IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000115

First-tier Tribunal No: PA/00416/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 27th of September 2024

Before

UPPER TRIBUNAL JUDGE O'BRIEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OB
(ANONYMITY ORDER IN FORCE)

Respondent

Representation:
For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer
For the Respondent: Mr S Tawiah of Counsel

Heard at Field House on 9 August 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

1. For the sake of convenience, I refer to the parties below as they were known in the First-tier Tribunal.

2. The respondent appeals against the decision of First-tier Tribunal Judge Robinson and First-tier Tribunal Judge Hughes ('the judges') who, in a decision

and reasons promulgated on 23 November 2023, allowed the appellant's appeal against the respondent's decision to refuse his protection and human rights claim.

3. Permission to appeal was granted by First-tier Tribunal Judge Boyes on 28 December 2023 on both pleaded grounds, namely that the judges:

   a. Failed to consider whether the presumption prescribed in s72 of the Nationality, Immigration and Asylum Act 2002 applied to the appellant in light of his convictions overseas (which, whilst not raised before the judges by the respondent, was said to be a Robinson obvious point);

   b. Failed to give adequate reasons for concluding that there was insufficiency of protection and/or reached an irrational conclusion on that point.

4. The appellant did not submit a rule 24 response; however, Ms Isherwood did confirm that the appeal was opposed on the basis that it was clear from the reasons that the judges' decision did not involve the making of an error on a point of law.

The Decision

5. The judges found that there would be a real risk to the appellant's life on return to St Kitts and Nevis from other gang members [31] and that he would not have sufficiency of protection [31-33]. It had been conceded by the respondent that any risk could not be addressed by internal relocation [10]. Consequently, the judges allowed his appeal on asylum grounds and under Articles 2 and 3 ECHR [33].

6. Ground 1, if made out, goes only to the judges' decision under the Refugee Convention whereas success on ground 2 would require the entire decision to be set aside.

Submissions

7. Ms Isherwood submitted that the s72 presumption unarguably applied to the appellant in light of his admitted overseas convictions, that the judges had failed to consider (which they should have done irrespective of whether the matter was raised by the respondent) whether the appellant had rebutted that presumption, and so they had thereby erred in law. She further submitted that, if they had addressed their minds to it, the judges would probably (or at least, realistically, possibly) have concluded that the appellant had failed to rebut the presumption, thus precluding them from considering the appeal on asylum grounds. Ms Isherwood submitted that the s72 issue was a Robinson obvious point (see R (ex p Robinson) v SSHD [1997] EWCA Civ 3090) requiring the judges' attention notwithstanding that the parties had failed to put it expressly in issue (per para 28 of Lata (FtT: principal controversial issues) [2023] UKUT 00163 (IAC)).

8. As to ground 2, Ms Isherwood submitted that the judges had no rational basis for concluding that the appellant would not have sufficiency of protection. The letters relied upon had been addressed to the appellant's solicitors and not the Tribunal, and did not set out what they had been asked to comment on. They did not expressly deal with sufficiency of protection. The expert report did not comply

with the Practice Direction in several material respects, and it was not reasonably open to the judges to place weight on the report. The judges had not considered the relevant Country Policy and Information Note at all.

9. Mr Tawiah dealt first with ground 2. The judges reached their conclusion on sufficiency of protection having taken all of the evidence into account. The respondent had not at the hearing made the criticisms of the expert report which were now being made. The judges cannot be criticised for failing to address arguments not put to them and were unarguably entitled to give weight to the report. The judges' conclusion on sufficiency of protection was rationally open to them.

10. As for ground 1, Mr Tawiah accepted that the judges should have considered the application of s72 of the 2002 Act. However, he submitted that the respondent had not argued that the appellant was in fact a danger to the community of the United Kingdom and could be taken to have accepted that he was not. Had the respondent advanced a case to the contrary, the appellant would have dealt with it expressly in his own evidence and submissions. The judges had in any event accepted that the appellant was prima facie at risk because of his involvement in the Peace Programme and the evidence pointed clearly to the appellant being a force for good and having put his criminality behind him. It was inevitable that, had the judges considered s72 and had they accepted that the presumption applied, they would also have concluded that the presumption had been rebutted.

Conclusions

11. Section 72 of the Nationality, Immigration and Asylum Act 2002 ('Serious Criminal'), as saved for convictions predating the entry into force of s38 of the Nationality and Borders Act 2022, provides:

> (1) This section applies for the purpose of the construction and application of Article 33(2) of the Refugee Convention (exclusion from prohibition of expulsion or return).
> …
> (3) A person is convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if—
> (a) he is convicted outside the United Kingdom of an offence,
> (b) he is sentenced to a period of imprisonment of at least two years, and
> (c) he could have been sentenced to a period of imprisonment of at least two years had his conviction been a conviction in the United Kingdom of a similar offence.
> …
> (6) A presumption under subsection (2), (3) or (4) that a person constitutes a danger to the community is rebuttable by that person.
> …
> (9) Subsection (10) applies where—
> (a) a person appeals under section 82 of this Act…wholly or partly on the ground mentioned in section 84(1)(a) or (3)(a) of this Act (breach of the United Kingdom's obligations under the Refugee Convention), and
> (b) the Secretary of State issues a certificate that presumptions under subsections (2), (3) or (4) apply to the person (subject to rebuttal).
> (10) The Tribunal or Commission hearing the appeal—

> (a) must begin substantive deliberation on the appeal by considering the certificate, and
> (b) if in agreement that presumptions under subsections (2), (3) or (4) apply (having given the appellant an opportunity for rebuttal) must dismiss the appeal in so far as it relies on the ground specified in subsection (9)(a).
> …

12. As made clear in SSHD v MS (Somalia) [2019] EWCA Civ 1345, '…once the facts giving rise to the statutory presumption have been established, it would be an error of law for the relevant decision maker to fail to apply the presumption, irrespective of whether a certificate had been issued.'

13. It is not in issue that the respondent's decision letter records the following when dealing with the appellant's Article 8 rights, under the heading 'Consideration of Suitability':

> 'You admit on one of the shootings, you were found guilty and received a 19-year prison sentence, which went to appeal, and it was reduced to 5 years (AIR 134).'

14. That admission can be found in the appellant's asylum interview. In answer to question 134 ('What sort of offences were you accused of?'), the appellant is recorded as having responded:

> 'I was accused of murder, found not guilty, shooting, found not guilty, accused of another shooting, and I was found guilty for that case and received 19 years in prison, went to appeal and I got a five year sentence which was 3 years. I was accused of gang fights, but all the rest I was found not guilty.'

15. Consequently, the judges had before them uncontentious evidence that the appellant satisfied ss72(3). Mr Tawaih properly accepted that the judges should have addressed their minds to s72 and it is clear that they did not. Certainly, if they did, their reasons give no conclusions on the issue. Either way, they erred in law.

16. Nevertheless, Mr Tawaih submits that, had the issue been taken at the hearing, the judges would have been taken to the evidence of the appellant's having turned away from violence and instead to assisting the authorities (accepted by the judges as the basis on which the appellant would be at risk on return) and accepted that any presumption of being a danger to the community of the United Kingdom had been rebutted. There are two problems with this argument.

17. First, as made clear in [31], the judges accepted the appellant's account only to the lower standard of proof, whereas they would have to be satisfied on the balance of probabilities that the s72 presumption had been rebutted. Second, whilst they may have been able to infer from the applicant's involvement in the St Kitts and Nevis Peace Initiative that he was no longer a danger to the community of the United Kingdom it cannot be said that they inevitably would have done. Neither is it inevitable that they would have been satisfied on the issue on the balance of probabilities if they had also taken into account Mr Adams's comment that 'From 2018 to present [the appellant] has been in close contact with me and has been living as a regular law abiding citizen', especially

given that the appellant has been in the United Kingdom since 25 February 2022. As for the appellant's own evidence, insofar as it deals with the risk he poses to the community of the United Kingdom, he did not attend to be cross-examined. All in all, I am unable to find that the judges 'must have reached the same conclusion without the error' (IA (Somalia) v SSHD [2007] EWCA Civ 323 at para 15).

18. For these reasons, ground 1 succeeds and the decision that the appeal succeeded on s84(1)(a) (Refugee Convention) grounds must be set aside.

19. Turning to ground 2, the basis on which the judges concluded that the appellant would not have sufficiency of protection is set out principally in [32]. They refer in particular to what is said (or rather not said) by Mr Adams and Mr Wilkins in their letters, and to the comments of the expert, Mr Nital, regarding the weakness of the major law enforcement unit in St Kitts and Nevis. The judges also refer to the response dated 30 August 2023 to an information request by the respondent, which they observe is neutral on risks and protection available to a person in the Appellant's particular circumstances returning to St Kitts and Nevis, and whilst positive regarding the 'Peace initiative' and steps taken by the police to address a surge in violent crime, provides no information on the effectiveness of the police or the treatment of returned former gang members. They also note that a 2021 source referred to in that response stated that 'victim and witness protection is minimal'. Any suggestion therefore that the judges failed to consider the information request response is insupportable.

20. Ms Isherwood makes fair criticism of the expert report's failure to comply with the applicable practice direction. However, the judges also noted the report's shortcomings at [26-27] but nevertheless gave adequate reasons for giving it weight. It was rationally open to them to do so. It was also rationally open to the judges to give weight to the letters of Mr Adams and Mr Wilkins.

21. Mr Adams was at the time of writing his letter Assistant Commissioner of Police in the Operations Directorate. He says in his penultimate paragraph, 'If [the appellant] was [sic] to return to the Federation, it is more than likely that he would be killed.' It was not irrational for the judges to reason that, if Mr Adams believed his organisation could offer sufficient protection to the appellant, he would have said so.

22. Faced with that striking omission, and the information request response's quotation from the Global Organised Crime Index 2021 that, 'Victim and witness protection in St. Kitts and Nevis is minimal, although these are both considered essential due to the relatively high number of murders of witnesses', it was rationally open to the judges to conclude that the appellant would not have sufficiency of protection irrespective of what the expert or Mr Wilkins said. I note that neither said anything to suggest that there would be sufficiency of protection. Furthermore, the judges gave clear, sufficient reasons for their conclusion.

23. For those reasons, ground 2 fails.

Disposal

24. As discussed at the outset of the hearing, ground 2 having failed, the decision on s84(1)(c) (Article 3 ECHR) grounds involved no error of law and must stand.

Indeed, the only basis upon which the decision on s84(1)(a) grounds is set aside is that the judges failed to consider whether the appeal on those grounds had to be dismissed pursuant to s72(10). Given that the issue was not raised in either the decision letter or at the hearing, I consider that it would be not be inappropriate for the judges to consider now that point but rather that they would be the best placed to do so.

25. Consequently, I preserve all findings of fact and remit the appeal on s84(1)(a) grounds (only) to an identically constituted First-tier Tribunal (unless to so arrange would not be reasonably practicable) to consider only whether the appellant can rebut the s72(3) presumption. The extent to which further evidence (on that point only) is necessary is a matter for that Tribunal.

Anonymity

26. I maintain the anonymity order made by the First-tier Tribunal.

Notice of Decision

1. The judges' decision on the appeal on s84(1)(c) grounds did not involve the making of an error of law, and to that extent the appeal is dismissed.
2. The judges' decision on the appeal on s84(1)(a) grounds did involve the making of an error of law, and to that extent the appeal is allowed.
3. The appeal is remitted to the First-tier Tribunal to be dealt with by the same judges (unless not reasonably practicable) with all findings of fact preserved to consider only whether the presumption in s72(3) of the Nationality, Immigration and Asylum Act 2002 can be rebutted by the appellant.

Sean O'Brien

Judge of the Upper Tribunal
Immigration and Asylum Chamber

25 September 2024