IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001835

First-tier Tribunal No:
PA/53151/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 13th of September 2024

Before

UPPER TRIBUNAL JUDGE LINDSLEY
UPPER TRIBUNAL JUDGE PINDER

Between

GA
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Iqbal, of Counsel, instructed by BS Solicitors/Briton Solicitors
For the Respondent: Mr Wain, Senior Home Office Presenting Officer

Heard at Field House on 3 September 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

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

DECISION AND REASONS

Introduction

1. The claimant is a citizen of Albania born in 1992. He entered the UK clandestinely in August 2013 in a lorry but was returned to France on the same day. He re-entered successfully in October 2013. On 14 July 2017 he was arrested and on 10 August 2017 he was convicted by the Crown Court of offences relating to the supply of class A drugs, possession of criminal property and false identity documents and was sentenced to four years and four months imprisonment. He was deported at the end of his sentence to Albania on 20 December 2018. The claimant re-entered the UK clandestinely on 13 February 2020 and applied for asylum on 18 February 2020. He raised trafficking grounds, which led to a positive conclusive grounds decision on 7 March 2023. His asylum claim was refused by the Secretary of State in a decision dated 17 May 2023. His appeal against that decision was allowed by First-tier Tribunal Judge Farrall ('the judge') in a determination promulgated on 2 April 2024.

2. Permission to appeal was granted following an application by the Secretary of State and an Upper Tribunal Panel found that the First-tier Tribunal had erred in law for the reasons set out in the decision, which is appended to this decision as Annex A.

3. The matter came before us to remake the appeal. As set out in the decision on error of law, the judge's findings of fact and the decision that the appellant succeeded in his appeal on Article 3 ECHR grounds were preserved. The only matter therefore to be remade is whether or not the appellant is excluded from protection under the Refugee Convention and from Humanitarian Protection by application of s.72 of the Nationality, Immigration and Asylum Act 2002.

Submissions – Remaking

4. It is argued for the respondent that in accordance with Mugwagwa (s.72 – applying statutory presumptions) Zimbabwe [2011] UKUT 338 the Tribunal must apply the statutory presumptions in s. 72 of the 2002 Act of its own motion even if the respondent has not raised the matter. Mr Wain rightly recalled that the respondent had not addressed the issues arising from s.72 in the refusal decision of 17 May 2023 nor in the respondent's (undated) review before the First-tier Tribunal. Mr Wain also confirmed that despite directions being issued by this Tribunal, the respondent had not filed any further evidence in support of her position that the appellant constituted a danger to the community under s.72.

5. Through his oral submissions, Mr Wain emphasised that the appellant had been involved with the supply of cocaine, a class A drug, and as a consequence has a serious criminal record. He has been convicted of a 'particularly serious crime', and thus is to be presumed to constitute a danger to the community of the UK. There was no evidence that he had shown remorse or made efforts to rehabilitate himself and so he should

be found to be a danger to the community of the UK. Mr Wain submitted that the limited evidence provided by the appellant did not assist him since this did not provide any details of what the appellant had done to address his past criminal conduct.

6. Mr Wain lastly noted that the appellant had been placed under the supervision of the probation services and was the subject of licence conditions arising from his prison sentence, following his re-entry into the UK in 2020 in breach of the deportation order. Mr Wain submitted that this was indicative of the appellant remaining a danger to the community since this was also in spite of the appellant being recognised as victim of trafficking. He should therefore be excluded from the Refugee Convention and Humanitarian Protection on the grounds that the appellant has failed to rebut the presumption that he remains a danger to the community and so the appellant's appeal on these grounds must be dismissed.

7. Mr Iqbal, on behalf of the appellant, accepted that the appellant had been convicted of a 'particularly serious crime' - the first limb contained in s.72 - and focused his submissions on the second limb of whether or not the appellant constituted 'a danger to the community'. We briefly note at this juncture that neither Mr Iqbal, nor the appellant, were assisted by the appellant's solicitors in advance of and at the hearing. Firstly, Counsel was instructed to appear before us for an error of law hearing, not having been made aware that the error of law hearing had already taken place on 11 June 2024. The outcome of the error of law hearing had been communicated to the parties at the end of that hearing and the error of law decision was served on the parties on 25 June 2024. In light of Mr Iqbal's initial difficulty, we agreed for him to take some time and seek further instructions. On his return, Mr Iqbal confirmed that he was ready and instructed to proceed with the remaking hearing.

8. In addition, save for a supplementary bundle (without pagination or an index) consisting of various academic and course certificates undertaken by the appellant in prison, no other evidence had been filed on the appellant's behalf in advance of the hearing. We were made aware of, and duly provided with a copy, at the hearing, of an updated witness statement from the appellant but it was not clear when this had been filed, if filed at all. We are grateful to Mr Iqbal, who was also able to assist with retrieving an e-mail from the appellant's probation officer to the appellant's solicitors dated 20 October 2022, as well as a copy of a text message exchange between the appellant and his probation officer on the day of this hearing. Mr Wain did not object to this evidence being admitted, despite its lateness. However, these failures on the part of the appellant's solicitors caused unnecessary confusion and delay in the appellant's hearing and we make it plain to BS Solicitors/Briton Solicitors that if such professional failings repeat themselves that they may face Hamid processes in the Upper Tribunal with potential referral for investigation to the Solicitors Regulation Authority.

9. Returning to the case before us, it is otherwise argued for the appellant that the respondent has simply not addressed her mind in the refusal decision or thereafter to the reasons why the appellant presents a danger to the community. No suitability criteria were raised against the appellant in the decision, nor as we have recorded above was s.72 expressly referred to or addressed in any way in the decision, despite the respondent's knowledge of the appellant's past criminality. Mr Iqbal submitted that this demonstrated that the appellant is not in fact a danger.

10. With regards to the appellant's ability to rebut the presumption that he poses a danger, Mr Iqbal submitted that the probation officer's e-mail of 20 October 2022 speaks for itself. The probation officer confirmed in her e-mail that the appellant had fully complied with his licence conditions, that he has shown a positive attitude and has taken full responsibility for the crime he committed. She also stated that it is her professional assessment that if given permission to remain in the UK, the appellant will continue to be a law-abiding member of the community. She added that the appellant lives with close family members, who support him, and that she is certain that the appellant deserves a chance to prove that he can be a hard working citizen.

11. Mr Iqbal and the appellant confirmed that the appellant has remained on immigration bail, with an electronic tag, for the last three years. The appellant's text exchange on the morning of the hearing with his probation officer also showed the officer's continued support and positive assessment of the appellant. In summary, Mr Iqbal submitted that the appellant had not re-offended and that from the probation officer's assessment, he presented little, if any, risk of re-offending and was fully rehabilitated.

Conclusions – Remaking

12. The respondent is correct that we are obliged to consider the application of s.72 of the 2002 Act, despite this not being expressly invoked by the respondent in the refusal decision or subsequently. This was addressed by the panel at paragraphs 16-21 of the error of law decision in these proceedings.

13. We have reminded ourselves of the guidance from the Court of Appeal in EN (Serbia) v SSHD & Anor [2009] EWCA Civ 630 (per Stanley-Burnton LJ with whom Laws LJ and Hooper LJ agreed), which held that:

> *"45. 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."*

14. We are satisfied that the appellant has shown that he no longer constitutes a danger to the community for the following reasons. The appellant has been back in the UK since February 2020 and he has not re-offended. The probation officer's assessment of the appellant is very

positive and whilst dated in October 2022, the appellant has shown through his text message exchange with the officer on the day of the hearing that he continues to have her support. We find that such support would not be likely had the appellant not complied with the probation officer's expectations at the time of his licence conditions and subsequent discharge and had the appellant not continued to be a law-abiding person.

15. We have considered very carefully Mr Wain's submission that the appellant has not otherwise been able to show that he undertook activities or conducted himself in a way that demonstrates that he is fully rehabilitated. However, we bear in mind the appellant's written evidence at paragraph 9 of his statement dated 15 May 2024 that he has tried to do some voluntary work in order to engage in everyday life, but the appellant has not been permitted to do so as he has no right to work in the UK and still wears an electronic tag. We accept that the appellant is likely to have encountered such difficulties in light of his immigration status not being confirmed pending these proceedings.

16. We have also considered whether or not the appellant's lack of re-offending to date has been as a result of his continued immigration bail conditions and whether the risk of re-offending is likely to increase once those conditions are removed. There is no suggestion of this being the case from the appellant's probation officer and as addressed above, the officer's continued support of the appellant as at the date of this hearing is a credit to him. We also note the appellant's written evidence and the probation officer's reference to the appellant benefiting from the continued support of his close family members in the UK.

17. There is no evidence from the respondent before us to counter the contents of the appellant's probation evidence. The appellant has therefore in our judgment provided sufficient evidence to discharge the burden of proof that rests upon him. The Appellant has successfully rebutted the presumption under s.72(2) of the 2002 Act and we find that he does not constitute a danger to the community. Thus, the Appellant does not fall to be excluded from international protection under the Refugee Convention.

Decision:

18. Following from the preserved findings of Judge Farrall in the First-tier Tribunal, we re-make the appellant's appeal and allow it on Refugee Convention protection grounds as well as the preserved human rights grounds.

Sarah Pinder
Judge of the Upper Tribunal
Immigration and Asylum Chamber

4th September 2024

Annex A: Error of Law Decision

DECISION AND REASONS

Introduction

1. The claimant is a citizen of Albania born in 1992. He entered the UK clandestinely in August 2013 in a lorry but was returned to France on the same day. He re-entered successfully in October 2013. On 14 July 2017 he was arrested and on 10 August 2017 he was convicted by the Crown Court of offences relating to the supply class A drugs, possession of criminal property and false identity documents and was sentenced to four years and four months imprisonment. He was deported at the end of his sentence to Albania on 20 December 2018. The claimant re-entered the UK clandestinely on 13 February 2020 and applied for asylum on 18th February 2020. He raised trafficking grounds which led to a positive conclusive grounds decision on 7 March 2023. His asylum claim was refused by the Secretary of State in a decision dated 17 May 2023. His appeal against that decision was allowed by First-tier Tribunal Judge Farrall ('the judge') in a determination promulgated on the 2 April 2024.

2. Permission to appeal was granted by Judge of the First-tier Tribunal Saffer on 26 April 2024 on the basis that it was arguable that the First-tier judge had erred in law in failing to consider whether the claimant was excluded from protection under the 1951 Convention due to the four year prison sentence he received in 2017. All grounds were permitted to be argued.

3. The matter came before us to determine whether the First-tier Tribunal had erred in law, and if so whether any such error is material and whether the decision should be set aside.

Submissions – Error of Law

4. In the grounds of appeal and in submissions from Mr Melvin it is argued for the Secretary of State, in short summary, as follows. Firstly it is contended that the First-tier Tribunal failed to give adequate reasons on material matters and made a material misdirection of law in relation to whether the claimant would be at risk on return to Albania and whether he is part of a particular social group. The CPIN states that men who are trafficked not for sexual exploitation are unlikely to form part of a particular social group, and the First-tier Tribunal has failed to reason how the claimant would be distinctly identifiable in society and why he would be persecuted for reason of his membership of this group. It is also not explained in the decision why he would be of any future interest for those who trafficked him given he escaped and neither he nor his family have received any contact or harassment from those who forced him into labour, and it is argued that those who trafficked him were not part of a criminal gang. It is not explained why he could not seek

protection from the police given that generally there is sufficiency of protection; and it is not explained at paragraph 28 of the decision why the general circumstances mean that it would be unduly harsh for him to relocate internally. The claimant has no physical or mental health conditions and has family who might assist him in Albania.

5. Secondly, it is argued that the First-tier Tribunal failed to take into account and to resolve a matter of fact on a material matter. There is an extant deportation order in relation to the claimant and a s.72 notice was served on him as part of the asylum decision. Under Mugwagwa (s.72 – applying statutory presumptions) Zimbabwe [2011] UKUT 338 the Tribunal must apply the statutory presumptions in s. 72 of the Nationality, Immigration and Asylum Act 2002 of its own motion. The criminality was clear from the skeleton arguments before the First-tier Tribunal. The claimant had been involved with the supply of cocaine, a class A drug, and had a serious criminal record. He has been convicted of a particularly serious crime, and thus is to be presumed to constitute a danger to the community of the UK. There was no evidence that he had shown remorse of made efforts to rehabilitate himself.

6. In a Rule 24 response and in oral submissions from Mr Miah it is argued for the claimant, in short summary, as follows. It is argued that the first ground is merely a disagreement with the conclusions of the First-tier Tribunal Judge. The judge has properly considered the applicable test for membership of a social group at paragraphs [15]to [20] of the decision. The Secretary of State has accepted that he is a victim of trafficking, and it was open to the First-tier Tribunal that in circumstances where it is accepted the claimant escaped from his traffickers he remains at risk from them. The First-tier Tribunal makes findings on sufficiency of protection and internal relocation considering the country of origin evidence and case specific factors, such as the claimant being vulnerable.

7. In respect of the second ground it is argued that the case of Mugwagwa does not require the First-tier Tribunal to consider s.72 of its own volition when this is not an issue raised by the Secretary of State, and instead provides guidance where the First-tier Tribunal does consider it and an appellant is unrepresented. In this case the Secretary of State did not rely upon s.72 at any point in the refusal or in the appeal before the First-tier Tribunal. In any case even if a s.72 certificate were upheld the claimant would still be entitled to succeed on Article 3 ECHR grounds.

Conclusions – Error of Law

Ground 1

8. We find that ground 1 of the grounds of appeal does not identify an error of law in the findings of the First-tier Tribunal that the claimant is a member of a particular social group. The test, as set out by the judge at paragraph [18] of the decision, simply requires a common background factor that cannot be changed and not, in addition, something that

would be recognised as different in Albania. Although it was argued by the respondent that the judge had failed to reason how the claimant would be distinctly identifiable within society, as the judge identified at [18], the claimant's asylum claim was made in February 2020, prior to the Nationality and Borders Act 2022. It was open to the judge, to find as he did, that the claimant had to establish, either that he had an innate characteristic or that the group had a distinct identity in Albania. It was open therefore to the First-tier Tribunal to find that the claimant as a trafficked man, such not being in dispute, had an immutable characteristic, as is accepted in the Country Policy and Information Note: human trafficking, Albania, February 2023 (CPIN) extract cited at paragraph [17] of the decision.

9. It was argued in the respondent's grounds that the judge had failed to take into account the claimant's evidence that following his escape, neither he nor his family had experienced any contact or harassment from those who had forced him into labour. This implied that there was no longer any interest in the claimant, which it was argued the judge had failed to address in their finding that the claimant would be at risk on return to his home area or if he internally relocated.

10. Whilst the judge's findings on risk on return are brief, they are adequate, the judge taking into account, at paragraph [16], the claimant's accepted history of trafficking and torture and the fact that the claimant only escaped the criminal gang by leaving the country. Whilst the respondent asserted that the judge had failed to consider that the claimant's escape had taken place 'without significant hindrance', it was open to the judge to find that the risk to the claimant was not undermined by the fact that he spent time at his uncle's home and his mother's home without incident.

11. The judge at (the second) paragraph [15] properly remined himself that Rule 339K of the Immigration Rules provides that the fact a person has been subject to past persecution or serious harm or direct threats of such persecution or harm, will be regarded as a serous indication of the person's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated. Read holistically, it was open to the judge to find as they did at paragraph [16] that the claimant would, as a previous victim of trafficking, be vulnerable on return to his home area from criminal gangs.

12. Although Ground 1 further argued that the judge failed to consider all the evidence including that the claimant's evidence did not establish that he actually sought police protection or that such would not be available, the judge provides adequate reasoning from their (second) paragraphs [17] to [23]. The judge, who considered this in the context that the claimant was an accepted victim of trafficking, having considered the CPIN Albania: Actors of Protection, December 2022 and CPIN: Human Trafficking Albania 2023, was satisfied that the claimant's account was consistent with the background country information in relation to the effectiveness of the police; with the judge being satisfied

that it was credible that the claimant would not seek out the protection of the police against harm from the gangs.

13. It was open to the judge to find as he did, to the lower standard, that on the available evidence the claimant, who was not protected by the police on the previous occasion, would be at risk of serious harm on return to his home area and that there was no sufficiency of protection available.

14. Similarly, the judge adequately addressed internal relocation from paragraphs [24] to [35], with the judge finding that the traffickers would be motivated to trace the claimant, both to seek retribution for the claimant leaving and for financial gain. The judge took into consideration the background country information in relation to the difficulty/impossibility of living anonymously in Albania, with the judge finding that the risk extended beyond the claimant's home area. The judge went on to make alternative findings that relocation would be unduly harsh, bearing in mind the claimant's vulnerability as a victim of trafficking and the heightened difficulties if he were to separate from his family in an effort to avoid recapture. In so finding, it was open to the judge to attach weight to the background country information including that the system of compulsory registration in Albania would increase his vulnerability to the criminal traffickers. However, if he did not register the judge was satisfied that it would be extremely difficult for the claimant to access basic needs, such as housing and medical care.

15. Those were findings properly open to the judge. No error of law is made out in Ground 1.

Ground 2

16. With respect to the second ground, we note that the section 72 certificate was not identified as an issue to be decided at paragraph [6] of the decision and does not form part of the legal framework at paragraph [14] of the decision. The decision under challenge did not raise the issue either, and there is no evidence that there were submissions for the Secretary of State on this matter. Mr Melvin conceded that the First-tier Tribunal was not assisted by the respondent.

17. However we have applied the relevant jurisprudence: the Court of Appeal in Secretary of State for the Home Department v TB (Jamaica) [2008] EWCA Civ 977 found that where the Secretary of State issues a certificate under Section 72(9)(b) of the Nationality, Immigration and Asylum Act 2002 (the Act), that the presumptions under sub-section 72(2) and (4) of that Act apply to an appellant's claim, then section 72(10) provides that the Tribunal must begin its "substantive deliberation on the appeal by considering the certificate."

18. The appellant is subject to a Deportation Order and we accept that the appellant was served with a section 72 notice as part of the asylum process. The First-tier Tribunal was required to decide whether the appellant was entitled to protection under the Refugee Convention.

19. The Court of Appeal in AQ (Somalia) v Secretary of State for the Home Department [2011] EWCA Civ 695 confirmed that the section 72 presumption applied regardless of whether the Secretary of State had issued a certificate and that the Court of Appeal's conclusions in TB (Jamaica) were correct. Section 72(9) and (10) provided a self-contained procedural code which reversed the normal course of an appeal in cases where a certificate was issued. The Secretary of State was not under any obligation to issue a certificate in order for the presumption to take effect. The certificate had the limited procedural effect of requiring the Tribunal first to address the certificate and any issue as to the rebuttal of the presumption. An appellant could rebut the presumptions of both dangerousness and criminality.

20. In Mugwagwa (s.72 – applying statutory presumptions) Zimbabwe [2011] UKUT 00338 (IAC) the Tribunal held that the First-tier Tribunal is required to apply of its own motion the statutory presumptions in section 72 that Art 33(2) of the Refugee Convention will not prevent refoulement of a refugee where the factual underpinning for the application of section 72 is present even if the Secretary of State has not relied upon Art 33(2) and section 72. Mugwagwa confirmed that the Secretary of State is entitled to take the point before the Upper Tribunal. Similarly, the Court of Appeal in MS (Somalia) [2019] EWCA Civ 1345 reiterated that it was an error of law for a decision maker to fail to apply the statutory presumption, even if a certificate had not been issued.

21. As we indicated at the end of the hearing, Ground 2 does therefore disclose an error of law, although we make no criticism of the judge of the First-tier Tribunal who was not assisted by the Secretary of State who only raised this issue in the grounds for permission to appeal to the Upper Tribunal. However that does not obviate the requirement for the decision maker to apply section 72. We agreed with Mr Miah, where the appellant had not previously had an opportunity to address the section 72 argument, the decision should be remade following an adjourned hearing, at the first available date before the Upper Tribunal. No interpreter is required.

22. We preserve the judge's findings of fact, with the proviso that should the section 72 presumptions not be rebutted, the positive findings on asylum and humanitarian protection will necessarily fall away. Given the judge's findings of fact and our conclusions that there is no error of law in those findings of fact (contrary to the arguments in Ground 1) the appellant's appeal succeeds under Article 3 ECHR.

Decision:

19. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

20. We set aside the decision of the First-tier Tribunal allowing the appeal on asylum or humanitarian protection grounds, but preserve the

findings of fact and the decision allowing the appeal on Human Rights, Article 3 Grounds.

21. We adjourn the remaking of the decision.

Directions:

1. The Upper Tribunal shall, at a resumed hearing, determine whether the appellant has rebutted the presumption that he constitutes a danger to the community (section 72 of the 2002 Act (as amended)).

2. The parties may adduce new evidence provided that documentary evidence (including witness statements) are electronically filed with the Upper Tribunal and served on the other party no less than 10 days prior to the resumed hearing.

M M Hutchinson
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

12 June 2024