.
>
> 31. I also found that the OASys report did not take any account of the impact of potential trafficking of the Appellant that he had possibly been coerced into committing offences by [AT]. In any event the Appellant has been assessed as posing a low risk of reoffending and I note as submitted by the Appellant's representative in the decision in **Mugwagwa** that the Respondent has previously accepted that where there is an assessment of a low risk of reoffending that this rebutted that Section 72 presumption. I find that on the totality of the evidence before me and the assessment of the Appellant as posing a low risk of reoffending rebuts the presumption that the Appellant is a danger to the community in s.72(2) of the 2002 Act".

14. The judge allowed the appeal.

Issues on appeal to the Upper Tribunal

15. There are five grounds of appeal. Ground 1 is that the judge failed to follow the dicta of Underhill LJ in *HA (Iraq)* as approved by the Supreme Court in [2022] UKSC 22. At para. 58, Lord Hamblen approved observations by Underhill LJ in the proceedings before the Court of Appeal concerning the approach a judge should take when considering the prospective future risk posed by an individual facing deportation. At para. 141 of the Court of Appeal's judgment, Underhill LJ said:

> "I would add that tribunals will properly be cautious about their ability to make findings on the risk of re-offending, and will usually be unable to do so with any confidence based on no more than the undertaking of prison courses or mere assertions of reform by the offender or the absence of subsequent offending for what will typically be a relatively short period".

16. Ground 2 is a reasons challenge to the judge's findings that the appellant was coerced into the supply of drugs by AT. This ground contends that the judge failed properly to consider the Secretary of State's extensive submissions concerning this issue, outlined at paras 12 to 14 of her decision.

17. Ground 2 challenges the judge's reading of the OASys Report, in particular her conclusion that it found that the appellant represented a low risk of reoffending. Properly understood, the grounds contend, that was not the conclusion of the OASys Report. The judge had either misread it or failed to give sufficient reasons analysing the report in those terms.

18. Ground 4 is that the judge failed to take into account the OASys Report's reasons for rejecting the appellant's claims to have been pressured by AT into committing these offences.

19. Ground 5 concerns the judge's reliance on *Mugwagwa (s.72 - applying statutory presumptions) Zimbabwe* [2011] UKUT; the judge elevated the Upper Tribunal's fact-specific application of the principles for which that authority was reported into some wider proposition of law. In *Mugwagwa ,* the Secretary of State had conceded that, because the appellant in that case had been found to represent a low risk of reoffending by the OASys Report, he had succeeded in rebutting the section 72 presumption. The Secretary of State submitted that there is no such broad proposition of law, and the Secretary of State has not made a more general concession that where there is a low risk of harm assessed by an OASys Report that it will always and inevitably necessarily follow that the section 72 presumption is rebutted.

20. We are grateful to Mr Allison for his Rule 24 response dated 24 March 2023, and to the Secretary of State for her skeleton argument dated 17 July 2023.

The law

21. 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 protection).
>
> (2) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is –
>
> (a) convicted in the United Kingdom of an offence, and
>
> (b) sentenced to a period of imprisonment of at least two years".
>
> "(6) A presumption under sub-Section 2 ... that a person constitutes a danger to the community is rebuttable by that person".

22. Since this appeal challenges findings of fact reached by a first instance judge, it is necessary briefly to record some of the principles applicable to an Appellate court or Tribunal in reviewing findings of fact reached by a first instance trial judge. In *Fage UK Limited v Chobani UK Limited* [2014] EWCA Civ 5 at para. 114 Lewison LJ summarised some of the principles concerning the approach of appellate courts and tribunals to findings of fact in the following way:

> "(i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
>
> (ii) The trial is not a dress rehearsal. It is the first and last night of the show.
>
> […]
>
> (iv) In making his decisions the trial judge will have regard to the whole sea of evidence presented to him, whereas an appellate court will only be island hopping".

23. We also refer to *Henderson v Foxworth Investments Limited* [2014] UKSC 41 at para. 62:

> "It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached".

24. See also *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605. This well-known authority summarised many of the principles applicable to challenging reasons of a trial judge based on their claimed inadequacy. Lord Phillips MR said at para. 118 that:

> "An unsuccessful party should not seek to upset a judgment on the ground of inadequacy of reasons unless, despite the advantage of considering the judgment with knowledge of the evidence given and submissions made at the trial, that party is unable to understand why it is that the Judge has reached an adverse decision".

25. These principles are also summarised in the Appendix to *TC (PS compliance - "issues-based" reasoning) Zimbabwe* [2023] UKUT 164 (IAC).

26. Against that background we turn to the grounds of appeal.

No error in relation to *HA (Iraq)*

27. We can deal with the first ground briefly since Mr Terrell realistically accepted that it had little merit. The judgment of Underhill LJ in *HA (Iraq)* was addressing situations where a judge in a deportation appeal is invited by an appellant to conclude that that individual has reformed and has rehabilitated and, therefore, represents a very minimal, if any, risk going forward. In some deportation cases, the only material an individual will seek to rely on in order to make good that contention is the record of having completed some courses in prison, perhaps coupled with the relatively short period of time following the individual's release from custody in which they had not committed any further offences.

28. As Mr Terrell very fairly and realistically accepted, these proceedings are not in that territory. This appellant relied on the wealth of additional material concerning the reasons why he says he does not represent a risk, such that the section 72 presumption had been rebutted. That evidence, of course, included details concerning the alleged conduct of AT in relation to his own personal culpability. That is entirely different territory from that which must be characterised by the caution with which judges should approach findings of prospective future risk, based on different evidence, in deportation appeals, pursuant to the judgment of Underhill LJ in *HA (Iraq)*.

Judge's analysis of 'AT' open to her

29. The second ground of appeal concerns the approach of the judge to the appellant's account of being coerced by AT. In our judgment the central issue in relation to this ground of appeal is whether the judge was entitled to find the appellant to be credible when concluding that he had been coerced into committing those offences by AT.

30. We observe at the outset of our analysis under this ground that Mr Terrell did *not* submit that it was not at least, in principle, open to a judge to reach findings of fact which would, on a superficial analysis, appear to contradict a conviction imposed some years earlier by the criminal courts. He was right not to do so. The analysis of the judge in relation to this issue was reached with the benefit of having considered the medical reports in which the appellant had been recorded as giving a consistent narrative over many years, the account he gave to the author of the OASys Report, and the detailed explanation that he had given to Lisa Davies in the course of his consultations prior to her preparation of her expert report. In our judgment, these were findings of fact which the judge was, in principle, entitled to reach.

31. The question therefore for our consideration is whether the reasons given by the judge were sufficient? Put another way, to adopt the terminology of *Emery Reimbold*, is the party who lost, namely the Secretary of State, unable to understand why it is that the judge has reached an adverse decision?

32. In our judgment it is clear from the reasons given by the judge why she reached her findings in relation to the impact of AT on the appellant's risk profile. The appellant provided a consistent account, on different occasions, to different individuals.

33. The judge's findings concerning the appellant's risk profile were, we observe, consistent with some of the conclusions that were reached by the author of the OASys Report. The author of the report observed that one of the potential future vulnerabilities which may affect this appellant and his risk profile in the future is his vulnerabilities of being "cuckooed" by criminal associates. That is precisely what the appellant had claimed AT had done to him.

34. It was unquestionably open to the judge to reach the conclusions that she did in relation to this issue. While not all judges would have reached that conclusion, we observe that, as the Supreme Court held in *Henderson v Foxworth Investments Limited*, what matters is whether the decision under appeal is one that no reasonable judge could have reached. This judge's decision is not in that territory.

No error in relation to the OASys report

35. That brings us to the third ground of appeal. The issue in relation to this ground is whether the judge misread the OASys Report at para. 30 of her decision. In that paragraph, the judge addressed the report's conclusion that the appellant represented a medium risk of harm, concluding that that assessment was "almost entirely" based upon threats the appellant had made in prison. Mr Terrell submitted that if one reads the OASys Report in its entirety, it is clear that there were a number of factors which led to the report's conclusion, at para. 10.6, that the appellant represented a medium risk of harm to members of the community. It was not solely related to the risk he posed to prisoners; the conduct of the appellant in prison was only one facet of that detailed risk assessment. It was an insufficient reason to conclude, as the judge did at para. 30, that it was attributable entirely to the appellant's prison-based conduct.

36. We can deal with this point relatively swiftly. The crucial point is that the judge did not say that the conclusions of the OASys Report were dealt with *exclusively* based on the appellant's prison-based conduct. Rather she said that they were "*almost* entirely" based on threats made in prison. When one reads the report, it

is clear that there are a number of additional factors going to the appellant's overall risk profile, but, as Mr Allison submitted, those primarily represented the risk that the appellant posed to himself: see para. 10.2, and the risk from violent reprisals from criminal associates. The actual risk posed by this appellant was indeed low. The author of the report found that he represented a low risk of reoffending, but because of the potential for harm were he to reoffend, the broader conclusion in relation to his harm in the community was assessed as being at a medium level. That is entirely consistent with the judge's summary of the report. She noted at para. 31 that he had been assessed as posing "a low risk of reoffending". That was a factually accurate statement of what the report said.

37. We turn to ground 4. By this ground it is submitted that the judge failed to ascribe significance to the OASys Report's treatment of the narrative concerning AT. The report concluded that since AT had not been arrested for any of the alleged offences which the appellant sought to attribute to him, little weight could be ascribed to that aspect of his case of his account.

38. In our judgment the litmus test for whether the judge was entitled to reach these findings of fact was not whether AT was arrested, but whether by reference to the broader evidential landscape of which the judge had the benefit, or as *Fage v Chobani* puts it "the whole sea of evidence", whether she was entitled to reach that conclusion? In our judgment she was. Properly understood this ground of appeal is simply a different facet to those issues dealt with under ground 2.

No error in relation to *Mugwagwa*

39. The final ground of appeal relates to the judges treatment of the *Mugwagwa* decision. We find that the judge did not elevate the operative conclusion in that case to some broader proposition of law. She simply referred to it as being an example of a situation where a low risk of reoffending as found by an OASys Report was a basis to conclude that the section 72 presumption had been rebutted. She did not rely on it in order to purport to establish some broader principle of law. Rather she underlined her own conclusions by saying nothing more than on at least one other occasion the Secretary of State had adopted a similar approach. She was entitled to approach matters in that way.

40. We therefore conclude our analysis by rejecting each of the grounds of appeal raised by the Secretary of State and therefore this appeal is dismissed.

41. Before concluding however it is necessary briefly to address an issue which arose at the hearing in relation to the impact of this decision. Mr Allison referred to the reported decisions of this Tribunal in *Dang* and *Essa (Revocation of protection status appeals)* [2018] UKUT 00244 (IAC), in which the Vice President concluded that an individual who fails to rebut the Secretary of State's presumption is still entitled to the protection of the Refugee Convention save for the protection from refoulement under Article 33(2). It follows that even if this appeal had been allowed and ultimately a judge had found that the appellant had *not* rebutted the section 72 presumption it would not affect his in-country entitlement to be regarded as a refugee for the purposes of the Refugee Convention. However, since that is not the operative issue in these proceedings it is a matter about which we need to say no more.

42. For the above reasons this appeal is dismissed.

Anonymity

43. The First-tier Tribunal made an order for the appellant's anonymity. We maintain that order. The appellant remains a recognised refugee. The Secretary of State accepts that the appellant presently continues to be at risk of Article 3 mistreatment in Iran, and the judge below accepted the appellant's evidence concerning AT. The author of the OASys report also highlighted the appellant's vulnerability to the malign influence of criminal associates. Taken together, these factors make it appropriate to maintain the anonymity order already in force.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

27 July 2023