Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: RP/00069/2019**

THE IMMIGRATION ACTS

Heard remotely via Teams	**Decision & Reasons Promulgated**
On the 11th June 2021	**On the 28th June 2021**

Before

UPPER TRIBUNAL JUDGE LANE

Between

YUNUS SINE Appellant

(ANONYMITY DIRECTION NOT MADE)

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Juss
For the Respondent: Mr Diwnycz, Senior Presenting Officer

DECISION AND REASONS

1. By a decision promulgated on 12 May 2021, I set aside the decision of the First-tier Tribunal. My reasons were as follows:

1. I shall refer to the appellant as the 'respondent' and the respondent as the 'appellant', as they appeared respectively before the First-tier Tribunal. The appellant is a male citizen of Turkey who was born in 1992. He was granted leave to remain as a refugee in October 2008 as a child and indefinite leave to remain on 27 February 2014. He was convicted of possession with intent to supply a Class A drug (heroin) in July 2018 and sentenced to 3 years' imprisonment. By a decision dated 3 June 2019, the appellant's refugee status was revoked and a deportation order was signed on 3 July 2019. The appellant appealed on human rights and asylum grounds to the First-tier Tribunal (Judge Ali) which, in a decision promulgated on 17 March 2020, allowed his appeal. The Secretary of State now appeals with permission to the Upper Tribunal.

2. There are two grounds of appeal. In the first ground, the Secretary of State argues that the First-tier Tribunal erred in law by failing to determine whether section 72 of the 2002 Act (as amended) applied in this case and, in particular, whether the appellant had successfully rebutted the presumption that he constitutes a danger to the community.

3. The appellant argues that, whilst the judge did not in terms determine the section 72 issue, it is clear from the remainder of the judge's decision that any error is immaterial. Further, relying on *Mugwagwa* (s.72 – applying statutory presumptions) Zimbabwe [2011] UKUT 00338 (IAC), he asserts that the OASYS report (which indicated a low risk of re-offending) was evidence which would inevitably have led the judge to conclude that the presumption had been rebutted.

4. In *Mugwagwa,* at [35] the Upper Tribunal recorded that the Senior Presenting Officer appearing before it accepted that the OASYS report 'rebutted the presumption that the appellant was a "danger to the community" created by s.72 of the 2002 Act.' That concession on the particular facts in the appeal cannot be, as the appellant in the instant appeal seeks to argue, of universal application. Indeed, as the italic words at the outset of the reported case indicate, *Mugwagwa* is authority for the principle that 'the First-tier Tribunal (Immigration and Asylum Chamber) is required to apply of its own motion the statutory presumptions in s.72 of the Nationality, Immigration and Asylum Act 2002 to the effect that Art 33(2) of the Refugee Convention will not prevent refoulement of a refugee where the factual underpinning for the application of s.72 is present even if the Secretary of State has not relied upon Art 33(2) and s.72.' The case stresses the importance of the Tribunal dealing with a section 72 certificate, not excusing a failure to do so in the light of a particular item of evidence. Moreover, I reject the appellant's submission that the fact the judge had mentioned section 72 at [6] and [14] is sufficient. To note that a provision arises in an appeal is not the same as determining any issue arising from the provision. I am satisfied that the First-tier Tribunal did err in law by failing to determine the section 72 issue.

5. The Secretary of State's second ground of appeal is less persuasive. The respondent argues that the judge has provided inadequate reasons for finding that the appellant would still be at risk on return to Turkey. The UNHCR had been notified of the Secretary of State's intention to revoke the appellant's asylum status and had responded by writing a detailed response. The judge has considered this letter and the other evidence at [51-60]. He finds [55] that he should attach 'significant weight' to the letter and the case made in it for rejecting the respondent's assertion that there have been fundamental and

durable changes in Turkey such that the appellant, a committed supported of Kurdish separatist politics, would not be at risk on return. The respondent's criticisms of the judge's analysis, for example that the judge attached weight to the failure of the Secretary of State to follow up on the UNHCR's suggestion that she interview the appellant, fail to disturb that analysis. In my opinion, all the findings detailed by the judge at [51-60] were available to him on the evidence (including the UNHCR letter) and the challenges in the grounds of appeal at [3] are no more than disagreements with the judge's findings. In the passage of the CPIN Report of March 2020 upon which the Secretary of State in the grounds relies, I note that, whilst being a member or supporter of the HDP (the successor party to the DTP which the appellant had supported) is unlikely to result in persecution 'the risk will depend on the person's profile and activities.' [2.4.15]. It was plainly open to the judge, on a consideration of the all the evidence (including the UNHCR letter), to find that this particular appellant maintains a profile which continues to expose him to risk. I find that Ground 2 is not made out.

6. As regards disposal, Mr Tan, who appeared for the Secretary of State before the Upper Tribunal, submitted that the appeal would have to be returned to the First-tier Tribunal. The First-tier Tribunal's decision is incomplete rather than incorrect; the main findings as regards the revocation of the appellant's asylum status are, for the reasons I have given, sound. Consequently, there is no reason to remit the appeal to another First-tier Tribunal judge whilst returning it to Judge Ali to complete the decision will also cause unnecessary delay. The section 72 certificate is a discrete issue in the appeal and I consider that it can be determined in the Upper Tribunal following a resumed hearing. The findings of the First-tier Tribunal as to risk on return shall stand; it follows that the appellant is, in any event, entitled to succeed on Article 3 ECHR grounds. As regards asylum, the Secretary of State may wish to consider her position before the resumed hearing.

Notice of Decision

The decision of the First-tier Tribunal is set aside. The Tribunal's findings at [48-60] shall stand. Consequently, the appeal against the Secretary of State decision is allowed on Article 3 ECHR grounds. The Upper Tribunal shall, at a resumed hearing, determine whether the appellant (who has been found to have committed a particularly serious offence) has rebutted the presumption that he is constitutes a danger to the community (see section 72 of the 2002 Act (as amended)). The parties may adduce new evidence provided that documentary evidence (including witness statements) are sent to the Upper Tribunal and to the other party no less than 10 days prior to the resumed hearing.

Signed Date 28 April 2021
Upper Tribunal Judge Lane

2. Section 72 (1-6) of the Nationality, Immigration and Asylum Act 2002 provides:

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) 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—

(a) he is convicted outside the United Kingdom of an offence,

(b) he is sentenced to a period of imprisonment of at least two years, and

(c) he could have been sentenced to a period of imprisonment of at least two years had his conviction been a conviction in the United Kingdom of a similar offence.

(4) 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—

(a) he is convicted of an offence specified by order of the Secretary of State, or

(b) he is convicted outside the United Kingdom of an offence and the Secretary of State certifies that in his opinion the offence is similar to an offence specified by order under paragraph (a).

....

(6) A presumption under subsection (2), (3) or (4) that a person constitutes a danger to the community is rebuttable by that person.

3. The appellant, therefore, falls to be considered as a serious criminal on account of his conviction and 3 years sentence of imprisonment. He is able to rebut the consequent presumption that he is a danger to the community. The evidence which he adduces in support of his rebuttal will be subject to assessment by the standard of proof of the balance of probabilities.

4. The appellant relies upon the OASYS report produced in 2019 following his conviction. In each of the categories considered in the report, including violent and non-violent offending, the risk has been assessed as low. Mr Diwnycz, who appeared for the Secretary of State at the resumed hearing, did not seek to challenge in submissions the assertion that (i) the OASYS is capable of determining the appeal in respect of section 72 (see *AM (Somalia)* [2019] EWCA Civ 774); (ii) the report in the instant constituted the only independent assessment of the appellant's likely danger to the community.

5. There is no evidence that the appellant has offended again since his release from prison. I accept that the OASYS report unequivocally concludes that the appellant is at low risk of reoffending in each category addressed in the report. I find that the report constitutes an accurate evaluation of the risks to society posed by the appellant. On the basis of the evidence available to the Upper Tribunal, I find that the appellant has rebutted the presumption that he constitutes a danger to the community. In the light of that finding and the conclusions as to real risk on return set out in my error of law decision, his appeal against the decision to revoke his refugee status is allowed.

Notice of Decision

The appellant's appeal against the revocation of his refugee status is allowed. The appellant is entitled to protection as a refugee.

Signed Date 12 June 2021
Upper Tribunal Judge Lane