Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00016/2019

THE IMMIGRATION ACTS

Heard at Field House via *Skype*	**Decision & Reasons Promulgated**
On 31 July 2020	**On 9 October 2020**

Before

UPPER TRIBUNAL JUDGE PERKINS
UPPER TRIBUNAL JUDGE BLUNDELL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

CD (TURKEY)
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant:	Mr T Lindsay, Senior Presenting Officer
For the Respondent:	Ms A Radford of counsel, instructed by Turpin & Miller LLP (Oxford) Solicitors

DECISION AND REASONS

Introduction

1. On 19 May 2020, we issued a decision in which we allowed, in part, the Secretary of State's appeal against the First-tier Tribunal's decision to allow CD's appeal against the revocation of his protection status. That decision is appended to this one subject to correcting an obvious error that Ms Radford drew to our attention at the resumed hearing.

2. In order to avoid confusion, we intend to refer to CD as the appellant and the Secretary of State as the respondent throughout this decision.

3. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 we make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant or his family. Breach of this order can be punished as a contempt of court. We make this order because the appellant is an asylum seeker and so entitled to anonymity.

4. In our earlier decision, we concluded, firstly, that the Ft-T had *not* erred in law in deciding that the circumstances in connection with which the appellant had been recognised as a refugee had not ceased to exist. We concluded that the Ft-T's decision to allow the appeal against the Secretary of State's cessation of his refugee status had accordingly been properly open to it, as had the decision to allow the appeal under Articles 2 and 3 of the European Convention on Human Rights.

5. We decided, secondly, that the Ft-T *had* erred in law in reaching the conclusion that the appellant was a refugee who continued to be protected from refoulement by Article 33(1) of the Refugee Convention. We concluded that the Ft-T had erred in its assessment of one of the two questions posed by Article 33(2) of the Refugee Convention and s72 of the Nationality, Immigration and Asylum Act 2002; namely, whether the appellant had rebutted the statutory presumption that he represented a danger to the community of the United Kingdom. We ordered that the latter aspect of the decision would be remade in the Upper Tribunal. This decision follows a further hearing which was convened for that purpose.

6. As a result of our decision to uphold and to preserve the Ft-T's conscientious assessment of the ongoing risk to the appellant in Turkey, he cannot (subject to any further proceedings) be removed there. That course is prohibited by the United Kingdom's obligations under the ECHR. The decision that we make in respect of the application of Article 33(2) is nevertheless significant, for the following reasons.

7. A deportation order has been made against the appellant and the Indefinite Leave to Remain ("ILR") which he hitherto enjoyed has been invalidated by operation of statute. In the event that we conclude that he has rebutted the statutory presumptions in s72 of the 2002 Act, and that he is therefore a refugee to whom the United Kingdom owes the obligation of non-refoulement, he will be granted a five-year residence permit under paragraph 339Q of the Immigration Rules. In that event, he would be entitled to apply for Indefinite Leave after holding leave in that capacity for five years, under paragraph 339R.

8. Alternatively, in the event that we conclude that the appellant must not benefit from the protection against refoulement in the Refugee Convention, any residence permit granted to him under paragraph 339Q would not be for five years. Instead, he would be granted Restricted Leave by the Secretary of State. The Restricted Leave regime was recently analysed in detail (by Nicol J and UTJ Stephen Smith) in R (MBT) v SSHD [2019] UKUT 414 (IAC); [2020] Imm AR 615. As the Upper Tribunal explained, a recipient of Restricted Leave is 'subject to regular and renewed grants of short periods of limited leave to remain, in a

process which can continue for many years.': [2]. That stated intention behind the policy is to ensure that the individual can be removed at the earliest possible opportunity. In the event that Article 3 ECHR continued to preclude that course, it is quite likely that the appellant would not be eligible for Indefinite Leave to Remain for thirty years.

Background

9. The appellant is a Turkish national who was born on 3 January 1968. He entered the United Kingdom and claimed asylum in 1995, aged 27. His asylum claim was refused but he was granted four years' Exceptional Leave to Remain ("ELR") in August 2000.

10. On 5 April 2002, the appellant's home was searched by the police for material relevant to an overseas investigation[1]. He had fallen under suspicion of drug trafficking in Holland. He was arrested for being in possession of a self-loading pistol and six rounds of ammunition which were in the magazine. In November that year he was convicted of possessing those items without a certificate and sentenced to four years' imprisonment. The Secretary of State initiated deportation proceedings as a result of that conviction. The appellant resisted deportation on protection and human rights grounds.

11. On 2 March 2006, the appellant's appeal against the deportation order was allowed by Immigration Judge Haynes, who found that he would be at risk on return to Turkey as a result of his extensive connections to Kurdish separatism, his draft evasion, his convictions in the UK, and the fact that he had been the subject of a Dutch extradition request for drug offences. That conclusion was upheld by a panel of the Asylum and Immigration Tribunal chaired by Senior Immigration Judge Lane (as he then was) on 14 July 2006 and, on 30 October 2006, he was granted ILR as a refugee.

12. The appellant subsequently fell under suspicion, again, of being involved in the international drugs trade. A listening device was installed at his home in Finchley and evidence was gathered to show that he was the head of a massive, nationwide operation, importing drugs from all over the world for distribution to a broad customer base across the country. He was arrested in July 2008 and was subsequently convicted – along with two more junior members of the operation – of offences relating to the importation and supply of heroin. In sentencing him, HHJ Ainley noted that he was a 'very major player in the heroin trade in this country' and he was 'at the top of this heroin importing and heroin wholesaling criminal business'. The amounts of heroin were described by the judge as follows:

> The specific counts of the indictment are: keeping 41 kilogrammes of heroin at Brownlow Road, importing 64 kilogrammes of heroin. Conspiring to supply 9.81 kilogrammes of heroin almost seems minor compared to those, yet in any other context it would be a very serious crime indeed.

[1] The respondent's letter of 19 May 2004 refers, at P1-P2 of her bundle.

13. The appellant was given credit for his somewhat belated guilty plea and HHJ Ainley reduced the total sentence from 25 years' imprisonment to 18. He was made the subject of a substantial confiscation order, with a sentence of 5 years' imprisonment in default of payment. HHJ Ainley also imposed a Serious Crime Prevention Order ("SCPO"), restricting the appellant's activities for five years after his release. A confiscation order in the sum of £1.3 million was made under the Proceeds of Crime Act 2002 by Croydon Crown Court in 2011. At Westminster Magistrates' Court the appellant was committed to prison for a further five years in default of payment in 2012.

14. The appellant's offending caused the respondent to initiate deportation action for a second time. Having sought his representations, and having consulted with the United Nations High Commissioner for Refugees over the cessation of his refugee status, she made a deportation decision against him on 26 February 2019. A letter of the same date explained the reasons that the respondent had decided to cease the appellant's refugee status and to deport him to Turkey.

15. The appellant appealed and, as we have noted, his appeal to the First-tier Tribunal was allowed on protection and human rights grounds (Articles 2 and 3 ECHR). The respondent sought and was granted permission to appeal against that decision and the appeal to the Upper Tribunal took the course we have described at the start of this decision.

Preliminary Matters

16. At the outset of the hearing, we asked Ms Radford about the confiscation order which had been made in the criminal courts. We had stated in our first decision that we were particularly concerned about the effect of that order, if any, on the assessment we were to perform in respect of the appellant's danger to the community.

17. Mr Radford stated that a confiscation order had been made, the appellant had been unable to pay it, and that he had served five years in prison in default of payment. The appellant had been unable to obtain any documents at all in relation to the confiscation proceedings and all she was able to do was to ask the appellant himself. Ms Radford offered to take further instructions and to research the relevant provisions under which the initial order had been made and the additional term of imprisonment ordered in default.

18. We also asked Ms Radford to draw to our attention the evidential basis upon which it was to be submitted that the appellant had reformed and was able to rebut the presumption of dangerousness in s72. She took us to the OASys report which had been prepared in February, which indicated that the appellant posed a low risk of re-offending, and submitted that this was to form the bedrock of her submissions in this regard.

19. Upon resuming the hearing, Ms Radford referred us to the confiscation scheme in Part 2 of the Proceeds of Crime Act 2002, particularly at s6-13B, and to s35, which applies the relevant parts of the Sentencing Act 2000 and specifies the maximum term of imprisonment which is to be served in default of payment of

given sums. Ms Radford's instructions were that a confiscation order in the sum of £1.3 million had been made by the Crown Court. A term of five years' imprisonment had been fixed in the event of non-payment and that had been enforced by the Magistrates' Court in 2012. She did not seek an adjournment and invited us to proceed on the basis of the evidence before us.

Evidence Before the Upper Tribunal

20. The Secretary of State did not file or serve any additional evidence in preparation for the resumed hearing before us. She relied on the bundle she had prepared for the hearing before the Ft-T, comprising the decision under appeal and the documents to which she referred within that letter. The appellant's solicitors filed and served an updated bundle of 114 pages. We also received a helpful skeleton argument from Ms Radford, who has represented the appellant throughout this appeal.

21. We heard oral evidence from the appellant, his son and his partner. Their evidence was given in English over the Skype link. Each witness was in a different location. Mr Lindsay voiced no objection to each remaining in the Skype 'meeting' whilst the other gave evidence. This was a proper and realistic stance for him to adopt, given the absence of any real overlap in the subject matter of their oral evidence. We should record that the Skype link worked very well throughout the hearing, with no concerns expressed by the representatives at any stage.

The Appellant's Evidence

22. The appellant adopted the statement he had prepared for the hearing. In that statement, he explained that he had been granted bail and released from prison on 22 January 2020. He had attended all Probation and Home Office meetings and made himself available for home visits and virtual appointments during the pandemic. He had complied with the requirements of the SCPO. Two friends, TC and MT had been his Financial Condition Supporters at the bail hearing. He had been provided with long-term accommodation, free of charge, by MT. He had also been assisted by MT to settle into the area in which he was now living. He would have started a job which had been arranged for him by MT but he was not permitted to work. TC had also assisted him financially and emotionally since his release. It had been difficult, particularly during lockdown, but he had kept active. He had seen his two children, who are adults with British citizenship, although much of their contact had been "virtual" due to the pandemic. He had learned a variety of skills when he was in prison and he intended to become financially independent so that he could give something back to society. He also wanted to undertake voluntary work, as he had in prison.

23. Examined by Ms Radford, the appellant stated that he had been given six months to pay the confiscation order which was imposed by the trial judge but he had not had the means to pay it. The judge had used the benefit figure, not his recoverable assets, which were less than £30,000. He was not able to pay the sum now. He had had some money in the bank and some in his house and he had paid that but that was all that he had. Ms Radford noted that the OASys report

had attached some significance to the appellant's children in considering the risk of him reoffending but that this had also been said in the 2006 OASys report. The appellant stated that he had said the same thing in the first report but that this was different. He had been released without any support in 2006 and he had fallen in with the wrong people. He had not known how to say no. Now, he was older and his children had grown up. He did not know whether they would forgive him for what he had done. He had not seen them physically because of Coronavirus and it was hard for him to ask for forgiveness over the phone. He had a support network and he was wiser. He had learned skills in prison, and he had an industrial cleaning qualification, and certificates in cooking and cleaning. He had communication skills and listening skills, having helped hardcore criminals who were nevertheless vulnerable in prison. He had taken a lot from society but he wanted to give a lot back. His release in 2006 had been after he had served his full sentence; not on licence.

24. Cross-examined by Mr Lindsay, the appellant stated that it was correct to note that he had been in charge of the organisation but he had been in the company of the wrong people. He had caused many problems in the community and in his family by what he had done and he had tried to learn from that. Things were different from how they had been in 2006, when he had been released without supervision from probation; he felt he had been abandoned at the end of his sentence. Now he had a support group and it was completely different. There were people who supported him financially and he knew that he should not repeat the mistakes he had made in the past. As to the size of the confiscation order, Judge Ainley had been upset with the prosecution when he imposed an order in the sum of £1.3 million. The burden had been on the appellant to show that he had no money. He had been in prison for years and then he was required to serve a further five years in default of payment. He had not gained any money from his crimes. He had made a choice to be a good citizen and he would not destroy that chance again. The confiscation order had become a civil matter; the authorities could take lottery winnings or inheritance but otherwise he had served his sentence in default. He intended to make an application to the High Court for a 'certificate of adequacy' (we consider this below). He accepted that the risk of him committing further offences would be higher if he became financially unstable or if his accommodation was under threat but he had support and he was willing to work. He did not need much.

25. The National Crime Agency kept him under observation. He was not allowed to speak to his co-defendants and the people around him now were not from his former associates. There were no concerns about him absconding; he had complied with his reporting requirements with the Home Office and probation. He was entirely reliant on his friends, but only because he was not permitted to work. He had extensive qualifications and a job offer. His friends would not withdraw their support and he had a tenancy agreement which required him to pay no rent. It did not matter that it was not legally binding in the absence of consideration. He was not applying for bankruptcy but for a certificate of adequacy and the author of the OASys report had misunderstood because English was the appellant's second language. He did not play the system; he learned from the system. He had hosted great people at the prison restaurant and had been inspired. He wanted a chance to use the opportunities he had been given. He wanted to be a success story. He accepted that he had been able to

hide his crimes from those around him. He accepted what he had done and that he had a leading role. He had lost his children and his emotional wellbeing as a result of what he had done. He was 200% sure that he would not commit any crime in the future. He knew that he would die in prison if he did so. His phone is always open and he never opened himself to temptation.

26. We asked the appellant some questions in order to clarify his evidence. We asked what had happened to the money he had made from drug importation. He said that £1.3 million was the benefit figure of the heroin but it had never been sold. He had not given evidence and had not been able to convince the court that the available amount was less than the £1.3 million required but Judge Ainley had fixed a lower term of imprisonment than the 14 years which might have been imposed. There had not been any previous drug transactions. He had pleaded guilty to three counts and the court had ordered that the others were to remain on the file.

27. We noted that there were various references in the papers to the appellant possibly being extradited to Holland to face charges relating to drug exportation there. He said that the case in Holland had been dropped after he brought a case in the High Court in the Netherlands. The prosecutor in charge of his case had been changed and the new prosecutor apologised to him. He was told that he could receive compensation from the Dutch authorities but he preferred simply for the case against him to be dropped.

28. We asked the appellant about the 'certificate of adequacy' he had described in his evidence. He said that it was an application which was made to the High Court to vary the confiscation order when a person was unable to pay the sum which had been fixed. He was going to use the same solicitors to make the application. He was unable to instruct the partner who had previously had conduct of the case as he had retired to Puerto Rico but another solicitor would take the case once he had spoken to counsel. The firm was called BSB Solicitors.

29. Neither advocate had questions arising from our own.

The Appellant's Son's Evidence

30. We then heard from the appellant's son, OD. He adopted his statement, subject to the clarification that he was currently living in in the Midlands, where he plays rugby at professional level. In his statement, he said that he has a good relationship with his father and that they keep in touch by telephone and Facebook. They had always been close, despite the appellant's time in prison. He had been four when his father first went to prison (for the firearms offence). He had remained in prison until OD was about eight. He remembered visiting him once when he was about five, before he understood the reality of his situation. The appellant had been released for less than a year before he returned to prison (initially on remand for the heroin offences). From the age of nine, he visited his father regularly in prison and would also speak to him on the telephone. When he began university, his visits reduced to once a year but he maintained the weekly telephone calls. OD stated that he last visited his father in January 2020, upon his release from prison. He had not seen him since as a result of his sporting commitments and the pandemic but they speak regularly and have a strong relationship. OD firmly believes that his father will not offend in

the future. He had learned from his time in prison and he understood that it would be unforgiveable, in the eyes of his family, if he committed any further offences. All the appellant wanted, in his son's opinion, was to have a normal life and to build a relationship with OD and his sister.

31. Cross-examined by Mr Lindsay, OD accepted that he would not know if his father returned to committing criminal offences, commenting that he had only found out at the hearing why his father had been imprisoned for so long on the second occasion. They had never had any indication of his criminal activity. Mr Lindsay observed that the reports stated that the appellant had been able to conceal his criminal activity. OD did not feel able to comment further on this. Mr Lindsay suggested that the appellant was also skilled at giving people the impression that he had changed. OD disagreed. He considered his father to be honest and he thought that he understood that it would mark an end to his relationship with his children if he returned to prison.

32. OD was not re-examined. We had no questions for him.

The Appellant's Partner's Evidence

33. We also heard from the appellant's current partner, TC. She adopted the witness statement she had made on 21 July 2020 but she clarified that she was the partner to whom the appellant had referred. They had started a relationship earlier in 2020, when the appellant was released. In her statement, TC stated that she had been a Family Support Worker for the last decade and she had known him when she was a Prison Officer. He was a trusted prisoner, who had assisted in the provision of food and also provided listening services for other prisoners. He had learned a variety of practical skills in prison and had always been very hard working. He had a lot to offer and wanted to give back to society. She had supported him in various ways since his release, including financial assistance of £50 per week and help with modern technology. She was aware that he had complied with all of the requirements imposed by the SCPO and the Home Office and that he had, in particular, registered his telephone and his computer with the National Crime Agency. He clearly wanted to change and have a positive future. TC valued his companionship very much. She saw him 3-4 times per week and they were also in touch several times a day by Whatsapp.

34. Cross examined by Mr Lindsay, TC confirmed that she did not live with the appellant; she lived in Sutton and he lives in West London. She did not accept Mr Lindsay's suggestion that she would not know if he returned to criminality. She stated that she had been a prison officer for 13 years and she had worked in probation as well. Even in her present role, she worked with a variety of families with a criminal background. She had attended probation and NCA meetings with the appellant and she knew that he had submitted all relevant information to the relevant agencies. His phone was always open – she had given it to him – and she knew that all of the people he associated with were positive peers. She would know if he had another telephone; he was not allowed a second one. He was monitored by the NCA. She knew her way around his home and she had cleaned it. She would know if he was hiding a second phone; she had conducted cell searches as a prison officer and she was very observant. She knew there was no second phone. It was not correct to state that he was always able to conceal what he was doing; if that was the case, he would not have been caught in the

first place. He was always very open about his offending past. Whilst he had accepted that he had concealed things in the past, that was 12 years ago and he was a different man then. Asked whether the appellant was skilled at giving the impression of being a changed man, TC stated that he was actually very reflective. He is now older and had no connection with the people with whom he had previously been involved. He had undertaken a lot of work in prison and was consistent in his commitment to rehabilitation. Mr Lindsay noted that the author of the OASys report expressed doubt that the appellant would not contact his former associates but TC was adamant that he had not done so; he was monitored by the NCA and his phone is always open.

35. TC was not re-examined. We had no questions for her.

Submissions

Respondent's Submissions

36. Mr Lindsay relied on the Secretary of State's skeleton argument, which had been settled by Mr Clarke. It was seemingly accepted that the appellant's crimes were particularly serious within the meaning of Article 33(2) and the sole question was whether the appellant had rebutted the statutory presumption that he represents a danger to the community of the UK. The Secretary of State noted that the OASys report from earlier in the year had concluded that he represented a low risk of re-offending. In Mr Lindsay's submission, however, the 14% risk of re-offending over the course of the next 2 years was a real risk. The consequences of any similar offending were to be borne in mind, and we were invited to note that there was said in the same report to be a medium risk of serious harm to the public. Mr Lindsay's first submission, therefore, was that even on the face of the OASys report, there was a proper basis to conclude that the appellant represented an ongoing danger to the UK.

37. The Secretary of State's second submission, however, was that there were serious concerns about the OASys report and there were proper reasons for the Tribunal to reach a different view on the likelihood of the appellant reoffending. The report noted that the appellant would be at greater risk of committing offences in the event of financial instability or housing concerns. The author of the report had proceeded on the basis that there were no such concerns because he was given money by his friends and a flat had been provided for him to live in free-of-charge. That was an unsafe foundation for the conclusions reached in the report, however, since it was clear that the tenancy agreement into which the appellant had entered was unenforceable for want of consideration. The appellant was also under financial pressure as a result of the confiscation order, the total of which had risen to £2.2 million as a result of interest accrued. The appellant said he had no means to pay that sum but there had clearly been a judicial finding that he had the means to pay it in the past. The OASys report had been in error in concluding that there was no financial pressure on the appellant; he was actually under significant financial pressure and in a state of very real financial instability. He was dependent on TC for small sums of money but his relationship with her was a recent one and could not possibly guarantee that he would not feel under pressure. The fact that he had made contact with his criminal solicitors and was considering making an application for a certificate of adequacy was evidence of the pressure he was actually under.

38. The author of the OASys report had been unsure whether the appellant was merely saying what he should, and whether his protestations of reform were merely lip service. There were also concerns expressed about him absconding. It was no doubt the case – as Ms Radford would submit – that the report was careful and thorough but what the author of the report had overlooked in assessing risk was his belief that the appellant would make contact with his previous peers.

Appellant's Submissions

39. Ms Radford relied on her skeleton argument and submitted that there was not a great deal of authority on the point at issue. What there was, however, was the UNHCR's opinion on the restrictive manner in which Article 33(2) should be applied. That opinion was to be treated with great respect. The question for the Tribunal to consider was whether there was a real risk of the repetition of the same crime, whereas the limited risk in the OASys report was of *any* offending. UNHCR's view was that Article 33(2) was only to be applied in cases where a refugee was likely to offend again. It was to be recalled that the Convention is an international instrument which was to be interpreted consistently across the world. In the UK, and other countries which were signatories to the ECHR, there was no risk of a refoulable refugee actually being returned to a place where they would be subjected to ill-treatment. In non-signatory countries, however, the application of Article 33(2) exposed a refugee to the likelihood of serious harm on return to their country of origin. It was for that reason that there should be a real risk of the commission of serious crimes in the future. The assessment of risk in this context was not comparable to the assessment of risk under Article 1A(2) of the Convention. The latter provision was for assessing the risk to an individual, whereas Article 33(2) was about the justification of exposing an individual to a risk which was known to exist.

40. The assessment of whether the appellant posed a risk to the community of the UK was prospective in character. It had been submitted by the Secretary of State that the appellant's accommodation was precarious but there was obviously nothing in that concern. The probation officer was satisfied with the offer of accommodation and there was no reason to go behind that view. As for the confiscation order, it was an accepted fact that the appellant had failed to persuade the Crown Court that he had a smaller sum of money than the benefit figure which was automatically based on the value of the heroin recovered. That was in 2011, however, and there was no indication that he had been receiving money from his previous activities since then. The confiscation proceedings were also known to, and considered by, the authors of the OASys report. The existence of that order and the interest which had accrued upon it, did not mean that the appellant was more likely to resort to crime than the authors of the report had thought.

41. It had been submitted by Mr Lindsay that there was a risk of the appellant absconding but it was clear that this had been expunged in 2010; the OASys report showed that the escape list alert had been made inactive in August that year. There was no proper evidential foundation for a conclusion that the OASys assessment was wrong, particularly when it was so clear from the evidence as a whole that the appellant had engaged diligently with courses in prison and

supervision thereafter. He was consistently described as being open and honest. It was to be noted that the author of the OASys report had said that they were 'not sure' whether the appellant was paying lip service to rehabilitation, and that was a very different observation from saying that he was actually doing so. The appellant had not given evidence in his confiscation proceedings and there was no judicial finding that he was not a credible witness. He could not alter the past. The medium risk of serious harm was said to be unlikely and would only come about in the event of a change of circumstances. It was clear that he had a stable support network, including TC, who had known him for 12 years and was in a proper position to provide financial and other support. Whether the appellant was making an application for bankruptcy or a certificate of adequacy, neither was an indication that there was a lack of stability in his life. In reality, all the indications were that he had rehabilitated and was unlikely to re-offend. He was not a danger to the community and the decision on the appeal should be remade by allowing it on the basis that the appellant's removal to Turkey would be contrary to the Refugee Convention.

Legal Framework

42. It was accepted by the Ft-T that the appellant remains a refugee and that his expulsion would be contrary to Articles 2 and 3 ECHR. Those findings were not erroneous in law and are preserved. The only matter in issue between the parties before us, as we have explained above, is whether the appellant is a refoulable refugee.

43. We do not propose to set out Article 33(2) of the Refugee Convention or Article 21 of the Qualification Directive (2004/83/EC). It suffices for present purposes to set out in their current form the salient parts of section 72 of the Nationality, Immigration and Asylum Act 2002:

> **72 Serious criminal**
> (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.
>
> (3) – (5) …
>
> (6) A presumption under subsection (2), (3) or (4) that a person constitutes a danger to the community is rebuttable by that person.
>
> (7) …
>
> (8) Section 34(1) of the Anti-terrorism, Crime and Security Act 2001 (c. 24) (no need to consider gravity of fear or threat of

persecution) applies for the purpose of considering whether a presumption mentioned in subsection (6) has been rebutted as it applies for the purpose of considering whether Article 33(2) of the Refugee Convention applies.

(9) Subsection (10) applies where—
(a) a person appeals under section 82 of this Act or under section 2 of the Special Immigration Appeals Commission Act 1997 (c. 68) 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 subsection (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 subsection (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).

(10A) Subsection (10) also applies in relation to the Upper Tribunal when it acts under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

(11) For the purposes of this section—
(a) *"the Refugee Convention"* means the Convention relating to the Status of Refugees done at Geneva on 28th July 1951 and its Protocol, and
(b) …

44. The leading domestic authority on these provisions remains that of the Court of Appeal in EN (Serbia) & KC (South Africa) [2009] EWCA Civ 630; [2010] QB 633. Stanley Burnton LJ gave the leading judgment, with which Laws and Hooper LJJ agreed. Certain aspects of the decision, such as those concerning the *vires* of the 2004 Order or Article 14(5) of the Directive, are not relevant for the purposes of this appeal. The following aspects are very relevant to our assessment of the danger which the appellant poses to the community of the UK:

(i) The authorities relied upon by the claimants (including commentary from Professor Hathaway and a joint opinion provided to the UNHCR) added an unjustified gloss on Article 33(2) insofar as they suggested that it might only be applied in the most exceptional of circumstances where the refugee posed a very serious danger to the host country: [43].

(ii) "The words "particularly serious crime" are nevertheless 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.": [45]

(iii) Normally, the danger required by Article 33(2) is demonstrated by proof of the particularly serious offence and the risk of its recurrence or of the recurrence of a similar offence. But it does not expressly require a causal connection and one is not to be implied: [46].

(iv) The rebuttable presumptions of seriousness and dangerousness in s72 were not incompatible with the Refugee Convention or the Qualification Directive: [66]. The statute is to be interpreted conformably with the QD as creating rebuttable presumptions in both respects: [80].

(v) In practice, once the State has established that a person has been convicted of what is on the face of it a particularly serious crime, it will be for him to show either that it was not in fact particularly serious, because of mitigating factors associated with its commission, or that because there is no danger of its repetition he does not constitute a danger to the community: [66]

45. We do not consider the later authorities cited at [5] of Ms Radford's skeleton to cast any doubt on the decision in EN & KC. Al-Sirri v SSHD [2012] UKSC 54; [2013] 1 AC 745 was a decision concerning Article 1F(C) of the Convention. EN & KC was cited to the Supreme Court (p765 of the Appeal Cases report refers) but nothing was said about its correctness. The restrictive approach to which the court referred at [75] was specifically directed to the exclusion clauses, and not to Article 33(2). And nothing said by Dingemans J (as he then was) in R (W) v SSHD [2019] EWHC 254 (Admin) could, as a matter of precedent, cast doubt on what was said by the Court of Appeal.

46. Insofar as Ms Radford draws at some length, at [2]-[9] of her skeleton upon various UNHCR Guidelines and other such documents which support a restrictive application of Article 33(2) and a requirement for a 'very serious' threat to the host state, similar submissions were considered and rejected in EN & KC. Despite the considerable respect which is given to the opinions of the UNHCR in Refugee Convention matters (IA (Somalia) [2014] UKSC 6; [2014] 1 WLR 384 refers), we are bound to adopt the approach of the Court of Appeal, and simply to apply the plain and clear words of Article 33(2) and the Directive, subject to section 72: [51] of EN & KC refers. We nevertheless recognise – in light of H.T. v Land Baden-Württemberg (Case C-373/13); [2016] 1 CMLR 6 – that the practice of refoulement is subject to rigorous conditions, and that any consideration of such questions must be undertaken with the most anxious scrutiny.

Discussion

47. In considering whether the appellant has rebutted the presumption that he represents a danger to the community of the UK, we have considered all of the evidence which has been placed before us. The salient parts of that evidence, in broadly chronological order, are as follows.

48. The appellant was 27 years old when he arrived in the United Kingdom in 1995. He stated in his screening interview (on 7 June 2005) that he had been self-employed as a 'middle-man', trading goods when he lived in Turkey. In April 2002, he was arrested in possession of a pistol with six rounds of ammunition in the magazine. He initially sought to suggest that the weapon belonged to a man who was visiting him from Holland at the time but, 'at the last moment', he pleaded guilty to possessing the weapon and the ammunition without a certificate and was sentenced by HHJ Hordern QC to a total of four years' imprisonment. He said that he had bought the gun to protect himself from Turkish terrorists in the UK who had threatened him.

49. An OASys report was prepared for the Risk Assessment and Management Board ("RAM Board") on 26 May 2004. Amongst other things, the following matters were noted in that report. The appellant was on the enhanced regime for good behaviour at HMP Long Lartin. It was unclear whether we would be released in December 2004 because extradition proceedings brought by the Netherlands remained pending, in which the appellant was accused in the exportation of heroin between 1 January 2000 and 5 April 2002. The author of the report adjudged the appellant to present a low risk of reconviction for "other offences" (non-violent or sexual) within two years but to present "some" risk of reconviction for violent offences within two years. The appellant told the author of the report that he planned to return to Middlesex to live with his partner and that they ran a business exporting sheepskin from Ireland to Turkey. He had been educated to the age of twelve and he struggled with English. There was no evidence that financial hardship was an issue. He was separated from his wife and children, although he remained in contact with them. There was not thought to be any negative influence from others and there was no evidence of a manipulative or predatory lifestyle. There was one adjudication for fighting in April 2003. There were no reported substance abuse issues, although it was noted that he had a conviction for driving with excess alcohol in 1998. He was coping with custody, although he found it hard being away from his children and did feel guilty. He had been a prison listener at HMP Belmarsh. He communicated well with staff and was noted to be polite. His long term goals were to buy a house, have a regular income and build a good life. He had reflected on his offence and had realised that it was wrong to have an unlicenced gun in England. He had favourable wing reports and was a wing cleaner. He and his family had suffered from his being in prison. He had been unable to take any courses in prison due to his level of English and he needed to attend education to improve his reading and writing.

50. The risk of serious harm was considered at p32 of the report. It was thought that the appellant needed to avoid alcohol (so as to avoid another drink driving offence) and 'contact with certain organisations' in order to prevent any risk of injury from firearms. Asked to consider whether the appellant had "the capacity to change and reduce offending", the author of the RAM report checked a box to indicate that he was "quite capable". It was noted that he was quite motivated and had shown an encouraging interest in education. The appellant said that he would definitely not offend in the future and that he had learned his lesson in prison.

51. As recorded at the start of this decision, the respondent took deportation action against the appellant in 2005. She rejected his protection claim and considered that his deportation would not be contrary to Article 8 ECHR. Before she reached that decision, she had interviewed the appellant (in connection with his asylum claim) and had also received a statement from the appellant's ex-wife, SD. She stated that she was the Group Operations Manager for a group which operated a number of restaurants in the Greater London area. She and the appellant had two children together, their son OD and their daughter SSD. He had a good relationship with both children, although he had left the matrimonial home in 2001, when SSD was a baby. She was living in Finchley. The flat they had owned in Camden was on the market. She had visited the appellant in HMP Belmarsh once a month and had taken the children, which was extremely stressful. He had also been in regular contact with them on the telephone. They had not visited him in HMP Long Lartin, which was too far, particularly in light of her daughter suffering from asthma and anaphylaxis. They remained in contact on the telephone, although this was difficult for OD, who missed physical contact with his father. It would not be possible for SD and the children to relocate to Turkey and visits would be impossible for financial reasons.

52. Immigration Judge Haynes allowed the appellant's appeal on protection grounds in February 2006. He did not consider Article 33(2) or section 72 of the 2002 Act, and made no findings in relation to the risk (if any) the appellant presented to the community of the United Kingdom.

53. On reconsideration of IJ Haynes' decision, the Asylum and Immigration Tribunal had no hesitation in rejecting the Secretary of State's contention that IJ Haynes had erred in his assessment of the risk to the appellant: [8]. It was also submitted by the Secretary of State that the appellant fell to be excluded from the protection of the Refugee Convention under Article 1F(b). As SIJ Lane explained, however, that submission was misconceived because a crime committed in the UK could not fall within that provision: [10]. He noted that there was a better point that the respondent could have taken but had not. That point concerned s72 of the 2002 Act, which had not been considered by the judge. Given that there had been no certificate issued by the respondent, however, the judge could not be criticised for failing to take the point of his own motion: [11]-[18]. (We note that this is not the current state of the law – TB (Jamaica) [2008] EWCA Civ 977; [2009] INLR 221 and MS (Somalia) [2019] EWCA Civ 1345; [2020] QB 364 refer – but nothing turns on that for present purposes.) The respondent did not, to our knowledge, appeal against the decision of the AIT and the appellant was granted ILR as a refugee on 30 October 2006.

54. We have been unable to ascertain from the papers the precise date on which the appellant was released from his first period in prison. We know from the RAM Board report that he was eligible for release from December 2004. We know that he was not released at that time, however, due to the pending extradition proceedings. We note that the statement made by SD in connection with the first deportation proceedings was made on 3 August 2005, at which time he was still said to be in HMP Long Lartin. He was still detained there when his appeal was heard by IJ Haynes (paragraph 4.1.2 of his determination refers) in February 2006. OD said in his statement that his father was imprisoned when he was four and released when he was about eight years old. We think it more likely than

not that he was released in the latter half of 2006, when the extradition proceedings to Holland were discontinued. That certainly chimes with the assertion made by the appellant's friend JA, in his statement of 19 July 2020, that he met the appellant in 2006 or 2007.

55. The appellant was convicted of the drugs offences on 22 May 2009. When he was sentenced by HHJ Ainley on 1 June 2009, the judge noted that he had spent 306 days on remand, which would count against the sentence of imprisonment he was required to serve. The date of his arrest for the offences is unfortunately not clear from the papers but it would appear to be around ten months before 1 June 2009, which would be the summer of 2008. That chimes with the Trial Record Sheet for the drugs offences, which shows that he was sent for trial from Hendon Magistrates' Court on 24 July 2008. The later OASys assessment, to which we will turn in due course, is clearly wrong in suggesting that the date of the drugs offence was 1 January 2009. It appears, in sum, that he was at liberty for between eighteen months and two years before he was arrested for the drugs offences.

56. HHJ Ainley made a Serious Crime Prevention Order. A confiscation order was made at the same court in 2011. The appellant was committed to prison for five years in default of payment in 2012. We will return in due course to the significance of each.

57. It is clear that the appellant did not sit idly in prison. Pages 16 to 58 of the bundle prepared for this hearing contain a great number of certificates and other documents. Some of those merely reflect that he tested negative for prohibited substances. (We say 'merely' because, as already noted, there has never been any suggestion that he has a difficulty with substance abuse but drugtaking abounds in prison and it is to the appellant's credit that he avoided its temptations.) Other documents reflect the work he undertook to improve his numeracy and literacy and to obtain the vocational qualifications he described in his evidence, in fields such as cleaning, food safety and constructions skills. In the latter connection, we also note that he was complimented by a senior civil servant for his enthusiasm and hard work during a visit she paid to HMP High Down on 25 February 2010. We also note the courses he undertook on Pro-Social Modelling in October 2017, during which he remained well motivated and focused throughout the twelve three-hour sessions.

58. On 7 February 2020, another OASys report was written, following an assessment by a Probation Services Officer ("PSO") named James Heffernan on the same date. It is necessary to set out this report in detail, since Mr Radford relied heavily upon it in submitting that the appellant posed no demonstrable risk to the community of the UK, whereas Mr Lindsay criticised the conclusions and the methodology in the report.

The OASys Report

59. The author gave the appellant's address in West London and stated that the purpose of the report was that the appellant had been released on licence. Having noted basic details such as the nature of the index offence and the date of the appellant's release (23 January 2020), he undertook an Offender Group Reconviction Scale ("OGRS 3") assessment which culminated in a reckoning that there was a 7% chance of reoffending within a year and a 14% chance of

reoffending in 2 years. Given the significance which Ms Radford invited us to attach to those figures, we think it is important to understand the statistical basis upon which they were reached. The table which appears above those percentages is as follows:

1.5 Number of court appearances at which convicted, or received a conditional or absolute discharge aged under 18 years	0
Score	0
1.6 Number of court appearances at which convicted, or received a conditional or absolute discharge aged 18 years and over. Do not include current appearances.	2
Score	1
1.7 Age at first conviction, conditional or absolute discharge (record in years)	30
Score	0
1.8 Age first in contact with police: first recorded caution, reprimand or final warning (record in years)	30
Score	0
1.24 Number of previous formal cautions, reprimands and final warnings	0
1.26 How many of the sum (1.5, 1.6 and 1.24) previous convictions, conditional or absolute discharges, cautions, reprimands or final warnings included any violent offences	0
1.28 How many of the sum (1.5, 1.6 and 1.24) previous convictions, conditional or absolute discharges, cautions, reprimands or final warnings include any sexual offences (or offences with a sexual element), committed at an age of 16 or over	0

60. Following the OGRS 3 analysis, there followed a further 'layer' of consideration, which began with brief details of the offence, in the following terms:

> [The appellant] appeared at Croydon Crown Court on the 1st June 2009 for sentence following his guilty pleas to three counts, on a nine count indictment. The remaining six counts were ordered to remain on file not to proceed without leave of the court. On count (4) The importation of Class A drugs he received a sentence of 14 years' imprisonment. On count (7) Conspiracy to supply class (A) drugs (Heroin) he received a sentence of 13 years' imprisonment. On count (9) Importation of class (A) drugs he received a sentence of 18 years' imprisonment.

> The court also ordered that [the appellant] would be the subject of a 5 year serious crime prevention order to begin at his release date.
>
> [The appellant] was convicted along with [his co-defendants] as the principles [sic] in a major Heroin importing organisation. Evidence suggests that [the appellant] was the head of the organisation, with [the co-defendants] as the next tier of management within the organisation. The organisation is said to have had a broad customer base with representatives in many areas of the UK. The counts on the indictment which referred to [the appellant] alone encompassed 68.92 kilos of Heroin with an estimated retail value of 5.2 million GB pounds.
>
> A listening devise [sic] had been installed in [the appellant's] home and recordings were made of him organising and discussing matters connected to his supply chain. Following a drug delivery intercept by police and customs officials, [the appellant] was arrested at his home in Finchley.

61. Mr Heffernan then checked or left blank a number of boxes designed to inform the analysis of the index offence. He noted that there were no directly identified victims and that the appellant's offences would 'impact on society in general'. It was noted that the appellant understood the impact on society. Eleven to fifteen other individuals were said to have been involved and peer group influence was said to have played a part, although the appellant was identified as the leader. His motivation was stated to be 'purely financial gain'. Then, at 2.11, there is the following answer to a question about how much responsibility the appellant took for his offending:

> [The appellant] accepts full responsibility for his actions, he explains that a co-defendant came to him for help due to him being in financial difficulty however he realises he had the opportunity to say no and could have opted out of helping him and ultimately committing the offence.

62. The report noted that the appellant had previous convictions for drink driving and possession of gun in 2002. The index offence was an escalation in the offending, although at 2.14, it was said that there was no established pattern of similar offending. Underneath that, there is the following analysis of 'issues contributing to risks of offending and harm':

> [The appellant] stands convicted of being a major figure in a world wide conspiracy to import Class (A) drugs into the UK. From the massive amounts of drugs involved he stood to profit in millions of pounds GB. His earlier offences relations to firearms are an indication of the violence that can be involved within the drug trade.

63. Mr Heffernan there concluded that the analysis of the offence was linked to a risk of serious harm, risks to the individual and other risks. He then moved on to analysis of the appellant's accommodation, noting at the outset what had been said in previous reports. He then noted that he had visited the appellant's new

accommodation on 5 February 2020 and that it had been provided by a friend (MT) free of charge. He was shown a tenancy agreement which confirmed that the appellant could live at the property with no deposit and no rent. The property was likened to a 'nice hotel room' which had a private bathroom and a shared kitchen. Mr Heffernan assessed that accommodation was not linked to a risk of serious harm ("RoSH"), risks to the individual or other risks or offending behaviour.

64. In considering the next part of the assessment – Education, Training and Employability – the author of the report assessed there to be 'some problems' in relation to the appellant's employment history, work-related skills and school attendance but no problems in relation to his attitude to employment, reading writing or numeracy, learning difficulties or his attitude to education and training. There is then a section in the following terms:

> [The appellant] states that between the age of 7 and 12 years of age he attended school in Turkey on a mornings or afternoons only basis, and at that early age he had begun to work on a part time basis in order to make a contribution to the family income. At the age of 14 he left secondary education due to family pressure to take up full time employment, this he states was a normal thing to do in the Turkish culture. [The appellant] was always self-employed trading in various goods, and eventually opening his own retail business in Turkey. Members of his family became involved in the political scene in Turkey and they became under pressure from a Kurdish fraction as well as government agents. When [the appellant's] brother was murdered by what he describes as Kurdish terrorists, he moved to the UK and applied for political asylum.
>
> [The appellant] stated that he believed that he was still under threat while living in the UK from the Kurdish people so he procured himself a firearm and ammunition for self-protection, this resulted in his arrest and his first jail sentence. On release from prison he had no visible means of support, and claims that he was receiving financial help from family and friends. It was at this time that the appellant became of interest to the police in relation to his involvement in drug trafficking which culminated in his current 18 year prison sentence. While serving this sentence the appellant is undertaking an extensive training programme at NVQ level in restaurant operation and management, as a possible avenue of employment when released. [The appellant] has also improved his ability to communicate both orally and in writing in both English and Turkish, and his standard of comprehension is at a level which permits him to engage in both educational and rehabilitative programmes. [The appellant] states that his wife has a number of cosmetics retail outlets in various shopping precincts and malls, so there is no immediate need for him to rush into employment on release.
>
> Review 15/12/2015 – [the appellant] is currently in full time employment at HMP Lowdham Grange as the reception orderly. He has many positive case notes relating to his work in reception

> regarding his level of hard work and respectfulness to staff. [The appellant] is also a buddy on the wing, supporting other prisoners when they need it.
>
> Current OASys
> [The appellant's] immigration status does not allow him to work, study or have access to public funds. During a H/V appointment with [the appellant] on 5/2/20 he did say that he would like to find employment as he likes to keep busy but he will have to wait on the decision of the Home Office as to whether or not he is allowed to remain in the UK.
>
> Assessment
> ETE is linked to a RoSH, risks to the individual and other risks and offending behaviour.

65. Financial Management and Income is the next section of the report. There were thought to be 'some problems' in relation to the appellant's financial situation, financial management and over-reliance on family/friends and 'significant problems' related to illegal earnings as a source of income. There were no problems noted in relation to budgeting. There was then the following:

> Previous OASys
> [The appellant] states that both he and his wife have always been self-employed. His wife is the proprietor of a number of retail cosmetic outlets in various shopping precincts and malls in the Greater London area, and that he traded in various goods. At the time of his arrest [the appellant] claims that he was entering into a business arrangement with two others to set up and operate restaurant business, but his arrest brought this venture to a close.
>
> [The appellant's] index offences show that he was also involved in a major drug trafficking conspiracy which involved the import of large quantities of illegal drugs into the UK from various areas of the world, a project which generated vast sums of illegal and unaccountable money.
>
> [The appellant] has been given a confiscation order of approximately 1.6 million with interest, he states he has no way of paying this money as he simply does not have the funds and this is something he is trying to sort out with his solicitor. [The appellant] states his previous solicitor withdrew from this case due to issues over funding, he is currently researching the possibility of bankruptcy as he still states he cannot pay his confiscation order.
>
> Review 15/12/2015 – [the appellant's] confiscation order remains unpaid and the appellant is not in a position to pay this back currently. He states in custody he feels he is managing his finances okay with the income he receives from his employment and occasional money sent in from family on special occasions. I have changed section 5.4 from some problems to no problems as there is

> no current evidence in custody that the appellant obtains illegal earnings as a source of income.
>
> Current OASys
> [The appellant] states that his confiscation order has now risen to 2.2 million and as previously stated he has no means to pay for this. He adds that he received an additional 5 year custodial term for non-payment of confiscation order. Having met with the appellant for a H/V on 5/2/20, I can see that his friends are helping him out financially, free accommodation, they are supporting his travel and food costs. When I met with him he was dressed in nice attire and his room was recently decorated with brand new furnishings.
>
> Immigration status means that Mr Denman is not allowed to work study or have access to public funds so he is completely reliant on his partner and friends providing him with financial support.
>
> Assessment
> Financial issues are linked to a RoSH, risks to the individual and other risks and offending.

66. Section 6 concerned relationships. It was noted that the appellant had parental responsibilities and that he was in a non-cohabiting relationship. There were thought to be some problems with his childhood, his relationships with his family and with his previous experience of close relationships. We need not set out all the text which appears beneath those sections. It suffices to state that the report repeats the account of the appellant's relationships with his children and with TC which we have set out above. Relationships were not thought to be a contributory factor to the risk assessment.

67. Section 7 concerned Lifestyle and Associates. It was thought that there were some problems in three area: regular activities encourage offending, easily influenced by criminal associates and recklessness and risk-taking behaviour. The section which appears underneath is as follows:

> Previous OASys
> [The appellant's] involvement in international drug trafficking and his regular interaction with his co-defendants and others in this venture, is an indicator of the criminal lifestyle that he chose to undertake. His previous offences which involved the possession of illegal firearms and ammunition is a further indication of the criminal lifestyle and the associated dangers that he regularly undertook in the pursuit of vast financial gain. [The appellant] explained that a co-defendant came to him asking for his help as he was in debt and this is how he became involved in drug trafficking in an attempt to help pay the back the debt. [The appellant] takes full responsibility for the offence and explained that he could have said no at any point but chose not to. [The appellant] tends to spend his time in custody around more pro-social prisoners and doesn't get involved in issues that don't concern himself or problematic behaviour

> Review 15/12/2015 – [the appellant] spends his time in custody constructively, working full time and being a Buddy on the wing supporting others. [The appellant] continues to accept responsibility for the offence and does not minimise his involvement. There is no evidence in custody currently that the appellant engages in regular activities to encourage offending or displays reckless behaviour. Based on this I have changed both sections to no problems. [The appellant] has remained adjudication free since 2009 and has positive relationships with staff and prisoners.
>
> Current OASys
> During a H/V on 05/02/2020 [the appellant] has informed me that he is keeping himself to himself and has only a very close circle of friends and family that he trusts and socialises with. I explored the fact that as he was a ringleader in the index offence and given the nature of it there must be individuals (negative peers) who would wish to re acquaint with him, the appellant stated that the drug supply chain would have changed during the 11 years that he was in custody and as such there would be totally different players who are involved in this type of offending.
>
> Assessment
> I assesses [sic] that lifestyle and associates are linked to a RoSH , risks to the individual, other risks and offending. I find it difficult to believe that the appellant will not contact those individuals who were linked to his index offence given the high value of the imported drugs.

68. Drug misuse was considered at section 8, and no issues of concern arose; the appellant had occasionally taken drugs in the distant past but had not consumed any since the 1990s. Drugs were not linked to risk. Given the appellant's conviction for drink driving in 1998, however, some concern was expressed at section 9 about alcohol misuse in the past. Section 10 concerned emotional well-being. No problems were noted in this respect; issues with depression had been addressed in previous years; the appellant did not feel that there was any concern; he came across as a very confident individual who had integrated into the community very well.

69. At section 11, there were certain problems noted with thinking and behaviour. Mr Heffernan's assessment was follows:

> Previous OASys
> In interview [the appellant] came across as taking full responsibility for his offence and was open and honest in saying that he was the senior player in the operation. He states how a co-defendant came to him for help as he was in trouble with a group of individuals for a drug debt however he was not passing the blame as he understands he could and should have said no.
>
> 08/12/2014 Review – [the appellant] has been given the pro-social modelling course as a sentence plan target to broaden his knowledge

on thinking skills and anti-social behaviour which includes victim awareness and drug trafficking.

15/12/2015 Review – [the appellant] demonstrates appropriate interpersonal skills for his age and always engages very well when having offender supervisor contact. He demonstrates no aggressive behaviour and feels he understands people's views adequately. [The appellant] is adhering to his sentence plan by completing his maths and English level 2 however he still needs to complete the pro-social modelling course before the end of his sentence.

Current OASys
Having met with [the appellant] for a H/V on 05/02/2020 he is a very polite individual who I am sure given his background knows the system well enough to provide textbook answers to questions. He came across as very reflective on the mistakes of the past taking full ownership and responsibility for his offences and commented that he would never go back to offending but I am not sure if this was "lip service".

Assessment
Thinking and behaviour or linked to a RoSH , risks to the individual, other risks and offending.

70. The final part of this section of the report on which we must dwell at some length is number 12 – attitudes. It was noted that the appellant was quite motivated to address his offending behaviour, that there were 'no problems in several respects and 'some problems in relation to his attitude towards community and society. Mr Heffernan then wrote:

Previous OASys
[The appellant] currently portrays an attitude of contrition in relation to his offending. There is however evidence to support that at the time of his offending he was part of a criminal subculture that showed indifference to acceptable standards of behaviour. [The appellant] says that he felt abandoned when he was released from his previous prison sentence, and that he turned to people he knew for help and support, these people were family and friends.

Review 21/08/2018 – [the appellant] explained in interview that the reason for carrying the firearm for the previous offence was that at the time he was not accustomed to British culture and he did not go to the police when he was under threat, he dealt with issues himself he said he now realises this was the wrong thing to do – [the appellant] must take responsibility for his actions he knew that carrying a firearm without a certificate is an illegal offence whether used to British culture or not.

Review 08/12/14 - no change in circumstance.

> Review 15/12/2015 - no change to the above information. [The appellant] interacts very well with staff and other prisoners and demonstrated an understanding of why he offended. [The appellant] remains motivated to address aspects of his offending and currently shows no signs of pro-criminal attitudes within custody therefore I have changed section 12.1 to no problems.
>
> Current OASys
> Having met with [the appellant] for a H/V on 05/02/2020 he is a very polite individual who I am sure given his background knows the system well enough to provide textbook answers to questions. He came across as very reflective on the mistakes of the past and commented that he would never go back to offending but I'm not sure if this was "lip service."
>
> Assessment
> Based on previous offences I would have to assess attitudes are linked to a RoSH, risks to the individual, other risks and offending.

71. No concerns were expressed in relation to health or other considerations at section 13, and the appellant's self-assessment indicated on page 29 of the form that he had no problems in any of the 27 respects listed and that he was 'definitely not' likely to offend in the future because he had learned his lesson.

72. These elements of the analysis (and further checked boxes) were carried forward into the OASys Violence Predictor (OVP) score, which was 4% in the first year and 7% in the second year, resulting in an overall assessment that the risk of violent offending was low.

73. At p35 of the report, Mr Heffernan undertook a full analysis of the risk of serious harm to others. The aim, as stated in the rubric of the report was 'to use all information to assess whether the offender was likely to cause serious harm'. The offence details were (understandably) copied from an earlier section of the report. He noted that the appellant had been convicted of the importation of large quantities of class A drugs via various ports; that there was evidence of sophisticated planning to avoid detection; and that drug users and members of the public were the victims of the offending. This was said to be a 'major conspiracy involving some thirteen or more conspirators' which was motivated by financial gain. Mr Heffernan noted that he had the previous OASys and a previous interview with the appellant available to him but that he had no current CPS documentation. There was then reference to the historical drink driving and firearms offences.

74. The report stated that there was no risk to children and that the appellant presented no risk of self harm or suicide, despite such concerns having been noted in the past. There were no concerns regarding escaping or absconding, a previous alert having been de-activated in August 2010. There were no issues about controlling behaviour or breach of trust.

75. At p43 of the report, Mr Heffernan noted that the risks associated with the appellant's previous offending included physical harm from the use of firearms

and 'Large quantities of class A drugs entering the streets with Cities throughout the UK and the knock on effect such drugs have on society. These risks were thought to be at their greatest

> if [the appellant] becomes financially unstable and associating with criminal peers. [the appellant] is currently in the community being financially supported by his partner and close friends.

76. The circumstances which were likely to increase risk were said to be 'future involvement in organised crime, association with criminal peers and being unemployed or financially unstable. Full-time employment, financial stability, a good support network and using skills learned from the pro-social modelling course were factors which were thought to reduce the risk. There then followed an important section of the report, much of which we must reproduce in full:

> Custody
> Assess the risk of serious harm the offender poses on the basis that they could be released imminently back into the community. The length of the sentence left to serve is not relevant to completion of this section. Assess both the risk of serious harm the offender presents now , in custody, and the risk they could present to others whilst in a custodial setting.
>
> Low risk of serious harm - current evidence does not indicate likelihood of serious harm.
>
> Medium risk of serious harm - there are identifiable indicators of risk of serious harm. The offender has the potential to cause serious harm but is unlikely to do so unless there is a change in circumstances, for example, failure to take medication, loss of accommodation, relationship breakdown, drug or alcohol misuse growth.
>
> High risk of serious harm - there are identifiable indicators of risk of serious harm. The potential event could happen at anytime and the impact would be serious.
>
> Very high risk of serious harm - there is an imminent risk of serious harm. The potential event is more likely than not to happen imminently and the impact would be serious.
>
> Where an individual is assessed as being at medium high or very high risk of serious harm, this MUST be followed through with a risk management plan.

Risk	Risk in Community	Risk in Custody
Children	Low	Low
Public	Medium	Low
Known adult	Low	Low
Staff	Low	Low
Prisoners	-	Low

77. At p46, amongst other things, the author noted the terms of the SCPO, which restrict possession of cash (to £1000, including combined currencies) and communication devices and require the appellant to notify the details of any telephones or vehicles under his control. He is also required to notify his address. In addition, his licence requires that he is not to contact or associate with his co-defendants without the prior approval of his supervising officer and he is not to own or possess more than one mobile phone or SIM card without similar approval. The details of any mobile phone or SIM card owned or possessed by the appellant are to be notified to his supervising officer. The OGRS, OGP and OVP scores were given again, showing that the appellant was 'low' in each case. He was said to be a medium risk of serious harm to the public but low in all other areas. Compliance and risk were to be monitored by the National Crime Agency, the Offender Manager ("OM") and the immigration authorities. He was required to report to the OM every two weeks.

78. At p49, there was a tabular 'Criminogenic Needs Summary and Section Scores' which we have considered but need not reproduce. Page 50, however, contains a table which draws together the Weighted Scores for the OGP and the OVP. Although neither advocate referred to this part of the report, we should reproduce it in full[2]:

Section	OGP Score	OVP Score
Section 1 and other static factors	8	12
2. Analysis of Offences	N/A	0
3. Accommodation	0	0
4. ETE	3	3
7. Lifestyle & Associates	3	N/A
8. Drug misuse	2	N/A
9. Alcohol misuse	N/A	0
10. Emotional Well-being	N/A	0
11. Thinking and behaviour	2	0
12. Attitudes	1	2
Total score on static factors	8/60	12/60
Total score on dynamic factors	11/40	5/40
Total score on all factors	19/100	17/100

79. On the following page, it was noted that the appellant had identifies no issues in his self-assessment and that he was 'quite motivated' to address offending and that he was 'quite capable' to change and reduce offending. He was said to be very reflective and to accept full responsibility for his offences. A factor that might inhibit change was said to be future involvement in organised crime and re-engagement with negative peers. The positive factors noted above (regular employment etc) were thought to be positive factors to be maintained or developed.

[2] It will be noted that the original table omits rows 5 and 6, moving straight from '4. ETE' to '7. Lifestyle and Associates'; this is not a transposition error on our part.

80. On p52. The Offender Objectives were given, and it was said that the development or cognitive and employment skills was ongoing, as was the management of personal relationships. An NVQ programme, and adjudication free sentence and the maintenance of the enhanced regime were all fully achieved. Contact details for officers in the National Crime Agency and the National Probation Service were given. The report was then countersigned by a supervisor; the 'Skills Checker' at the end being left blank.

81. In addition to the OASys assessment and the evidence of the appellant's activities in prison, we have a range of evidence from people with whom he has associated since release. We have already described the evidence given by his family members and his partner. There are also statements from individuals who did not attend to give oral evidence before us.

82. The appellant's daughter is a student at the University of Nottingham. She has a good relationship with him and has remained in regular contact with him. Like her brother, she stopped visiting him when she was taking her A-Levels. She had also seen him in between his two terms of imprisonment. She had tested positive for Covid-19 and had isolated so she had kept in contact with him over the telephone. She thought it 'completely unlikely' that the appellant would re-offend as there was too much at stake for him. She said that it would be a personal affront to her and her brother and would put the latter's career in sport in jeopardy. She thought that he was a much more mature and optimistic person.

83. Statements were also given by JA, MH and MHK, all of whom are the appellant's friends. Each had known him since before he was imprisoned for the drugs offences. They provided him with support and companionship and they were all of the view that he had been rehabilitated. MH, in particular, emphasised the great personal kindness that the appellant had shown him over the years. MHK stated that he had also been a positive influence on her son.

84. Having summarised the evidence before us, we turn to our analysis, taking all of the above into account.

85. There are a number of statements from family and friends which support the appellant's account that he has firmly turned his back on criminality. We attach some weight to those assessments, and particularly to the views expressed by TC. She is not only the appellant's current partner, who spends a good deal of time with him (although they do not presently cohabit); she is also an ex-prison officer, and we accept both the honesty of her evidence and her assertion that she has experience which is relevant to the view she holds about the appellant's rehabilitation. That said, we note and accept the submission made by Mr Lindsay about the appellant's ability in the past to keep those close to him completely in the dark about his offending. We were struck, in that connection, by his son's statement that he only found out about the scope of his father's offending during the hearing before us.

86. It was on the professional assessments of risk that the advocates understandably focused, however, and we were invited to consider the OASys report in some

detail. Before we come to that, we return to the significance of the SCPO, the Ft-T's one-sided treatment of which caused us to conclude that it had erred in law. On any proper view, it is a significant matter that the sentencing judge, who had conduct of this complex case (involving 121 witnesses for the prosecution and 7341 pages of evidence) between October 2008 and November 2009, saw fit to pass a Serious Crime Prevention Order. He did so under s19(2) of the Serious Crime Act 2007, which required him to be satisfied, amongst other things, that there were reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement in serious crime. The maximum term of any such order is five years (s16 refers), and it is also significant that HHJ Ainley chose to impose an order of the maximum length, which applied from the date of each defendants' release. In making any such order, the court is concerned with future risk and the court must be satisfied that there is a real or significant risk, and not a bare possibility, that the defendant will commit further serious offences: R v Hancox [2010] 1 WLR 1434, at [9]. Judge Ainley, who was uniquely well-placed to assess the need for a SCPO at the end of the appellant's sentence, clearly considered that there was a real or significant risk of him becoming involved in further serious offences upon release. That assessment, undertaken at the point of sentence in June 2009, continues to form the backdrop to the assessment we must undertake in this appeal.

87. A breach of a SCPO is a criminal offence carrying imprisonment of up to five years: section 25 of the Serious Crime Act 2007 refers. We accept that the appellant is subject to strict monitoring under the terms of that order, which continues for the foreseeable future. Like the judge in the Ft-T, we accept that the existence of the order, the monitoring which takes place pursuant to it, and the possibility of a further sentence of imprisonment for a breach all operate to reduce the likelihood of the appellant committing further offences. The purpose of the order is to reduce risk and we accept that it does so.

88. We turn, therefore, to the OASys report, upon which Ms Radford placed significant reliance in support of her submission that the appellant had rebutted the presumption of danger to the community in s72. We treat that report as expert evidence, given the expertise and impartiality of the officers of Her Majesty's Prison and Probation Service. It is nevertheless well established that we are not bound by the conclusions of such a report. The weight to be given to any evidence, including expert evidence, is a matter for the tribunal of fact, which is obliged to approach that evidence with appropriate care and to give good reasons for reaching a conclusion contrary to that of the expert: SS (Sri Lanka) [2012] EWCA Civ 155, at [21], per Stanley Burnton LJ (with whom Lewison and Maurice Kay LJJ agreed). In relation to reports of this specific nature, we also note the body of authority in criminal law in which it is emphasised that a sentencer is entitled to reject a suitably qualified expert's report tending towards a conclusion that a defendant is not dangerous, providing he considers all the circumstances of the case and explains his reasons for doing so: R v Rocha [2007] EWCA Crim 1505 and R v S & Ors [2005] EWCA Crim 3616; [2006] 2 Cr App R (S) 35.

89. We can deal fairly briefly with Ms Radford's reliance on the Offender Group Reconviction Scale assessment that the appellant presents a 7% risk of

reoffending in the first year after release and 14% risk of reoffending in the second year. It is important to understand the way in which these percentages are calculated, which is clear from the report itself. The calculation is algorithmic, and based on the numbers entered in the seven boxes. (We have reproduced the whole table at [59] above.) Where, as here, the numbers show that a person does not have a pattern of convictions or court appearances, the OGRS assessment suggests that the individual has a low risk of reconviction. There is a reason that the OGRS assessment features at an early stage of the OASys report; it is a starting point, a 'ready reckoner' which is based on statistical research. There is no scope for human consideration, however, and no scope (in cases where there is no history of sexual or violent offending) for the officer to consider the nature of the offending. Because he was first in trouble at the age of thirty and has only two convictions, he was placed at a low point on the scale. As far as the OGRS was concerned, there were no other matters which suggested a risk of reconviction, since the appellant scored zero in every other category. Obviously, however, it is necessary to consider all the circumstances of the case in coming to a conclusion on risk, and we do not consider that the low score on the OGRS bears the weight which Ms Radford invited us to attach to it.

90. Of greater significance is the overall evaluation of risk undertaken by Mr Heffernan (and approved by his supervisor) over the remaining pages of the report. We have endeavoured to provide a fulsome summary of that analysis, and have considered the whole of the report with great care in coming to our conclusions. Having done so, we consider that there are a number of difficulties with the appellant's evidence, and with the reasoning in the OASys report, which cause us not to accept the conclusion that he presents only a low risk of reoffending.

91. We do not consider the appellant to have been at all frank with us – or with the author of the OASys report – about his history. He maintained in his evidence that he had become involved in the heroin trade after being released from prison for two reasons. He said, firstly, that he had felt abandoned by the authorities when he was released into the community without support and that he had turned to his friends. He said, secondly, that a friend had asked him for help with some debt and he had decided to become involved in the heroin trade in order to assist this person. These explanations overlook both the appellant's past and the position he held when he was arrested. He received a conviction for being in possession of a loaded weapon a few years after he arrived in the United Kingdom, and was implicated by the Dutch authorities with the heroin trade in that country. His conviction for the firearms offence plainly shows that he had connections which most people do not have; at the very least, he had channels through which he could obtain such things.

92. As we have explained above, something between one and two years passed between the appellant's release from prison and his arrest for the drugs offences. His son recalled barely any time passing between his release and his return to prison. It is frankly absurd to maintain, as he has throughout, that he had no involvement in the heroin trade before his conviction for the firearms offence. To accept that assertion would require us to accept that a man with no previous involvement could rise to the very top of the heroin trade in the UK within eighteen months. The obvious reality, instead, is that the appellant was already

involved in criminality when his flat was searched in 2002 and that he returned to that world – as a senior figure – as soon as he was released from prison. Were that not the case, the appellant would not have had the national and international connections which he relied upon to import and distribute large quantities of heroin. We are unable to accept that connections of that nature can be established from scratch within around eighteen months. We do not accept that he fell into the heroin trade for either of the reasons he gave in evidence and to the author of the OASys report, and we consider it more likely than not that he had worked his way to the top of the organisation, having reached a rung near the top of that ladder before his first period of imprisonment.

93. Nor do we consider the appellant to have been truthful about his income from his involvement in the heroin trade. We were surprised by his evidence before us that he had been unable to pay very much of the confiscation order which was made against him because he had not undertaken any heroin transactions before he was arrested. The description of the facts in the OASys report and in Judge Ainley's sentencing remarks suggests quite clearly that the appellant had in place a nationwide network of recipients for the heroin which he was importing. We do not accept that there had been no previous transactions through this network. Just as he did with regard to his history, the appellant was clearly attempting to minimise his involvement in the offending by giving this evidence to us.

94. We are also concerned that there is no documentary evidence before us about the making of the confiscation order at Croydon Crown Court in February 2011. We note that the heroin with which the appellant was personally associated had a street value of £5.2 million but that the confiscation order which was imposed was in the sum of £1.3 million. We do not know how that sum was arrived at. We do not know, for example, whether the appellant was found to have a criminal lifestyle. Nor do we know whether any assessment was undertaken of the amount of benefit he was thought to have received from his criminal conduct, or whether the sum was based on an assumption which the court was required to adopt as a result of the statutory scheme in Part 2 of the Proceeds of Crime Act 2002. Nor do we know why the sentence specified in default of payment was 5 years, when the maximum period, under s35(2A) of the Proceeds of Crime Act 2002, was 14 years.

95. Equally, we have no documentary evidence about the decision made by Westminster Magistrates Court to commit the appellant to prison in default of payment in January 2012. The process, under s35(2) of the 2002 Act, is that an order made under POCA 2002 is treated as a fine for enforcement purposes. Where a defendant defaults, therefore, he is summonsed to attend the Magistrates' Court, which must decide whether to commit him to prison: s76 of the Magistrates' Court Act 1980 refers. We note that a line of authority, culminating in R (Sanghera) v Birmingham Magistrates' Court [2017] EWHC 3323 (Admin), has emphasised the requirement (in s82 of the MCA 1980) that the default is due to 'the offender's wilful refusal or culpable neglect' and that a committal decision might properly be overturned (as it was in Sanghera) where no finding of wilful refusal or culpable neglect has been made. Such a finding must have been made, therefore, in the case of this appellant. As with the confiscation proceedings in the Crown Court, however, we have been provided with no information about the committal proceedings.

96. We were told by Ms Radford at the start of the hearing that, despite our statement (at [98] of our first decision) that we were particularly concerned about the confiscation order and the decision to commit the appellant to prison, he had been unable to obtain any evidence about these proceedings. We obviously accept that the appellant has provided no evidence to his immigration solicitors. We do not accept that he was unable to obtain any relevant material from his criminal solicitors, however. It became clear during the course of his evidence that he continues to take advice from BSB Solicitors of London NW1. He stated that he is in the process of taking their advice on the possibility of applying for a 'certificate of adequacy', which we take to be a reference to a certificate of inadequacy, under s23 of POCA 2002. He was able to tell us that the partner who had represented him in the Crown Court at Croydon had retired to Puerto Rico but that another partner was assisting him. It is inconceivable, in the circumstances described, that the appellant would not have had available to him the answers to the numerous questions we have raised above. As we have recorded, we canvassed these concerns with Ms Radford at the start of the hearing. She was able to provide some assistance on the statutory framework but she made no application to adjourn to gather any further information. We consider that the appellant has chosen not to disclose anything in relation to the confiscation or the committal proceedings lest it undermines his chances of success in this appeal. Not only is he willing, therefore, to downplay his involvement in criminality; he also chooses to conceal relevant material.

97. The author of the OASys report wondered whether the appellant had genuinely reformed or whether, having been involved in the system for a number of years, he simply knew what to say and was paying lip service to rehabilitation (page 25 of his report refers). It seems that he was willing to give the appellant the benefit of the doubt in this respect. For the reasons we have given above, we reach the opposite conclusion. We formed the clear impression, as a result of the matters above, that the appellant attempts, when it serves his purposes, to deceive and to conceal.

98. We consider Mr Lindsay to have made a sound point in relation to the accommodation in which the appellant presently lives. Whilst Mr Heffernan expressed concern about the effect of instability on the likelihood of the appellant reoffending, he proceeded on the basis that the accommodation which he occupied would continue to be available to him. Mr Lindsay pointed out that the contract by which the appellant has been provided with a free room is unenforceable for want of consideration. That must be right, but it leads to a more fundamental point. Given that the appellant relies on the provision of this room as part of his submission that his life is settled and he has no reason to return to crime, it is concerning that there is no evidence from the gentleman (MT) who is said to own the property. We note that the gentleman who said that he was MT was not able to produce any evidence of identity to Mr Heffernan on 5 February 2020 (page 11 of the report refers). There is no documentary evidence before us to confirm the ownership of the property or to explain the basis upon which the owner is willing to provide it to the appellant free of charge. Unlike Mr Heffernan, we are not prepared to take this assertion at face value and we consider that his situation is rather more precarious than it was thought to be by the author of the report.

99. Drawing these threads together, we remind ourselves that it is not for the respondent to establish that the appellant presents a risk to the community of the United Kingdom. It is, instead, for the appellant to rebut the statutory presumption that he represents such a danger. HHJ Ainley concluded that he would present a risk of reoffending in serious crime on release from prison but the SCPO he imposed is designed to minimise that risk. He is thought by his family and friends to have turned a corner in his life and to have left prison a reformed man. He persuaded the author of the OASYS report that he presented a low risk of reoffending and he has certainly worked hard in prison to obtain qualifications and to take relevant courses. We do not consider him to have told the truth about his history, however. We do not accept that he rose from the bottom to the top of an international heroin smuggling ring within eighteen months of his release from prison. We think he has wilfully attempted to minimise or conceal his previous involvement in that world. Nor do we accept that he has been frank with us about his confiscation proceedings. Nor, in light of these concerns, do we accept that we should proceed on the same basis as the author of the OASys report in respect of the accommodation in which the appellant presently lives. Having considered all of the evidence before us, we do not consider that the appellant has rebutted the presumption that he presents a danger to the community of the UK. We are therefore obliged by statute to dismiss his appeal on asylum grounds.

Notice of Decision

We remake the decision on the appeal by finding that the appellant is a refoulable refugee and dismissing the appeal on asylum grounds. The decision that his expulsion would be unlawful under the Human Rights Act 1998 stands.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

25 September 2020

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP 00016 2019

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice
On 9 March 2020

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE PERKINS
UPPER TRIBUNAL JUDGE BLUNDELL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

C-D-
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Ms A Radford, Counsel instructed by Turpin and Miller LLP (Oxford) solicitors

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 we make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the respondent (also called the claimant). Breach of this order can be punished as a contempt of court. We make this order because the respondent (claimant) maintains that he is a refugee and is therefore entitled to privacy.

2. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing the appeal of the respondent, hereinafter "the claimant", against a decision of the Secretary of State on 26 February 2019

to refuse him leave to remain on human rights grounds and to revoke his protection status. The claimant was granted indefinite leave to remain as a refugee on 30 October 2006.

3. He is also a criminal. He has other convictions and has previously defended successfully a decision to deport him but on 20 May 2009 he was sentenced to concurrent terms of imprisonment, the longest being of eighteen years, for his part in the illegal import of heroin. He was described by the sentencing judge, H H Judge Ainley, as "a very major player in the heroin trade in this country".

4. We see no need to labour the details of his crime but we are very aware of the seriousness of the offence which is reflected by the long sentence of imprisonment and Judge Ainley's comments. We also note when sentencing the claimant Judge Ainley indicated that, had there not been a guilty plea, he would have been thinking of a sentence imprisonment for 25 years.

5. In 2017, the Secretary of State sought the views of the UNHCR about the claimant's ongoing status as a refugee. Having received those views, she made a number of decisions on 26 February 2019. She concluded that the circumstances in connection with which he had been recognized as a refugee had ceased to exist, such that it was appropriate to cease his refugee status under Article 1C(5) of the Refugee Convention. Secondly, she concluded that even if the claimant remained a refugee, he was not protected from refoulement to Turkey because his presence in the UK constituted a danger to the community of this country, applying Article 33(2) of the Convention and section 72 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). Thirdly, she concluded that the claimant was excluded from Humanitarian Protection because of his conviction for a serious crime, applying paragraph 339D of the Immigration Rules. Finally, and of no relevance to the issues before us, the respondent did not accept that the claimant's expulsion would be contrary to Article 8 ECHR because there were no very compelling circumstances in his case which sufficed to outweigh the strong public interest in that course.

6. As the First-tier Tribunal recognised correctly there are, broadly, two ways in which a person can be deprived of refugee status. One (cessation) is when there has been a significant and durable change in conditions in the country from which the asylum seeker sought protection so that he no longer needs protection. The other (refoulement) is that although still in need of protection he is undeserving of, and disqualified from, the protection of the Refugee Convention by reason of his own bad behaviour. A person in the second position may very well be able to show that removing him to the country he had escaped would be contrary to his rights under Article 3 of the European Convention on Human Rights but in that event he would enjoy fewer benefits as a person who could not be

returned on human rights grounds than he would as a person entitled to international protection as a refugee.

7. Article 1C(5) of the 1951 Convention provides that the cessation of the need for protection arises when the circumstances in connection with which he has been recognised as a refugee have ceased to exist. It is nothing to do with the conduct of the claimant but with whether there has been such a significant and 'non-temporary' change in the conditions in the country of nationality that the original fear of persecution can no longer be regarded as well-founded (Article 11(2) of the Qualification Directive - 2004/83/EC - refers). As the UNHCR are keen to emphasise, disqualification from protection against refoulement under the Convention requires entirely different considerations. There are statutory presumptions in s72 of the 2002 Act that a person who has been sentenced to two years' imprisonment has committed a particularly serious crime and is a danger to the community and so is not entitled to the protection of the Refugee Convention whether or not he needs it. Both presumptions are rebuttable: EN (Serbia) & KC (South Africa) v SSHD [2009] EWCA Civ 630; [2010] 1 QB 633.

8. It is a feature of this case that the claimant was made the subject of a Serious Crime Prevention Order as part of his sentence. Both parties regarded this as significant. The claimant contended that it was a reason to find that he was not a danger to the community because the community would be protected by the requirements of the Serious Crime Prevention Order and the Secretary of State maintained, contrarily, that the claimant was clearly a danger to the community because if he were not there would be no need for a Serious Crime Prevention Order.

9. It was therefore rather vexing when the appeal came before us in December 2019 to find that we did not have before us the Serious Crime Prevention Order. We were reluctant to assess the importance of a document when we do not know its terms. We adjourned the hearing and gave directions. A copy of the Serious Crime Prevention Order was provided.

10. The claimant does not deny committing a serious crime but he maintains in emphatic terms that he is no longer a danger to the community and that he would still be at risk of persecution in the event of his return to Turkey.

11. We note that as well as being the subject of a Serious Crime Prevention Order the claimant has, or might have, further obligations. At paragraph 18 of the Secretary of State's decision to revoke a protection status and refuse a human rights claim we are told:

> "On 28 February 2011, you were made the subject of a confiscation order at Croydon Crown Court. On 24 January 2012 at Westminster Magistrates' Court your default sentence of 1,813 days was activated in the absence of non-payment of the Order in full. The serving of the sentence does not expunge the Order."

12. Disappointingly we have not found much else about this order in the papers. We assume that there is an unintended double negative in the Secretary of State's precis but the existence of such an order could clearly impact on the claimant's rehabilitation and his propensity to commit further crime. We return to that issue at the end of this decision.

13. We outline how the First-tier Tribunal made its decision.

14. The First-tier Tribunal began, appropriately, by noting that the claimant was born in January 1968. He entered the United Kingdom clandestinely in September 1995 and claimed asylum soon afterwards. He was refused asylum but granted exceptional leave to remain.

15. In 2002 he was convicted of possessing a prohibited firearm and sentenced to four years' imprisonment. On 19 May 2004 a deportation order was made but he responded with further submissions concerning his asylum claim and although the application was refused by the Secretary of State the claimant appealed successfully and on 30 October 2006 was given indefinite leave to remain as a refugee. Two years after that he was convicted of conspiracy to import and supply controlled substances and in February 2011 the confiscation order was made.

16. Necessarily, the United Nations High Commissioner for Refugees was notified about the intention to revoke refugee status and made a response.

17. The judge reviewed the evidence concerning the seriousness of the crime and whether the claimant remains a danger to the community. The judge relied particularly on the OASys Report. This shows that the claimant had a criminal lifestyle before being convicted of the drugs offences and indeed had been convicted of the firearms offence. The judge noted that the claimant had been described as "principal in a nationwide conspiracy to import and supply Class A drugs" and that he was "a major figure in a worldwide conspiracy to import Class A drugs into the United Kingdom". The same report confirmed that the claimant had accepted full responsibility for what he had done and had used his time in custody constructively building positive relations with staff and fellow prisoners and that he showed contrition about his offending. The report said that the claimant: "Remains motivated to address aspects of his offending and currently shows no sign of pro-criminal attitudes within custody".

18. It was found that the claimant had the potential to cause serious harm but "is unlikely to do so unless there is a change of circumstances, for example, failure to take medication, loss of accommodation, relationship breakdown, drug or alcohol misuse". The judge noted that the report concluded that the claimant was motivated to change and not to reoffend.

19. It was the claimant's evidence that he had been in touch with his children. His son was born in September 1998 and so is now 21 years old and his daughter was born in June 2001 and so is now 18 years old. He took seriously their threat to disown him if he reverted to criminal behaviour. The judge said at paragraph 32:

"However, because the OASys Report confirms what he said, I am prepared to accept that his children are a strong motivation for him not to reoffend".

20. The judge also accepted submissions that the claimant had "shown the motivation and desire to address his offending behaviour whilst in custody" and indeed the judge concluded that the claimant

"appears to have done everything possible to demonstrate that he wishes to change his ways, and to obtain the necessary skills to do so."

21. The next two paragraphs in the judge's decision and reasons are particularly important and we set them out in their entirety:

"39. I also take into account that the [claimant] will not be left alone to his own devices once he leaves prison. He will be under the supervision of an offender manager who will agree a plan with him and monitor his progress. The [claimant] is also subject to a Serious Crime Prevention Order which can impose restrictions on financial, property or business dealings, working arrangements, associates and communications, the use of any item, and travel both within UK and abroad. It is not clear from the documents before me if the terms of the Order have yet been decided, but the Order (which was made when the [claimant] was sentenced), is another means of ensuring the [claimant] does not reoffend. I note that the OASys Report did not seem to suggest that such an order was critical in ensuring the risk of reoffending is kept to a minimum.

40. Having weighed all of these factors very carefully, I find that the difficulty I am left with is weighing such serious criminality and the possibility of the [claimant] returning to it because it was his lifestyle at the time, against the [claimant's] good behaviour, progress and attitude since he was sent to prison. Ultimately, the factors I find that tip the balance in the [claimant's] favour are: the changes he has made and the rehabilitation he has shown have endured for the ten year length of his sentence; that he will not be left to his own devices to face any challenges on release from custody; and the motivation he has shown because of his children who he will lose if he reoffends, not only because of what they have said but also because he may then face the possibility of removal from the country again."

22. The judge went on to say that he concluded for the reasons given that the claimant had rebutted the presumption and that he was a danger to the community.

23. The judge then examined the Secretary of State's assertion that the claimant no longer needed protection.

24. He began, appropriately, by considering the decision of the Tribunal in 2006. There the judge found that the claimant was a member of the PKK-Vejin faction of the Kurdistan Workers' Party and that he was a member of a family that may well be perceived by the Turkish authorities to be associated with the PKK-Vejin faction.

25. The First-tier Tribunal Judge then reminded himself of the decision of this Tribunal in **IK (returnees, records, IFA) [2004] UKIAT 312** where it was accepted that the Turkish state kept extensive and widely accessible manual records showing allegedly dubious conduct by its citizens, even if

no crime had been proved, and which identified their family members: [14] and [133] of IK (Turkey) refers.

26. The judge then directed his mind to the Secretary of State's case and particularly the Secretary of State's contention supported by the August 2017 Country Policy and Information Note suggesting that PKK supporters were now in a different and better position. According to the CPIN, prosecution for the support of an armed terrorist organisation was a possibility when justified by evidence but persecution was uncommon and claims by PKK supporters would be unlikely to succeed although, obviously, each case had to be decided on its own facts.

27. There was evidence that prison conditions in Turkey, although leaving much to be desired in many cases, are not below international standards and that the claimant would be unlikely to be required to do any military service because of his age (he is now 52).

28. However the Secretary of State had invited submissions from the UNHCR and the UNHCR did not accept that there had been a fundamental and durable change in Turkey so as to justify revocation of asylum status. Particularly the UNHCR referred to a coup attempt on 15 July 2016. Since then the Turkish authorities have "pursued an unprecedented crackdown against perceived critics and opponents" and that the anti-terror laws were used to assist in torture and other unacceptable behaviour.

29. The UNHCR clearly thought that conditions had not changed in the fundamental way required by Article 1C(5) and that there was evidence of persecution of pro-Kurdish groups including people who were not politically active. The closing paragraph of the section of the UNHCR letter dated 26 January 2018 (page 306 in the bundle) states:

> "In light of the above COI, UNHCR notes that these concerns underline that fundamental changes, in the sense of Article 5C(5), have not occurred in Turkey. The [Secretary of State] must have regard to the recent political climate in Turkey and it is evident that the persecution of supporters of pro-Kurdish groups, even those who are not politically active, and of those with Kurdish ethnicity still occurs in Turkey. Therefore, it is likely that [the claimant] would still be at risk of persecution, regardless of whether he has been politically active against the authorities in the UK".

30. The Secretary of State had responded to this and had indicated that members of the PKK who had a profile suggesting to the Turkish authorities that they are active or influential may well risk persecution but persons of a low profile or not active, although risking harassment or discrimination, did not generally face ill-treatment that amounted to persecution.

31. It was the Secretary of State's position that the claimant, having left Turkey in 1995 could not be thought of as a high profile, or indeed any kind of, activist.

32. The claimant had produced an expert report dated 10 June 2019 from Ms Sheri Laizer. Ms Laizer had also produced a report for the claimant in 2006.

33. The judge regarded Ms Laizer as a reliable expert. Her report was dated June 2019 and she had visited Turkey in 2017 and 2018 and had observed things that reflected in her opinion.

34. The judge summarised the expert report at paragraph 54 and we repeat that summary below:

> "1. The political climate in Turkey concerning Kurds and anyone linked with the PKK is worse now than in 2006. Ethnic Kurds face higher risks of adverse attention, including random detention and spurious charges based on their ethnicity and imputed support for the PKK.
>
> 2. The [claimant] would face very high risks of unfair detention and ill-treatment. Political files, and police records are not expunged with time, and the [claimant] will be known through these and therefore likely to come to the attention of the authorities on return. Intelligence even about people even without a criminal record is recorded and kept, and serves as guidance to the security services.
>
> 3. It is extremely likely that the Turkish authorities will check any past information held on the [claimant] and that of any known associates and family members and they will profile him accordingly, as a Kurdish draft evader who obtained refugee status in the United Kingdom. Being of Kurdish ethnicity will raise the level of suspicion about the [claimant] from the outset.
>
> 4. Prison conditions have deteriorated overall and with particular reference to the Kurdish Movement and those deemed to have links to the PKK."

35. The judge then considered submissions and allowed the appeal.

36. The Secretary of State's grounds of appeal to the Upper Tribunal, appropriately, attack separately the decisions concerning the cessation of refugee status and the Section 72 certificate.

37. Concerning the cessation of refugee status the grounds complain that, although the judge was not wrong to begin with the earlier Tribunal decision that led to the claimant getting asylum status, the appropriate starting point here was whether the claimant still needed protection. It relied on the case of **MA (Somalia) [2019] 1 WLR 241** approved in **MS (Somalia) [2019] EWCA Civ 1345** where Hamblen LJ approved Arden LJ saying:

> "A cessation decision is the mirror image of a decision determining refugee status. By that I mean that the grounds for cessation do not go beyond verifying whether the grounds for recognition of refugee status continue to exist. Thus, the relevant question is whether there has been a significant and non-temporary change in circumstances so that the circumstances which caused the person to be a refugee have ceased to apply and there is no other basis on which he will be held to be a refugee ..."

38. It was the claimant's case that he feared not just the authorities but also the PKK which was said by the Secretary of State not to be a violent organisation. It is said that the First-tier Tribunal Judge failed to give clear reasons why the claimant would still be at risk given that he supported a non-violent organisation and was not in a prominent position and was not engaged in sur place activity. It was also the general complaint that the examination of the evidence of country conditions was insufficient.

39. In his consideration of the Section 72 certificate the judge is criticised because the claimant has, amongst other offences, been sentenced to two substantial prison sentences so "in all respects his offences are serious" but the First-tier Tribunal Judge did not suggest otherwise and this criticism is misconceived.

40. The grounds also complain that a Serious Crime Prevention Order confirms that the claimant has the potential to cause serious harm to the public and, in any event, it only has five years' duration and so, according to the grounds "cannot be used to rebut a Section 72 certificate".

41. The grounds further maintain that the judge gave unlawful weight to the allegedly improving influence of his adult children given that they did not seem to influence his behaviour when they were children and the judge did not explain why they should be any more effective now.

42. Ms Radford had prepared a respondent's Rule 24 response.

43. Concerning the decision that the claimant no longer needed refugee protection she emphasised, correctly, that it is not for the claimant to prove that he is a refugee but for the Secretary of State to prove that the cessation clauses are made out. There has to be a change of a fundamental character and the clause is to be interpreted restrictively.

44. Ms Radford said that the First-tier Tribunal had gone about its task correctly and had concluded reasonably in a fully reasoned decision that the Secretary of State had not discharged the burden of proof.

45. The Rule 24 notice reminds us that the UNHCR was not satisfied with the decision of the Secretary of State and the UNHCR emphasised that the Turkish authorities had pursued an unprecedented crackdown against its perceived opponents after the 2016 coup attempt. The UNHCR did not accept that lack of political activity in the United Kingdom would be a saving feature.

46. It was the Secretary of State's position that low profile opponents were not at risk but Ms Radford argued that that was an unsustainable position. The claimant had produced an expert report from Ms Laizer and the judge had rejected inferences the Secretary of State had chosen to draw from CPINs and accepted instead Ms Laizer's clear conclusions.

47. The Rule 24 Notice also reminds us, correctly, that it is not our function to decide if the claimant still needs international protection but if the Secretary of State has satisfied us that the judge was not entitled to

conclude on the evidence relied upon that the Secretary of State had not proved that country conditions had changed. The grounds made out no arguable public law error to demonstrate for example, that important documents had been ignored or that the decision to allow the appeal was irrational.

48. With regard to the Section 72 decision the Notice again points out that the burden is on the Secretary of State to prove (on the facts of this case) that the claimant cannot be trusted not to commit further offences and, according to the Notice, the First-tier Tribunal Judge was entitled to conclude that, notwithstanding the statutory presumption, the contention that the claimant was a danger to the community was not made out.

49. Ms Radford dealt with the suggestion that Decision and Reasons was unlawful because the judge did not explain why he found that the claimant's children would keep him out of trouble when he had got into trouble notwithstanding his having children. She submitted that the omission was not important when the Decision was taken as a whole. The Decision is not wrong in law because under intense examination by a determined party some part of it is not all that it might be. A holistic exercise is necessary.

50. We agree with Ms Radford about the need for a holistic approach but, in any event, we do not regard this line of argument as being particularly helpful to the Secretary of State. Whatever the truth may be there is an obvious possible explanation for the restraining effect of the children, namely that having been deprived of close contact with them once he will not want to repeat the pain. It is, we find, petty and misconceived to contend that any explanation is necessary. The two sets of circumstances do not conflict.

51. In deciding if the First-tier Tribunal was entitled to conclude that there had not been a necessary change in circumstance it is appropriate that we consider precisely why the claimant was given refugee status in the first place. No explanation is offered by the Secretary of State because the claimant was refused asylum. The reasons must lie in the decision of Mr R J Haynes sitting as an Immigration Judge in February 2006.

52. The claimant's case was summarised at paragraph 2.1.

53. The claimant said that he risked persecution both by the state of Turkey and by the PKK. The claimant was involved with the Kurdistan Workers Party (Vejin), that is the "Vejin faction". His cousin was then serving a prison sentence of 35 years for his involvement in the party. There was a risk of persecution by the PKK because of his support for the Kurdistan Workers Party.

54. The claimant's stepbrother had been arrested and sent to prison for eight years because of his involvement in the People's Revolutionary Freedom Movement. The claimant had travelled with his stepbrother to Syria where they had met the commander of a PKK camp. That person was

disillusioned with the PKK and decided to set up the Kurdistan Workers Party (Vejin). This faction of the Kurdistan Workers Party was characterised by being non-confrontational and non-violent. The claimant said that the existence of the Kurdistan Workers Party (Vejin) was seen as a threat to the PKK and the claimant's stepbrother and sister-in-law were present at a meeting when four PKK activists shot and killed a party leader. The claimant's stepbrother was later shot.

55. After the death of his stepbrother the claimant's nephew returned from Iraq to take over his father's position in Turkey and was arrested due to his political activities including distributing leaflets and attending demonstrations.

56. The claimant was constantly harassed by the police and military. He was frequently taken to the police station where he was detained, questioned and tortured. He was pressurised to confess to his membership of an illegal organisation, the Kurdistan Workers Party (Vejin). Additionally, he is under constant threat by the PKK because he is seen as an enemy. The claimant had even received threats from the PKK in the United Kingdom.

57. Notwithstanding the claimant then being subject to deportation having been sentenced to four years' imprisonment for firearms offences, the Immigration Judge was satisfied with much of the claimant's evidence. In particular, there was background evidence supporting the claimant's account of the creation of the party.

58. The judge had studied the papers and found that the claimant had given a "long and uninterrupted account of his activities".

59. The judge was impressed with clear background evidence that the Turkish authorities kept extensive records. The judge was satisfied that the claimant would come to the attention of the authorities and there was a real risk of that leading to persecution.

60. The judge was concerned that the claimant's return from the United Kingdom would attract attention so that he would be interviewed and his stay would come to light. There was but a short step from that kind of information coming out and persecution and the judge was satisfied there was a real risk of persecution in this case.

61. In short, the Immigration Judge accepted that the claimant was a political activist and, importantly, was a relative and close associate of more prominent activists and that he faced a real risk of being identified as such by the authorities and persecuted. The decision was referred to the Upper Tribunal for reconsideration and was determined by Senior Immigration Judge Lane (as he then was) sitting with two lay members. The Tribunal found no fault in the Immigration Judge's decision. The reviewing Tribunal did muse about how the situation might have been different if the Secretary of State had chosen to rely on Section 72 of the 2002 Act but the Secretary of State did not and so there was no need to consider then

whether the claimant was disqualified from protection by reason of his behaviour.

62. In the instant case the Secretary of State had to show that the risks that existed when the claimant was recognised as a refugee did not exist now. The First-tier Tribunal decided that the Secretary of State had failed to do that.

63. The First-tier Tribunal Judge analysed the Secretary of State's case. The Secretary of State relied on an August 2017 Country Policy and Information Note that the PKK situation has changed saying that those associated with the PKK who were in trouble with the state probably risked prosecution for being linked to an illegal organisation rather than persecution. There is also a similar CPIN for March 2016 showing that the claimant was too old for military service and the Secretary of State decided that the claimant was not likely to be pursued for military service.

64. The Secretary of State decided that there had been a change in circumstances so that the claimant would not be at risk.

65. The First-tier Tribunal Judge noted that the UNHCR disagreed with the decision.

66. The UNHCR knew that since the coup attempt of 15 July 2016 the Turkish authorities had "pursued an unprecedented crackdown against perceived critics and opponents" and did not accept that fundamental changes in the sense of Article 1C(5) had not occurred in Turkey. However the Secretary of State did not accept that the claimant had a sufficiently high profile to be of interest in the event of return.

67. The judge then considered Ms Laizer's report and her conclusions that the attitude in Turkey towards Kurds and anyone linked with the PKK was worse now than in 2006 and there were "very high risks of unfair detention and ill-treatment" she confirmed that the legal records had not been expunged through the passage of time. The First-tier Tribunal Judge accepted Ms Laizer's evidence.

68. An important reason for the Secretary of State being given permission to appeal was that it was arguable that the First-tier Tribunal had not explained why the evidence of Ms Laizer was preferred to the evidence relied upon by the Secretary of State.

69. In truth little evidence was relied upon by the Secretary of State. The CPIN reports are based on summaries or extracts from a range of human rights reports and, although a useful starting point, rarely provide much depth. According to Ms Laizer's report at paragraph 3.2 the CPIN dated August 2017 "has been overtaken by the their own most recent guidance".

70. It may well be that the focus of ill treatment is presently directed towards recent Kurdish activists but the "clampdown" on those opposed to the government is very significant. Ms Laizer's report cites evidence in a 2019

report that in the "last two years more than 100,000 people have been detained".

71. It is wrong to focus on prison conditions in the sense of cell size and nutrition. The concern is the widespread abuse of prisoners. Ms Laizer refers to reports that Turkish prisons are "full of torture and abuse", that "reports of abuse in detention, including beatings and rape, are extremely alarming in Turkish jails" and that "the torture, abuse and ill-treatment of detainee and prisoners in Turkey has become the norm rather than the exception. These quotations are not from popular newspapers but from, for example, Amnesty International and the Stockholm Center for Freedom.

72. In short, there was ample evidence before the First-tier Tribunal which supported the judge's ultimate conclusion that there had not been a significant and non-temporary change in conditions in Turkey such that the claimant was no longer at risk on return.

73. Importantly, there was absolutely no reason for the judge to find that the sophisticated widespread record keeping in which people are linked to family members and possibly other associates who have attracted the adverse attention of the authorities has in any way diminished its reach since the Tribunal decided **IK (Turkey)**. Indeed it was Ms Laizer's evidence that arrival of electronic information systems means that records are more accessible and possibly further reaching than before.

74. It must follow from this that the judge was entitled to find that there is a real risk that the claimant's past associations will come to the attention of the authorities and that he would be at risk as a result of those associations

75. They are indeed "past" associations. This is not a man who has been active in Kurdish separatism. There is no evidence that he has added to the cause during his time in the United Kingdom. However, it is also plain that he has been associated with some prominent activists and this link will show up when he is investigated.

76. His case has fallen for consideration at a time when the Turkish authorities have been clamping down on any kind of opposition and we do not accept that the distinction drawn by the Secretary of State between "persecution" and "prosecution" is all that helpful. Persecutory behaviour does not cease to be persecution by reason of it being identified as a particular criminal offence.

77. On the evidence before us, if the claimant is in trouble it is not because of anything he has done to undermine the Turkish state in the last twenty years but because of his ethnicity and family members and previous activities. It is trite asylum law that persecuting states cannot be assumed to behave rationally. Their agenda is to crush a particular cause. We repeat we are satisfied that the First-tier Tribunal Judge was entitled to reach the view that he did.

78. In the reasons for refusal the Secretary of State, appropriately, refers back to the letter of 24 October 2017 giving Notification of Intention to Revoke Refugee Status.

79. It is absolutely right that the Secretary of State has acknowledged evidence of prosecution and harassment of PKK supporters. It is also right that the CPIN of August 2017 referred to supporters or perceived supporters (or their relatives) of the PKK being likely to face questioning and some harassment or discrimination. That does not deal with the situation of this claimant who would be returned to Turkey after a long break and could expect to be discovered as a PKK sympathiser who had avoided military service by leaving the country. It is quite clear from the evidence of Ms Laizer that there is, at the very least, good reason to suspect that people seen as opponents to the government are being targeted for unjustified prosecution and ill-treatment.

80. The claimant would have to re-establish himself in Turkey. This will involve entering the country and then registering himself in wherever community he chooses to settle. This will necessarily bring him into contact with the authorities when his past behaviour will be revealed.

81. Asylum decisions, particularly those that go to appeal, are rarely about certainties. A real risk is sufficient to entitle a person to protection and although there have certainly been many changes in Turkey during the claimant's absence, and for a time there were reasons to think there had been significant improvements, we consider that the judge was entitled as a matter of law to find that the changes had not been significant and non-temporary and that they would not have removed the risk to the claimant

82. As required by the grant of permission we have gone back to the materials relied on by the Secretary of State and applied our minds carefully to the risks facing this particular claimant. We acknowledge Mr Clarke's submissions that the claimant's case is that he associated himself with a separatist group from the PKK and disavowed violent revolution. With respect to Mr Clarke this is rather missing the point. The issue is not if the claimant is a threat to the state of Turkey (and there is evidence that political opposition of the most respectable kind is perceived in this way) but whether he would be perceived by the state of Turkey as a threat. We have no basis for thinking a Turkish police officer or Immigration Officer would be particularly concerned with the distinction. We found paragraph 5(v) of Ms Laizer's report particularly pithy. She said there:

> "Whilst some aspects of CG IK remain valid when profiling a Kurd like [the claimant] on return to Turkey, reference to the GBTS database alone – in terms of what is held on Turkish security databases – has long been out of date. "The information on individuals is obtained from '*investigative work, interrogation, citizens' letters, emails, new stories, video clips from surveillance cameras, city surveillance cameras (MOBESE subject to police interference and deletions) photos, identity information etc. making and profiling of criminals.*' [The claimant] would however, still show as a draft evader: it is not his age, but his evasion of military

service that counts, contrary to the Home Office Decision letter. Turks are expected to comply with military service and to consider it an honour to serve the Turkish motherland. When Kurds avoid military service, the imputation is that they are not loyal to the Turkish state and are therefore opponents likely to support the PKK."

83. Ms Laizer then said in sub-paragraph (viii) that in her opinion it was "extremely likely that the Turkish authorities will check any past information held on [the claimant] and that of any known associates and family members and they will profile him accordingly".

84. The claimant has the additional disadvantage of coming from Agri and that is an area where PKK activity has continued.

85. The weak spot in the claimant's case insofar as it relates to Miss Laizer's report is the likelihood of his experiencing any of the bad things that are known to happen. The Secretary of State is perfectly entitled to take the view that Kurds, generally, do not risk persecutory ill-treatment but this claimant is not to be regarded as an ordinary Kurd but one who has had a long absence from the country with an adverse profile and a particular reason for police interest because he has not done his military service. These points are not properly supported or investigated in the Secretary of State's reasons. The First-tier Tribunal Judge was entitled to prefer the specific and up-to-date evidence.

86. In short, however unattractive that the answer might be given the serious offending with which this claimant has been associated (we do not lose sight of the fact that he has a conviction for firearms offences considerably before the matter leading to the present decision) the First-tier Tribunal's conclusion that the Secretary of State had failed to show that the claimant no longer needed international protection was plainly open to it. It is to be recalled that the judge's conclusion in this regard accorded with the opinion of the UNHCR, to which particular respect was due: IA (Iran) [2014] UKSC 6; [2014] 1 WLR 384, at [44].

87. We turn now to the judge's separate analysis of whether the claimant should lose the protection against refoulement as a result of his offending, under Article 33(2) of the Convention and s72 of the 2002 Act. Our focus is on the judge's conclusion that the claimant is no longer a danger to the community. As far as we are aware it has never been suggested, nor could it be, that he has not committed very serious crimes.

88. We find the judge's reasons for concluding that the claimant had successfully rebutted the statutory presumption that he represents a danger to the community to be problematic. They are summarised at paragraph 40 where the judge said:

"Having weighed all of these factors very carefully, I find that the difficulty I am left with is weighing such serious criminality and the possibility of the [claimant] returning to it because it was his lifestyle at the time, against the [claimant's] good behaviour, progress and attitude since he was sent to prison. Ultimately,

> the factors I find that tip the balance in the [claimant's] favour are: the changes he has made and the rehabilitation he has shown have endured for the ten year length of his sentence; that he will not be left to his own devices to face any challenges on release from custody; and the motivation he has shown because of his children who he will lose if he reoffends, not only because of what they have said but also because he may then face the possibility of removal from the country again."

89. The children did not give evidence. The judge observed that it would have "been helpful to have heard from them" but he accepted the explanation that they had not attended the hearing because it was about his asylum claim and not his relationship with them. It is not our business to know what passed between the claimant, his children and the legal advisers but we find it a rather surprising suggestion to make about a case where his future conduct as well as his need for protection has had to be considered.

90. The reasons set out in paragraph 40 necessarily refer back to the preceding paragraph where the judge noted that the claimant would be under the supervision of an offender manager *and* he was the subject of a Serious Crime Prevention Order. Clearly the judge found both of those features significant in reaching his conclusion and we find, notwithstanding our initial interest in the Order, that he was wrong to do that. The Serious Crime Prevention Order made against the claimant is very detailed and precisely drawn but in broad terms prohibits him from having more than £1,000 in cash and from transferring more than £1,000 per week within the United Kingdom and from possessing more than one "mobile communication device" and from notifying the authorities of any vehicle he controls and other matters about his identity and address.

91. We have also considered **R v Hancox [2010] EWCA Crim 102; [2010] 1 WLR 1434** which looks at the purpose of a Serious Crime Prevention Order. It is clear that such orders are not made routinely and when they are made they are made because the judge imposing the sentence is satisfied that there is a future real risk of a person committing serious offences: [9] of Hancox refers. Of course, the fact that that was the view of the circuit judge when sentence was imposed does not mean that it is the state of affairs when the claimant came to be released but the judge in the First-tier Tribunal was wrong to regard the existence of that order purely as a check on the claimant's behaviour when in fact it was indicative of the sentencing judge being persuaded that there was a real risk of further offending. Further the terms of the order frustrate mischief rather than promote good behaviour. It is hard to see that the order adds anything to the support of the probation officer.

92. We fully appreciate that the judge also had in mind the supervisory role of the probation officer but we cannot avoid coming to the conclusion that he took a bad point by incorporating in his reasoning something that should not be there. The judge's reference to "factors that tip the balance" indicate

that he found this a close call and his reliance on a bad point, we find, undermines the decision as a whole.

93. We set aside the decision that the claimant does not represent a danger to the community of the United Kingdom.

94. In reaching that conclusion, we do not suggest that there was no evidence before the judge which militated in favour of the conclusion reached, but simply that his evaluation was tainted by the one dimensional view he took of the SCPO.

95. We have in mind the clear evidence of the claimant's good behaviour in prison and his protestations about his future behaviour. We have noted the claimant's comment, recorded in the OASys Assessment (page 106 in the bundle), "I have learnt my lesson, I have completed 16 and a half years in prison all together and don't want to do it anymore". However this is only helpful if he is able to give effect to his intentions. We have no idea how, or even "if" he can support himself in the community. We would like to know what has happened to his confiscation order (see OASys Assessment at page 95 of bundle).

96. The case will be relisted in the Upper Tribunal before this division of the Tribunal if reasonably practicable.

97. We make it plain that the judge's findings regarding the cessation of refugee status contained no legal error and are preserved. It is the assessment of the risk presented by the claimant to the community of the United Kingdom which falls to be assessed afresh, as part of the assessment of whether he is a refoulable refugee.

98. It is for the parties to decide on the evidence on which they seek to rely but we are particularly concerned about the order made in the Westminster Magistrates' Court and the outstanding sums that exist in the way of a compensation order. There is nothing before us to suggest that the claimant has any ability to discharge his financial obligations and the existence of that order may (we put it no higher than that) be an incentive for him not to comply with good behaviour but rather to encourage him to resume his old criminal ways. The parties may find it helpful to address us about this.

99. It follows therefore that the Secretary of State's appeal succeeds in part. We dismiss the challenge to the finding that the claimant still needs protection but we allow the challenge to the finding that he is still entitled to the protection of the Convention against refoulement.

Notice of Decision

100. The Secretary of State's appeal is allowed to the extent that we set aside the finding that the claimant is not a risk to the community and we direct the case be heard again on that point in the Upper Tribunal. We dismiss

the appeal against the finding that he is at risk of serious ill-treatment in Turkey.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal Dated 28 September 2020