Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: RP/00021/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 12 September 2022	**On the 12 October 2022**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE SAFFER

Between

BHX
(Anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Direction regarding anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008
Unless and until the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Appellant or members of his family. This direction applies to, among others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Representation:
For the Appellant: Mr D Bazini of Counsel, instructed by Times PBS Ltd
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The background to the hearing before us is set out in the decision promulgated on 6 December 2021 following a hearing on 11 November 2021 by the Upper Tribunal. At that hearing it was found that there was a material error of law in the decision of the First-tier Tribunal. It is not intended to repeat what was set out therein as we attach that decision by the Upper Tribunal as an annex to this decision.

2. Suffice it to say that there are two issues for us to determine. Firstly whether the Respondent had any legal basis upon which to revoke the Appellant's refugee status as explained in Dang (Refugee – query revocation – Article 3) [2013] UKUT 43 (IAC). Ms Cunha conceded that if she failed on this point, then she also failed on the second issue which was a reassessment of the certificate issued by the Respondent pursuant to s72 of the Nationality, Immigration and Asylum Act 2002 ("the s72 certificate"). It was conceded by the Respondent then and was repeated before us that the Appellant succeeds on Article 3 grounds.

3. We have retained the anonymity direction as the reasons for its grant remain.

The Respondent's submissions

4. No written submissions were provided in relation to the Dang issue. It was submitted orally that Dang can be distinguished from this case and not applied as the Appellant in Dang had been found to be a refugee and continues to be one. On the question of revocation, one needs to revert back to the 1951 Convention relating to the Status of Refugees and in particular Article 33 which has always allowed the Respondent to have that power as it states that;

> "1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."

5. The Appellant is a refugee and has been recognised as being one. By incorporating international law into national law the Respondent also imported Article 33. The 2004 Act was passed to simplify matters as the power was always there. Dang does not need to be applied as Article 33 (2) is word for word with s72. Dang does not look at the past. The mechanism for recognition needs to be consistent with the withdrawal of

recognition. Dang is wrong on the point that the Respondent never had the power to revoke refugee status.

6. It was submitted that R v Asfaw [2008] UKHL 31 is relevant as it considered a question asked by the Court of Appeal namely;

> "1. ... If a defendant is charged with an offence not specified in section 31(3) of the Immigration and Asylum Act 1999, to what extent is he entitled to rely on the protections afforded by article 31 of the 1951 United Nations Convention Relating to the Status of Refugees?"

7. We were pointed to the following passages to support the assertion that Dang could be distinguished;

> "56. The single most important point that emerges from a consideration of the travaux préparatoires is that there was universal acceptance that the mere fact that refugees stopped while in transit ought not deprive them of the benefit of the article. The phrase "coming directly", if read literally, would have that effect. But, as Dr Weis noted in *The Refugee Convention 1951*, p 310, the UK representative said that these words, which appeared for the first time in his suggested amendment, would allow for a certain amount of flexibility in the case of refugees coming through intermediary countries. They were then incorporated in the French amendment, which was adopted by a large majority. Lord Williams of Mostyn acknowledged this point when he said during the Third Reading in the House of Lords of the Bill which became the 1999 Act that, as he had already observed on Report, the definition of "coming directly" was a generous one: Hansard (HL) 2 November 1999, col 785. It is hard, then, to see why the fact that the refugees are still in transit should be ignored when the question arises whether they are entitled to the protection of the article. Lord Williams said that a time must come when they have stopped running away, which he described as the article 31(1) situation. But, on the facts of this case, the appellant had not stopped running when she was arrested.
>
> 57. Article 31(1) does not, of course, give the refugee a right to choose the country in which to seek asylum. So the United Kingdom was not in breach of it when the appellant's wish to travel on to the United States was frustrated by her arrest at the departure gate. But what article 31(1) does deal with is the issue of punishment. It deals with the situation where the question is whether refugees should be punished for offences committed while escaping from persecution by the use of false documents. It recognises that refugees, whose departure from their country of origin is usually a flight, are rarely in a position to comply with the requirements of legal entry to the country of refuge: Dr Weis, *The Refugee Convention 1951*, p 279. It was designed to protect refugees from punishment who resort to the use of false documents while they are still in flight to obtain entry to the country of refuge."

8. Ms Cunha submitted that if the Respondent is wrong in her understanding of Dang, the appeal must be allowed as there is no evidence that the circumstances have changed in Afghanistan since the Appellant was granted refugee status.

9. In relation to the S72 certificate the fact that the Appellant has been found by the probation service to be at a low risk of reoffending that does not mean he is a low risk to the community.

10. HA (Iraq) [2022] UKSC 22 at [68 to 72] provided guidance on the relationship between proportionality and the seriousness of offence in that;

> "68. Any evidence that bears on seriousness is relevant to that statutorily required assessment, not just the sentence imposed."

11. Notwithstanding the low risk of reoffending, the Appellant still denies his role in his offending behaviour. He has worked in the community and attended courses. But how can he recognise the impact of drugs on the community if he does not accept that what he did was wrong.

12. The probation officer's report does not adequately assess the nature and context of the offence. It is a question of weight to attach to the letter of 03 February 2021. HA (Iraq) looks at the public interest and this can be applied to the question of danger to the community. The mere fact it is the first offence is neither here nor there. The letter does not take into account that the Appellant was subject to licence and had an outstanding deportation issue. It is not accepted he understands the nature of his offending when the most recent medical report says he does not.

13. The Respondent is not saying that the probation officer is not capable of saying what she says, but she may be looking at public safety factors such as the Appellant not being monitored. He has been subject to licence. The assessment does not take into account wider public concerns as the Respondent. As explained in HA (Iraq), there are different public policy considerations in an immigration context as the risk to the community in immigration terms is wider than in the criminal context.

14. The probation officer's letter does not have details of the weight given to the OGRS statistic. There is no indication the probation officer has any expertise in an immigration context.

15. The fact that the Appellant's licence has expired does not add weight to his claim as he is still subject to deportation.

16. The OGRS tool takes into account a lack of previous offending. But there is nothing to indicate the assessment has been made on the basis of his offending. The author may not have had details of the crime. The weight to the assessment should be reduced due to his lack of acceptance of culpability and therefore has the propensity to reoffend. This undermines the assessed low reoffending percentage.

17. Little weight should be attached to the character references as they say he is of good character whereas he is not. He is still a danger to the community.

18. Dr Lawrence, the Psychiatrist, is not an expert on offending behaviour and cannot comment on its likelihood.

19. The standard of proof in considering whether the s72 certificate has been discharged is the balance of probabilities.

The Appellant's Submissions

20. It was submitted in the skeleton argument that the law is as explained in Dang. It was submitted orally that Asfaw predates Dang by 4 to 5 years. The Tribunal in Dang must have been aware of it. Asfaw refers to provisions that were not in law. However in Dang, it was not that there were no provisions, but that the provisions went against the 1951 Convention.

21. In relation to the s72 certificate it was submitted in the skeleton argument that the presumption has been rebutted. Apart from the index offence in 2013 there has been no offending behaviour since he arrived in 2002, and no evidence to suggest concerning behaviour. The probation reports cover a number of years and indicate he has learned from the offence, had engaged well, and is motivated to address his offending behaviour. The risk of reoffending was 3% in the first year and 5% in the second year. He has good interpersonal skills and positive family relationships which are supportive and protective factors. He is well known in the community. Character references point to his rehabilitation and good character. He has a profession and the ability to earn a good living is a protective factor. The assessment of risk of reoffending must be considered in light of EN (Serbia) v SSHD [2009] EWCA Civ 630.

22. Additionally, it was submitted orally that HA (Iraq) notes that the issues of rehabilitation and the public interest are multi-faceted. Here the public interest consideration is the danger to the community. EN (Serbia) notes that the evidence has to be looked at holistically in relation to seriousness and danger, and both have to be present although there does not have to be a nexus. Each case must be considered on its own facts and in the round. The expert evidence suggests he is not a danger now as explained in the OASys report, and that he has both motivation and capacity. When considering his acceptance of his offending behaviour, it must be looked at in the context of his mental health and memory. Initially he did not know he had offended but he accepts that he then realised he had and carried on. In any event the probation officers were fully aware of his background and reached the view they did. The standard of proof in relation to rebutting the presumption in the s72 certificate is the lower standard as that is the standard that led to the certificate being issued.

Subjective evidence relating to the issue of reoffending

23. In the Appellant's statement (22 May 2022) he said that in relation to the conviction he is extremely remorseful. He has suffered a lot due to this. He would never allow himself to be put in such a situation or repeat such a

mistake again. He has no justification for what happened and cannot go back and undo his actions or erase it from his past. All he can do is learn from it and ensure it is never repeated. Since then he has tried his best to better himself and be a person of good in society. He has worked hard to bring permanent changes in himself and has been compliant with probation rules. The probation officers report categorise him as a low risk. He does not believe he poses a threat to society. He would not commit any crime or allow himself to be in such a situation again. He had not offended previously or since.

24. References from Barry Wald, Bibi Morgan, Der Umme Solema Fatha Huda, Annette Vanherin-Wallace, Joseph Aluko and, Pesarlay Bakhtani variously attest to the Appellant's good character and community work.

Probation reports relating to the issue of reoffending

25. Luke Moran (17 August 2018) wrote that he is a probation service officer. He currently supervises the Appellant who is on licence in the community. Since his release he has successfully attended all 35 of his probation appointments. He has been open and honest in these sessions and they have discussed topics such as consequential thinking, the importance of positive work in the community and the wider implications of distributing harmful drugs. He has shown a good understanding about these topics and the importance of desisting from offending in the future. Outside of supervision, there is no intelligence or evidence to suggest he is involved in any concerning behaviour and home visits and checks on his address suggest that his home life is stable. He continues to maintain positive relationships with friends and family in the community.

26. Luke Moran (18 December 2019) wrote that since his release on 1 December 2017 the Appellant has a 100% record in attending probation appointments. Topics such as consequential thinking, keeping a positive routine and contributing to society have been covered in these sessions and the Appellant has demonstrated an adequate understanding of the implications of further offending. He has not been arrested or charged with any further offences whilst being supervised by probation and there is no police intelligence or evidence to suggest he has been engaging in concerning behaviour. He is currently assessed as being low risk of harm.

27. Aurelie Burmann (3 February 2021) wrote that she is a probation service officer. She is writing the letter in respect of the Appellant's asylum and immigration matter. She has supervised him since January 2020. Since his release he is subject to a substantial period of supervision on a monthly basis by telephone contact. His licence will expire on 23 May 2022. His attitude towards his licence has been positive. He engaged well during each session and has not missed any appointments. Her assessment is that the risk of serious harm in the community is low, and the risk is not imminent on the basis that this is his first offence and he has not come to the attention of the police since his release 3 years ago, in the community. He displays adequate levels of understanding and a level of maturity in

relation to the offence and the role he played. Work has been done in supervision sessions around consequential thinking and he has shown a good understanding in this area. Given his good engagement and his motivation to address his offending behaviour, she believes he has learned from the offence and there is no present indication of risks stating that he would reoffend. In fact, the OGRS, which is a tool used by Probation calculating the likelihood of proven reoffending from a date recorded about the current offence and criminal history, predicts a low probability of proven reoffending, at 3% in the first year and 5% in the second year. Furthermore he has shown good interpersonal skills as evidenced during supervision and has a positive family relationship who are supportive and a protective factor. He appears motivated to desist from crime and she believes he will continue to show a good attitude in the future.

28. Louise Foley (21 December 2021) wrote that she is a probation service officer. The Appellant has been under her supervision on licence since 8 June 2021. He has engaged fully with all requirements of his licence. He has attended all appointments offered and been fully compliant. Since he was released on licence in 2017 he has accrued no warning letters either for his behaviour or for non-attendance. He is assessed as a low risk of harm. He always presents as polite and courteous. She has no current concerns regarding his risk of harm or reoffending.

Medical reports relating to the issue of reoffending

29. Dr M. Khan, a GP in the Freuchen Medical Centre, wrote (15 February 2021 - sic) “It appears that he was imprisoned in drug offence, which informed that he was made a victim, and was incriminated by some other persons.”

30. Dr Robin Lawrence, Consultant Psychiatrist, wrote (8 July 2022) that the Appellant was illiterate in Afghanistan. He is not an intelligent man. When he came here he learned some English but does not understand the words he reads and can write some words. The Appellant's told Dr Lawrence about his memory problems.

31. In relation to the offence the Appellant said that he came under the wing of a man who came from Kandahar and worked for him as a butcher. He also cleaned flats and managed his shops. On one occasion his boss told him to go and pick up a package. The Appellant said with tears that he did not understand it contained heroin. When he was arrested he was terrified and did not understand what was going on. When he was bailed he spoke to his boss who threatened and intimidated him.

32. In relation to his mental state examination he was not theatrical in his presentation. There is no evidence of hallucinations or delusions. He was not disorientated in time place or person. He was not thought disordered. There were no abnormalities of speech. There is no evidence that he was attempting to dissimulate in any way. He has severe depression and post-traumatic stress disorder. The Appellant has noticed that his memory is poor, he is very confused and he is not clear in his thinking.

33. Dr Lawrence's opinion is that the Appellant poses no risk to the public. Nor is there any risk that he would commit a further offence. He is remorseful and has reasonable plans for the future.

Discussion and reasons

34. We are satisfied that the Respondent had no legal basis upon which to revoke the Appellant's refugee status as explained in Dang for the following reasons. In doing so, we set out below the relevant sections of Dang and have underlined the test to be applied.

> "33. … the final paragraph of para 339A, which provides that, where an application for asylum was made on or after 21 October 2004, the Respondent will revoke or refuse to renew a person's grant of asylum where she is satisfied that at least one of the provisions in sub-paragraphs (i) to (vi) apply. This is consistent with Article 14.1 which requires Members States to "*revoke, end or refuse to renew*" refugee status if an individual has ceased to be a refugee in accordance with Article 11 of the Qualification Directive and the individual's application for asylum was made on or after the date on which the Directive came into force. The Qualification Directive came into force on 20 October 2004.
>
> 34. One possible interpretation of the final paragraph of para 339A is to say that the power to revoke or refuse to renew an individual's grant of asylum is not available if an asylum application was made before 21 October 2004; it is only available if an asylum application was made on or after 21 October 2004 and at least one of the provisions in sub-paragraphs (i) to (vi) apply.
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> 35. The second is to say that, in the case of an asylum application made before 21 October 2004, the power is available if any one of the ten possibilities in para 339A applies but, in the case of an asylum application made on or after 21 October 2004, only if one of the provisions in sub-paragraphs (i) to (vi) apply.
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> 36. The second interpretation runs the clear risk of having the result that, in the case of an asylum application made before 21 October 2004, the Immigration Rules permit a practice that is contrary to the Refugee Convention because there is nothing in the Refugee Convention which allows for the revocation of status; and the conditions expressed in sub-paragraphs (vii) – (x) are expressed more widely than the exclusion provisions in the Convention. It is also inconsistent with the principle that refugee status under the Refugee Convention is something that exists independently of any recognition by a Contracting State.
>
> 37. We therefore prefer the first interpretation, which gives effect to section 2 of the 1993 Act which provides that nothing in the Immigration Rules shall lay down any practice which would be contrary to the Refugee Convention.

35. Dang cannot be distinguished from this appeal as both Appellants had been found to be a refugee and continue to be one. It is inconceivable that the Vice Presidential panel in Dang was unaware of Afsaw, and did not consider it. The paragraphs to which we were referred in Afsaw which we

have extracted above (see p[9]) have no discernible relevance to the issues we have to consider as Asfaw refers to provisions that were not in law whereas in Dang, it was not that there were no provisions, but that the provisions went against the 1951 Convention. The facts of this appeal are on all fours with Dang in that the refugee status predated 21 October 2004.

36. We are therefore satisfied that the Respondent had no power to revoke the Appellant's refugee status and the appeal must be allowed.

37. For the sake of completeness we will deal with the s72 certificate. We are satisfied that the standard of proof is the lower standard as that is the standard that was applied in its application. On the facts of this case, even if it had been on the balance of probabilities we would have reached the same conclusion.

38. The Respondent's submissions in essence are that the probation officers' assessments are inadequate and little weight should be attached to the risk assessment. We have looked at the evidence holistically and disagree with the Respondent for these reasons. They were conducted over a period of time by different probation officers. They were undertaken by professionals whose expertise is in assessing the risk of re-offending. The tools used were standard tools used for that purpose. The effluxion of time between his release from prison and now is some 5 years and postdates the end of his licence. There is no evidence of any further offending. As he has been assessed as being at a low risk of reoffending, that also means he is a low risk to the community as there is a low risk of him offending. We therefore accept that weight can be placed on the assessments.

39. We accept that his limited acceptance of his offending behaviour must be looked at in the context of his mental health. The report from Dr Khan is a brief summary of what the Appellant said and provides no context to how that information was elicited, by whom, when, or what additional information was given if any. We accordingly attach little weight to it in assessing the Appellant's acceptance of guilt.

40. The report form Dr Lawrence is an assessment of his mental health, and the offence commission was explored within that context. We attach less weight to his assessment of the risk of reoffending for that reason, but do not discount it.

41. While the character references themselves carry little weight as it is unclear what, if anything, the authors know of his offending behaviour, and as none of them attended the hearing for their evidence to be tested, they do establish that he has community support and work which are supportive and protective factors against reoffending.

42. For all the aforementioned reasons we are satisfied the s72 certificate presumption has been rebutted by the Appellant. Whilst he was convicted

of a “particularly serious crime”, he does not “constitute a danger to the community of the United Kingdom”.

43. We allow the appeal against the revocation of the Appellant’s refugee status.

Laurence Saffer

Deputy Upper Tribunal Judge Saffer
15 September 2022

Annex

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(Immigration and Asylum Chamber) Appeal Number: RP/00021/2018

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Representation:
For the appellant: Mr D Bazini, Counsel, instructed by Times PBS Ltd
For the respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of the First-tier Tribunal (a panel comprising Judges Brannan and Cartin: "the panel"), promulgated on 7 May 2021. By that decision, the panel:

    (i) allowed the appellant's appeal on the ground that the respondent's decision to revoke his protection status breached the United Kingdom's obligations under the Refugee Convention;

    (ii) dismissed the appellant's appeal on the ground that the appellant was excluded from the protection of the Refugee Convention and so his removal would not breach the United Kingdom's obligations under it;

    (iii) dismissed the appellant's appeal on the ground that his removal would not be unlawful under section 6 of the Human Rights Act 1998.

2. There are problems with each of these outcome decisions and we shall return to consider them in more detail, below.

3. The appellant's a citizen of Afghanistan, born in 1978. He entered the United Kingdom in December 2002 and, following a successful appeal, was recognised as a refugee on 29 January 2004. His claim had been based on the accepted fact that his father was a high-ranking member of former President Najibullah's government. In line with the practice at the time, he was granted indefinite leave to remain. On 22 November 2013, he was convicted of conspiracy to supply a Class A drugs and sentenced to 9 years' imprisonment. This triggered deportation proceedings. On 7 February 2017, the respondent made a decision to deport the appellant, pursuant to the UK Borders Act 2007. On 2 May of that year, he was served with an intention to revoke his refugee status on the basis of cessation, with reference to Article 1C(5) of the Refugee Convention and paragraph 339A(v) of the Immigration Rules. Representations were made by the appellant which the respondent treated as a human rights claim. On 18 January 2018, the respondent made decisions to revoke the appellant's protection status and to refuse his human rights claim. The appellant was excluded from humanitarian protection by virtue of his conviction and sentence. There was no decision to refuse a protection claim. The decision letter included a certificate under section 72 of the Nationality, immigration and Asylum Act 2002, as amended ("the section 72 certificate"). A deportation order was signed on the same date.

4. The appellant appealed these decisions. The Upper Tribunal concluded that the First-tier Tribunal had erred in law in respect of the section 72 certificate. This in turn had a material bearing on the revocation issue. The Upper Tribunal re-decided the section 72 issue and concluded that the appellant had failed to rebut the presumption that he constituted a danger to the community of the United Kingdom (there was no dispute that the appellant had been convicted of a "particularly serious crime"). The appeal

was remitted to the First-tier Tribunal to consider only the revocation and human rights issues.

The decision of the panel

5. The panel's decision is understandably lengthy, given the various issues involved. We only summarise its conclusions here and will deal with them in more detail when later setting out our analysis.

6. At [44] the panel concluded that, for reasons set out at [29]-[43], the respondent had failed to demonstrate that the appellant was no longer a refugee. In respect of the section 72 certificate, the panel decided that, notwithstanding the decision of the Upper Tribunal, it could re-assess the issue for itself: [45]-[50]. In so doing, it concluded that the appellant had failed to rebut the statutory presumption and that he did constitute a danger to the community of this country: [56]. Article 3 ECHR ("Article 3") was then considered at some length. A new thread to this aspect of the claim was considered and rejected at [81] (this is no longer a relevant issue). The central thrust of the Article 3 claim, namely a risk from the Taliban, was ultimately dealt with at [80]:

> "80. The Appellant is of lower-level interest for the Taliban and therefore does not (currently) face a real risk of persecution from the Taliban in Afghanistan. The Appellant would also not face a serious an individual threat to his life or person by reason of indiscriminate violence in Kabul. As a result we find the risk to the Appellant from violence in Kabul (to where he can perfectly reasonably be returned to mitigate any Article 3 risk) not to breach Article 3."

7. We have already set out the outcome decisions at paragraph 1, above.

The grounds of appeal and grant of permission

8. The grounds of appeal assert that the panel failed to deal with the issue of internal relocation in respect of Article 3. This was material because it had already found that the appellant remained a refugee and, at least implicitly, that there was a risk from the Taliban in the home area. Therefore, internal relocation should have been addressed. The conclusions on the section 72 certificate are challenged on the basis that the panel failed to take full account of all evidence and had provided reasons which were perverse or at least inadequate.

9. In granting permission to appeal, the Upper Tribunal purported to restrict the scope to the issue of internal relocation.

10. There has been no cross-appeal by the respondent in respect of the revocation issue or any rule 24 response indicating a reliance on other matters.

The hearing

11. In relation to the grant of permission, we informed the parties that the Upper Tribunal's decision did not include a direction expressly limiting its scope. In light of EH (PTA: limited grounds; Cart JR) Bangladesh [2021] UKUT 117 (IAC), we concluded that the grant of permission was not limited and that the appellant was entitled to rely on his challenge to the panel's consideration of the section 72 certificate. Ms Cunha took no issue with this and confirmed that she was willing and able to deal with the point at the hearing.

12. Ms Cunha then conceded that the panel had materially erred in law by failing to address the issue of internal relocation, as asserted in the grounds of appeal. She confirmed that, on a re-making of the decision, the respondent was also conceding that the appellant would face a real risk of treatment contrary to Article 3 if removed to Afghanistan. She confirmed that this concession was based on the respondent's latest CPIN, particularly paragraph 2.6.1 of the assessment section. The conceded risk emanated from the Taliban (in light of past findings of fact which had underpinned the original granted refugee status), but also took into account the appellant's overall ill-health.

13. Mr Bazini confirmed that he was content with the basis of the Article 3 concession, both in respect of the error of law and on a re-making of the decision. He realistically accepted that the appellant was excluded from humanitarian protection.

14. We then heard oral submissions on the section 72 certificate issue. In summary, Mr Bazini made the following points. Whether the appellant was in licence was "neither here nor there": the appellant would still be punished if he committed another offence even if not on licence. Being on licence was, he submitted a neutral factor. The panel had acted illogically at [56] when holding against the appellant the fact that he not been involved in crime prior to the offence. The appellant's denial of full responsibility for his offending was not of itself sufficient for the panel to conclude that he still represented a danger to the community. It had not properly considered the latest detailed letter from the Probation Service, a source which knew the appellant well.

15. Ms Cunha submitted that the panel had been entitled to rely on the appellant's own evidence to the effect that he was still minimising his responsibility. The existence of the licence was a relevant factor, as was what the Upper Tribunal had said. There was, she submitted, no perversity.

16. In reply, Mr Bazini submitted that there was no Devaseelan issue here. The appellant had accepted guilt, but had simply claimed that another person was also involved.

17. At the end of the hearing we announced that the panel had erred in law on the Article 3 issue, but that we would reserve our decision in respect of the section 72 certificate issue.

Conclusions on error of law

18. In our judgment, Ms Cunha's concession on the Article 3 issue was correctly made.

19. We found the panel's conclusion at [80] somewhat difficult to follow. We could not quite understand why it stated that the appellant did not face a "real risk" of persecution from the Taliban when it had previously found that he was still a refugee. We are unclear why there was a reference to the test under Article 15(c) of the Qualification Directive when the appellant was clearly excluded from humanitarian protection by virtue of his offending. In any event, the real point here is that there was, at least, an implicit acceptance that the appellant would face a risk of harm in his home area. It was therefore incumbent on the panel to address the issue of internal relocation to Kabul, not simply to determine whether or not he would be at a risk of Article 3 ill-treatment in the capital. The failure to do so constitutes an error of law. It cannot properly be said that there was only one outcome to the question of internal relocation and the error is therefore material.

20. This aspect of the panel's decision must be set aside.

21. Before turning to the section 72 certificate issue, it is appropriate to raise two additional points. It is common ground that the appellant was granted refugee status in January 2004. Having regard to the decision in Dang (Refugee – query revocation – Article 3) [2013] UKUT 43 (IAC), it would appear as though there was no legal basis on which the respondent could have revoked his status. Whilst we do not rely on this point in respect of our error of law decision, it may be a question that requires addressing in due course.

22. The second point relates to the first of the outcome decisions set out at paragraph 1, above. The appeal against the respondent's decision to revoke the appellant's protection status was brought under section 82(1)(c) of the 2002 Act. Therefore, the only ground upon which he could rely in respect of that decision was that under section 84(3)(a) (sub-section (b) could not apply because the appellant was excluded from humanitarian protection), namely that the decision to revoke protection status breached the United Kingdom's obligations under the Refugee Convention. However, because the panel upheld the section 72 certificate, the only lawful course of action for it to have taken was to determine that the appellant was (still) a refugee, but to dismiss the appeal: see Essa (Revocation of protection status appeals) [2018] UKUT 244 (IAC). It follows that the first of the outcome decisions is erroneous.

23. Once we raised this issue at the hearing, Mr Bazini fairly accepted that this must be the case. Any consequences which flow from this error will depend on our consideration of the section 72 certificate issue.

24. We turn then to the certificate. It is right to say that we harbour some concerns as to the correctness of the panel's decision to go behind the Upper Tribunal's approach and conclusion on the issue. However, the respondent has not taken this point at any stage and, in all the circumstances, we need not reach a firm conclusion on it in this particular case.

25. The parties' respective arguments have required careful consideration. Ultimately, whilst some of the panel's conclusions are sustainable, we find that it erred in law in respect of two and, when these are placed in context, they materially undermine its conclusion that the appellant was a danger to the community of United Kingdom and require its decision to be set aside. We will address those matters which do not disclose errors of law first before turning to the two which do. Before this, we remind ourselves that restraint should be exercised before interfering with a decision of the First-tier Tribunal. We caution ourselves against requiring perfection in a decision, seeking the best possible reasons, or simply substituting our view for what might in truth be a legitimate view formed by the panel. The panel's decision must be read sensibly and as a whole. This approach is consistent with the thread of observations made by the Court of Appeal over the last few years: see, for example, KB (Jamaica) [2020] EWCA Civ 1385, at paragraph 16; UT (Sri Lanka) [2019] EWCA Civ 1095, at paragraph 19; Herrera [2018] EWCA Civ 412, at paragraph 18, and now MI (Pakistan) [2021] EWCA Civ 1711, at paragraphs 47 and 51.

26. Mr Bazini submitted that the fact of the appellant been subject to a licence was "neither here nor there". Whilst we accept that this factor would be unlikely, in general terms, to constitute a decisive point (or even a particularly significant point) against an individual, the panel was entitled to take it into account and place weight on it. At [56] the panel relied on the fact that any re-offending whilst on licence would result in recall to prison to complete the extant sentence *as well as* facing any punishment as a result of the new offence. In our judgment, this analysis was open to the panel, as was the conclusion that the licence did represent a current incentive not to re-offend.

27. The next factor relied on by the panel at [56] is the fact that the appellant had no previous offending history, but that "[h]is willingness to become involved is demonstrative of the fact that abstaining from offending for a number of years is *not of itself especially telling that he would not offend in the future*." (emphasis added). We confess that this sentence lead us to several re-readings of it before reaching the conclusion that it does not disclose an erroneous approach on the panel's part.

28. Mr Bazini described the passage as "illogical" and indicative of a significant error. We might have been in agreement with this submission were it not for the words included in the second part of the sentence. On our reading, the panel was in reality saying that the absence of a previous record did not carry very much weight in the appellant's favour: they were not concluding that this fact actively counted *against* him, as asserted by

Mr Bazini. Logically speaking, an individual with an unblemished history could then commit a very serious offence "out of the blue", as it were, and, depending on the circumstances, could thereafter represent a danger to the community. In the present case, we conclude that the panel was entitled to take this factor into account in the manner which it did, and was also entitled to place it within its overall assessment of the section 72 certificate issue.

29. The panel clearly placed significant weight on the appellant's own pronouncements over the course of time in respect of his responsibility: [51] and [53]-[56]. We agree with Mr Bazini that this was not a Devaseelan situation, contrary to Ms Cunha's submission. Having said that, the panel's remarks at [53] do not disclose any error in this regard. On a fair reading, it was not treating the findings of the Upper Tribunal or a previous First-tier Tribunal Judge as a starting point. Rather, it was simply expressing an agreement with what had been said before in light of the same evidence which was before it, and for the same reasons. They were entitled to note the fact that the appellant did not give oral evidence at the hearing. This might not of itself counted against him, but it clearly left the panel with only the written evidence to consider and they were entitled regard this as unimpressive.

30. The panel made it clear enough at [56] that it regarded the appellant's denial of "full" responsibility as being a significant problem in his evidence. There is no suggestion that they did not accept his acknowledgement of at least some responsibility for the offending. In our judgment, the panel was, in all the circumstances, entitled to conclude that this was an important factor in the assessment of the section 72 certificate.

31. The panel was entitled to have regard to the sentencing remarks, albeit that they were given in 2013.

32. The panel's reliance at [56] on the ongoing appellate proceedings discloses the first of the two errors. A section 72 certificate is issued as part of the respondent's initial decision-making process. In reality, it is only once a relevant decision has been appealed that an individual can seek to rebut the statutory presumptions. So, whilst on the one hand any re-offending during the course of proceedings would clearly undermine the strength of their case, it is a simple fact that they are bound to be engaged a challenge to the original decision. Holding this state of affairs against the appellant's attempt to rebut the statutory presumption would appear to represent a "built-in" obstacle to all individuals. In our judgment, that cannot be right in principle. In the absence of any specific reasoning going beyond the mere fact that an appeal was ongoing, we conclude that the panel erred in weighing this factor against the appellant. To be clear, we are not simply disagreeing with the amount of weight attributable, but rather it is the relevance of the fact of itself in respect of which we have found an error to exist.

33. The second error arises from the letters from the National Probation Service which were in evidence before the panel. At [52], it listed three letters, dated 17 August 2018, 5 June 2018, and 18 December 2019. At [54], the panel quoted from one of these letters: "[the appellant] displayed adequate levels of understanding and a level of maturity in relation to the offence and the role he played." It disagreed with that conclusion, having regard to in particular the "lengthy history of denial" by the appellant.

34. All other things being equal, this assessment of the evidence expressly referred to might have been sustainable. At the hearing, however, we were referred by Mr Bazini to the most recent letter from the National Probation Service, dated 3 February 2021, included in bundle 4, which was before the panel: [11] and [18(iv)]. The letter, written by a Probation Service Officer who had supervised the appellant since January 2020, reads as follows:

> "[The appellant] was released on 4 December 2017 and is now subject to a substantial period of supervision on a monthly basis by telephone contact. His licence will expire on 23 May 2022. I should inform that [the appellant's] attitudes toward his licence he engaged well during each session and has not missed any appointment.
>
> It is my assessment that the risk of serious harm in the community is low and the risk is not imminent on the basis that this is [the appellant's] first offence, in the community. [The appellant] displayed adequate levels of understanding and a level of maturity in relation to the offence and the role he played.
>
> Work has been done in supervision sessions around consequential thinking and [the appellant] has shown a good understanding in this area.
>
> Given his good engagement and his motivation to address his offending behaviour, I believe that [the appellant] has learned from the offence and there is no present indication of risks stating that he would re-offend. In fact, the OGRS, which is a tool used by Probation calculating the likelihood of proven re-offending from a date recorded about the current offence and criminal history, predicts a low probability of proven re-offending, at 3% in the first year and 5% in the second year. Furthermore, [the appellant] has good interpersonal skills as evidenced during supervision and has a positive family relationship who are supportive and a protective factor.
>
> His aim now in the community is to become a better person than he was before committing the offence, he appears motivated to desist from crime and I believe that he will continue to show a good attitude in the future."

35. This letter is not mentioned by the panel at either [52] or [56]. It was, on its face, supportive of the appellant's attempts to rebut the statutory presumption that he constituted a danger to the community. It refers not only to the assessment of the appellant's attitude towards his offending by a professional, but also to the calculated risk of re-offending. In addition, it represented the most up-to-date source of independent evidence and post-dated the last letter referred to by the panel at [52] by just over a year.

36. We note that the phrase quoted by the panel at [54] also appears in the February 2021 letter and it might be said (although Ms Cunha did not make any such submission) that the substance of the latest letter had in effect been considered. We also bear in mind that not each and every item of evidence need be addressed by a tribunal when setting out its findings and conclusions.

37. In the circumstances of this case, however, we conclude that the panel should have expressly dealt with the February 2021 letter, given its contents and the fact that it was written over a year after the previous letter. The panel's failure to do so constitutes an error. As with the first error we have identified, it cannot be said that this item of evidence could have made no difference to the overall outcome.

38. When we combine this error with that identified in paragraph 32, above, we conclude that our discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 should be exercised so as to set aside the panel's decision not simply on the Article 3 issue, but also in respect of the section 72 certificate.

Next steps

39. In light of our decision, what happens next requires a degree of thought. In so far as the panel concluded that the respondent had failed to make out her case on the revocation issue and that therefore the appellant was still a refugee, this finding is preserved. Whether or not the appellant is excluded from the protection of the Refugee Convention will depend on the re-assessment of the section 72 certificate in due course. If that certificate is ultimately upheld, the appeal on the ground under section 84(3) of the 2002 Act would have to be dismissed, notwithstanding the fact that the appellant is a refugee: Essa. If he is able to rebut the second limb of the statutory presumption (the first having been found to apply, without challenge), he would succeed on the sole ground of appeal open to him as regards the revocation decision (it is common ground that he is excluded from humanitarian protection).

40. As highlighted earlier in our decision, there was no refusal of a protection claim and so no appeal under section 82(1)(a) of the 2002 Act.

41. In respect of the appeal against the refusal of the human rights claim, the respondent has conceded that on the re-making of the decision in this case, the appellant succeeds on Article 3 grounds, with reference to the previous findings of fact regarding the appellant's history in Afghanistan (that being the basis of his successful appeal in 2003) and paragraph 2.6.1 of the CPIN, "Afghanistan: Fear of the Taliban", version 1.0, published in October 2021. The relevant paragraph reads as follows:

> "Where the person has a well-founded fear of persecution from the Taliban, it will, in general, be unduly harsh to expect them to relocate to escape that risk."

42. We observed that when making the concession, Ms Cunha also confirmed that the risk of destitution and the consequences of the appellant's accepted ill-health were relevant factors.

43. Whilst we are not now formally re-making the decision in this appeal because of the need to re-assess the section 72 certificate issue, the respondent's concession on Article 3 is in our judgment binding on her as matters currently stand.

44. We have considered whether there needs to be a further hearing in this case, or whether written submissions from the parties would suffice. We have concluded that a resumed hearing is appropriate. The section 72 certificate issue is contentious and there are a variety of sources of evidence pertaining to it. It may be that further documentary evidence is adduced and, in all the circumstances, the Tribunal would benefit from hearing oral submissions. It seems unlikely that the appellant would give oral evidence.

45. The parties are referred to our directions, below.

Anonymity

46. The Upper Tribunal made an anonymity direction previously and attributed the initials "BHX" to the appellant. The panel maintained that direction, although it then referred to the appellant by name. We conclude that the direction should be maintained as the appellant is a refugee and a person entitled to protection under Article 3. For the sake of consistency at this level we have decided to revert to the initials used by the Upper Tribunal.

Notice of Decision

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

48. **We exercise our discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and set aside the decision of the First-tier Tribunal.**

49. **This appeal will be listed for a resumed hearing in due course.**

Directions to the parties

1. **No later than more 21 December 2021**, the appellant shall file and serve any additional evidence relied on. At the same time,; whether or not it is intended to call oral evidence at the resumed hearing;

2. **No later than 11 January 2022**, the appellant shall file and serve a skeleton argument addressing the following:

   (i) the decision in Dang;

   (ii) the section 72 certificate (but only in relation to the "danger to the community" limb).

3. **No later than 21 January 2022**, the respondent shall file and serve a skeleton argument;

4. With liberty to apply.

Signed: H Norton-Taylor **Date**: 29 November 2021

Upper Tribunal Judge Norton-Taylor

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.