Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00111/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On: 25 March 2022	**On: 15 June 2022**

Before

UPPER TRIBUNAL JUDGE KAMARA
DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

JDEB
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Symes, counsel instructed by Turpin & Miller LLP
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is the continuation hearing of an appeal against the decision of the Secretary of State, made on 19 November 2019, to refuse the appellant's protection and human rights claim and to cease his refugee status.

Anonymity

2. An anonymity direction was made previously and is reiterated below as this appeal concerns a protection claim as well as the mental health diagnoses of the appellant.

Background

3. The appellant, a national of Colombia, entered the United Kingdom clandestinely, aged 16, on 9 March 2000. He applied for asylum on 16 May 2001 and that application was refused on 16 December 2003. The basis of the appellant's asylum claim was that he feared his employer (Z) who was dealing in illicit weapons and had links to FARC. After a series of deaths including the appellant's sibling and friends which were linked to this employer, the appellant left Colombia for Spain. The appellant was too afraid to seek the protection of the Colombian authorities owing to corruption in the police force. Following a successful appeal, the appellant was granted refugee status and indefinite leave to remain on 9 June 2004.

4. The appellant was first convicted of an offence on 10 November 2010, namely possession of an offensive weapon. On 18 January 2011, the appellant was convicted of two counts of using threatening, abusive, insulting words or behaviour as well as failing to surrender to custody. On 13 August 2012 he was convicted of failure to comply with the community requirements of his preceding sentence and sentenced to 10 months' imprisonment. On 24 April 2015, the appellant was convicted of two counts of robbery and sentenced to 6 years' imprisonment, which is the index offence. Lastly, on 24 October 2018 the appellant was convicted of an offence of harassment for which he received a community order.

5. The appellant was served with notice of a decision to deport him on 15 November 2016 which included an allegation that he had been convicted of a particularly serious crime, with reference to section 72 of the 2002 act and he constituted a danger to the community. On 4 April 2017, the respondent served notification of an intention to revoke the appellant's refugee status.

6. The Secretary of State revoked the appellant's refugee status and decided to deport him under cover of a letter dated 21 November 2019. In

essence, the decision explained that the appellant's refugee status ceased under Article 1C (5) of the 1951 Convention and paragraph 339A(v) of the Immigration Rules because the circumstances in which he was recognised as a refugee ceased to exist and he could be expected to seek protection from the Colombian authorities. The respondent was of the view that no compelling reasons had been provided as to why the appellant's status should not cease. It was noted that the appellant feared a non-state agent but that the situation with FARC had a bearing on his case. Nonetheless, the respondent considered that FARC had formally ended their existence as an armed group, completed its disarmament and reincorporated as a political party in 2017, which amounted to a significant and durable change in the country situation. In addition, it was felt that the appellant's employer would lack the resources to know of the appellant's return after some 19 years.

7. The respondent also considered the appellant's claim that the decision to deport him would amount to a breach of his family and private life owing to his children, now aged 12 and 7, as well as a relationship with a partner, making the point that the test in this case was one of very compelling circumstances given the length of the appellant's prison sentence. Reference was made to the violence used by the appellant and his co-defendants in a series of robberies which netted in excess of £130,000.

8. The respondent commented on the absence of any evidence to support the appellant's claim to have a partner. As for the appellant's children, the respondent accepted that the appellant had a genuine and subsisting relationship with them but concluded that it would not be unduly harsh for the children to remain in the UK without the appellant. It was accepted that the appellant had been lawfully resident in the UK for most of his life but not that he was socially and culturally integrated owing to the nature of his offending. The Secretary of State considered the appellant's claim that his deportation would breach his Article 3 rights on medical (mental health) grounds but noted the absence of supporting evidence as well as the availability of medical treatment in Colombia.

The decision of the First-tier Tribunal

9. Following a hearing before the First-tier Tribunal, the judge upheld the certificate under section 72(9)(b) of the 2002 Act and consequently dismissed the appeal under the 1951 Convention. The Article 3 appeal was also dismissed. Furthermore, the judge concluded that the appellant was unable to demonstrate very compelling circumstances in respect of his Article 8 claim.

10. The decision of the First-tier Tribunal, apart from the Article 8 findings, was set aside by the Upper Tribunal owing to material errors of law, following a hearing which took place on 19 August 2021.

The continuation hearing

11. In advance of the hearing, those representing the appellant submitted a detailed skeleton argument and a consolidated bundle which incorporated the respondent's bundle before the First-tier Tribunal. No further evidence was submitted by either party, albeit Mr Tufan informed the panel that he had obtained an up-to-date PNC search which showed that there had been no further offending by the appellant since the 2018 conviction.

12. We heard oral evidence from the appellant. He adopted his witness statements and was tendered for cross-examination. The panel made a note of his evidence which was uncontroversial. It suffices to say that the appellant's evidence was that he continues to fear the same actors in Colombia as he did when he left the country. The appellant's partner and mother of his infant child attended the hearing and was prepared to give evidence however Mr Tufan did not wish to cross-examine her given that Article 8 was not being argued on the appellant's behalf.

13. Mr Tufan's submissions made the following points. It was held in *PS (cessation principles) Zimbabwe* [2021] UKUT 00283 (IAC) that cessation was a mirror image of a decision determining refugee status. The appellant was granted asylum because of what happened when he was aged 15, many years ago.

14. Mr Tufan contended that changes had taken place in Colombia since then including a peace agreement in 2006 and demobilisation of FARC in 2016. There was nothing in the reports of the expert to state that the appellant would be at risk today. The expert report mentioned that FARC became a political party in 2017, that some FARC members disarmed and lots of FARC members had left the organisation. There was no suggestion that the circumstances feared by the appellant achieved the level of an Article 15(c) risk. The decision under Article 1C (5) should be upheld. The appellant was not a refugee owing to the changed circumstances in Colombia.

15. Mr Tufan then turned his attention to the Section 72 matter, arguing that the appellant was a serious criminal, noting that the index offence attracted a 6-year sentence and that upon the appellant's release from prison he was immediately convicted of the harassment of his former wife. The latter conviction suggested that he continued to be a danger to society.

16. Mr Tufan argued that the OASys report indicated that the appellant posed a medium risk of harm to known adults, children and the public, despite the low risk of reoffending. The appellant had not rebutted the presumption that he is a danger to society.

17. Mr Tufan expressed his view that the consultant psychologist, Dr Lisa Davies, was not qualified to comment on the risk posed by the appellant and he asked the panel to place more weight on the OASys report. The appellant's continued criminality suggested the presumption remains and therefore section 72 applies. As for Article 3, any consideration had to be forward looking. The appellant would be returning to his country of citizenship as an adult, no one would be interested in him and the country circumstances in Colombia did not suggest that his Article 3 rights would be breached. Furthermore, the appellant's mental health did not reach the *AM (Zimbabwe)* threshold. He urged us to dismiss the appeal.

18. Mr Symes closely followed the format of his skeleton argument. In summary, he submitted that the first question was that of exclusion, if not excluded the second question was cessation and if the appellant's status was ceased, the third question was whether he had a viable Article 3 claim. Under the under the refugee approach, the respondent bore the burden, but for Article 3 it had to be a modern assessment. Mr Symes accepted that the appellant's conviction was undoubtedly serious, evidenced by the fact that it attracted a 6-year sentence of imprisonment. He argued that the appellant had rebutted the presumption of dangerousness, with reference to a range of evidence.

19. Reliance was placed on the 2020 OASys report together with the report of Dr Davies which explained the various measures given in the former report. In short, the evidence showed that there was a low likelihood of all types of reoffending. As for the medium risk of harm, the OASys author was referring to the consequences if the appellant were to have a confrontation with his former partner. This was an historic issue given that the appellant was settled in his new relationship and had a new baby. Therefore, the issue which would raise risk was no longer an issue. Dr Davies' report was completed in 2022 following an extended period of observation. As for Dr Davies' qualifications, her CV showed that she has consulted for the Probation Service as well as HMCTS and that her main occupation was assessing risk for violent and dangerous offenders in mental health institutions.

20. Dr Davies' identified strong protective factors against further reoffending including that the appellant has a strong relationship with his two sons

from a former relationship and wished to be a role model as well as reference to his modern family unit.

21. On the second issue of cessation, Mr Symes focused on the Refugee Convention. This was not a case where the complications in *Dang (Refugee – query revocation – Article 3) Vietnam* [2013] UKUT 43 (IAC), applied owing to the timing of the appellant's asylum claim. Mr Symes emphasised that the threat feared by the appellant must, following *Abdulla v Bundesrepublik Deutschland,* be 'permanently eradicated.' The First-tier Tribunal which considered the appellant's asylum appeal in 2004 accepted the core of the appellant's account. The accepted factual matrix being that the appellant fell out with his employer, Z who murdered others including the appellant's brother. The respondent made no challenge to those factual findings and had not established that the risk to the appellant had abated with the passage of time.

22. Mr Symes urged the panel to give very great weight to the UNHCR letter dated 26 September 2017 as well as the country expert evidence provided by Dr Engstrom. Mr Symes contended that it had to be assumed that Z remained a businessman with historic FARC connections, that Z would not want his responsibility for the murder of the appellant's brother to come to light and that the appellant would be either motivated or perceived to be so to bring up the murder of his blood relative. He argued that the evidence did not point to a permanent eradication of risk.

23. On the third point, Article 3, this was relied upon for the same reasons as the refugee claim.

24. At the end of the hearing, we reserved our decision which we give below, along with our reason.

Decision

25. Section 72 of the 2002 Act entitles the Secretary of State to expel a refugee who, having been convicted of a particularly serious crime, constitutes a danger to the community. The respondent did not attach a section 72 certificate in this case however we are required to consider whether the presumption under section 72 of the 2002 Act been rebutted, applying *MS (Somalia)* [2019] EWCA Civ 1345 at [69].

26. Mr Symes did not dispute that the appellant had been convicted of a particularly serious crime and we find that he has, therefore, the focus of our decision is whether the appellant is able to rebut the presumption that he poses a danger to the community, applying *EN (Serbia)* [2009] EWCA Civ 360.

27. Helpful guidance is found in a UNHCR briefing note of 2007 which said the following on assessing the danger posed a refugee convicted of a particularly serious crime.

> *"Conviction of a particularly serious crime in and of itself is not sufficient. The person concerned must, in view of this crime, also present a danger to the community. In UNHCR's opinion, the 2nd provision of Article 33(2) should not be applied solely by reason of the existence of a past crime but on an assessment of the present or future danger posed by the wrong doer. Thus, it is not the acts which the refugee has committed that warrant his expulsion, but rather the fact that he is considered dangerous as these acts serve as an indication of future behaviour, thus indirectly justifying his expulsion to the country of persecution... The burden of proof is on the State to prove that one or several convictions are symptomatic of the criminal, incorrigible nature of the person and that he is likely to commit offences again. As Article 33(2) is concerned with the present and future more than with the past, it seems that the authorities ought to give a refugee fair warning and a chance to mend his ways before expulsion to a country of persecution is seriously considered."*

28. Having considered all the evidence and submissions made we conclude that the appellant does not constitute a danger to the community for the following reasons, considered cumulatively.

29. We begin our consideration with the fact that the appellant was convicted of the harassment of his former partner after his release from prison and carefully consider whether this matter indicates that he poses a danger to the community. In doing so we take into consideration that the appellant was not recalled to prison under the terms his license following that conviction. As urged by Mr Tufan, we have placed considerable weight on the OASys report, dated September 2020. We note that the author of the said report took this further conviction into account but nonetheless made positive comments on the appellant's maturation. The OASys assessment stated that the appellant posed a low likelihood of reoffending, a low likelihood of non-violent reoffending and a low likelihood of violent reoffending. The OASys report summarises the risk as the appellant having the '*potential to cause serious harm but is unlikely to do so unless there is a change in circumstances*...'

30. We note from the assessment of the appellant's offender manager that were the appellant to offend, the risk of serious harm is medium to known adults, children and to the public. Whereas the risk of serious harm to children and the public is low. The appellant's offender manager made several detailed favourable comments on the appellant's progression, for instance noting, "*a level of maturation that has occurred. (the appellant) does not speak of a lifestyle that involves spending time with acquaintances. He talks of his employment, his family and his children. I am of the opinion that (the appellant) has made every effort to make*

positive changes in his life, so he can live and provide a more stable environment for himself and those he cares for."

31. We take into account the January 2022 report of Dr Lisa Davies, a Chartered and Registered Forensic Psychologist & Consultant Forensic Psychologist who considers that the appellant currently presents a low risk of violent reoffending, a low risk of causing serious harm to the public in the UK and a low risk to future intimate partners and to his ex-partner. We found Mr Tufan's criticism of Dr Davies' expertise to be baseless and have attached weight to her opinion. Dr Davies was of the view that the appellant did not present a risk of causing serious harm to others and she identified a series of motivational protective factors against future offending which were present. These were leisure activities, financial management, attitudes towards authority and life goals. A further protective factor was work which was currently absent because the appellant is not allowed to do so. On this point, we note that the appellant has engaged with courses and training while imprisoned, where he became an "entrusted employee" and was offered a barista role at Jamie Oliver's headquarters. External protective factors which are present are an intimate relationship and the appellant's living circumstances. Since that report was written the appellant and his partner have had a child. We have taken into consideration all factors whether present, partially present or absent.

32. We note from his witness statements, that the appellant has expressed remorse and taken responsibility for his actions. There is no suggestion that this expression of remorse is not genuine. We conclude, notwithstanding the appellant's offending, including that which predates the index and harassment offences, that the appellant does not pose a very serious danger to the community in the future and that he ought not to be excluded from the protection of the Refugee Convention.

33. Having found that the appellant should not be excluded from the protection of the Refugee Convention, we now consider whether there were grounds for the Secretary to cease the appellant's refugee status, with reference to Article 1C (5) of the Refugee Convention 1951.

34. Article 1C (5) states as follows:

"C. This Convention shall cease to apply to any person falling under the terms of section A if:

(5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality…"

35. We accept that this is not a case which falls under paragraph 339A of the Immigration Rules because the appellant applied for asylum prior to 21 October 2004, applying *Dang (Refugee – query revocation – Article 3) Vietnam* [2013] UKUT 43 (IAC).

36. In *Hoxha* [2005] UKHL 19 a 'strict and restrictive' approach to cessation clauses was found to be required. At [63] the following was said:

'This provision [article 1C (5)], it shall be borne in mind, is one calculated, if invoked, to redound to the refugee's disadvantage, not his benefit. Small wonder, therefore, that all the emphasis in paras 112 and 135 of the Handbook is upon the importance of ensuring that his recognised refugee status will not be taken from him save upon a fundamental change of circumstances in his home country. As the Lisbon Conference put it in para 27 of their conclusions: 'the asylum authorities should bear the burden of proof that such changes are indeed fundamental and durable.'

37. The starting point for the panel was a consideration of the basis for the appellant's grant of refugee status. We have reviewed the findings of the Adjudicator who allowed the appellant's appeal in 2004. In short, the appellant's claim was accepted in full and found to be plausible. That acceptance included that there was a link between the murder of the appellant's brother and the other fatal victims of Z, in that they all worked for Z as couriers. It was accepted that the appellant could not be expected to have sought protection from the Colombian authorities given the lack of evidence in the background material to show that sufficient protection was available. A further finding was that it was unduly harsh to expect the appellant to relocate away from Medellin.

38. The respondent argues that there has been a durable and fundamental change in the circumstances that led to the appellant being granted refugee status. Mr Tufan relied only on the peace agreement in 2006, the demobilisation of FARC in 2016 and that FARC had become a political party in 2017. We find that those submissions, along with the content of the reasons for refusal letter, do not begin to dislodge the presumption in favour of retaining refugee status and we find that the respondent's reasons for cessation are insufficient to meet the requisite threshold for reasons set out below.

39. We have considered the appellant's individual circumstances and noted that the appellant's fear is of an individual with connections to FARC. The letter from UNHCR dated 26 September 2017 states that there has been a lack of fundamental and durable change in Colombia and that cessation is not appropriate. At this point we note that this letter postdates the events in Colombia which were relied upon by the respondent. It is

uncontroversial that we are entitled to place weight on the guidance contained this letter.

40. The appellant also relies on two country reports from Dr Engstrom dated July 2020 and December 2021 which address the respondent's view of the current security situation in Colombia. Mr Tufan made no criticism of either Dr Engstrom or the content of his reports.

41. In his first report, Dr Engstrom expresses the following views, which are fully referenced. The security situation in Colombia has significantly deteriorated in recent years, the splintering of FARC led to a partial reversal of the demobilisation of ex-FARC combatants adding to the unpredictable and volatile security situation in the country, Colombia is currently facing the gradual unravelling of the peace agreement and the return to arms of some ex-combatants and the security situation in Colombia is "volatile and unpredictable." Any security gains following the initial period of the peace agreement are in acute jeopardy in many parts of the country, the peace agreement is unravelling and by November 2019, 26% of the stipulations of the accord had yet to be initiated and the government had only made "minimum" progress on another 34%, the sustainable demobilisation of FARC ex combatants has been jeopardised, the implementation of the peace process has been stalled, former FARC combatants have joined other active armed groups, forming an 'ex-FARC mafia' of around 3,000 and that Columbia continues to suffer from high levels of conflict related violence, continuing high levels of impunity and the absence of effective access to justice and that protection from the state authorities was limited.

42. The addendum report from Dr Engstrom does not refer to any changes or improvements in the security situation since his last report. On the contrary, he expands on the current activities of former members of FARC whom he states have infiltrated official institutions. While this report is as detailed and fully referenced as the first. It may suffice to reproduce the summary of his report as follows

"In brief, the overall assessment of this report is that through its involvement in Colombia's illicit economy, particularly the drug economy, the FARC developed extensive economic networks and alliances with organized criminal groups as well as business actors over the course of Colombia's armed conflict. Following the FARC's formal demobilisation in 2016, evidence suggests that these networks persist. This indicates that ex-FARC members may have both the ability and the motivation to continue to cultivate (illicit) economic relationships with Colombian business actors, including by assisting such actors to ensure impunity for past offenses. Moreover, it is reasonable to expect that the motivation of business actors to prevent accountability for ancient misdemeanours is strong. While

Colombia's criminal justice system remains generally inefficient and non-threatening to the economically and politically powerful, the risks of accountability are not negligible."

43. We do not accept the submission that the passage of time combined with the political changes amount to fundamental and durable change, such that the appellant would no longer be perceived as motivated to take steps to seek justice in respect of the murder of his brother by Z.

44. In view of the country material before us, with particular reference to the continued activities of former FARC members, we find that it cannot be said that there has been a fundamental and durable change of circumstances in Colombia nor that the risk to the appellant in Medellin has abated.

45. We further find that given the present country situation, as described by Dr Engstrom, there is an insufficiency of national protection available to the appellant.

46. The appellant's fear of persecution is based on events which occurred in Medellin. Therefore, we have also considered whether internal relocation remains unduly harsh for the appellant, as found by the First-tier Tribunal previously, and have assessed his current circumstances. Those circumstances are that the appellant left Colombia and arrived in the United Kingdom while he was a minor, twenty-two years ago and he has not returned since. The appellant has no contact with anyone in Colombia. The appellant is mentally vulnerable in that he was diagnosed with and has been treated for PTSD. Dr Davies' notes that while in prison he attended counselling sessions until he could not cope with the effects of reliving past traumas. The appellant has also been diagnosed with depression and anxiety which is linked to a number of factors including issues relating to his protection claim. The view of Dr Davies is that there would be a deterioration in the appellant's mental health were he to be removed to Colombia because *"Returning (the appellant) to the site of his index traumas would likely result in an increase in intrusive memories, flashbacks and nightmares and these could lead to an increase in depressed mood with suicidal ideations experienced*".

47. In conclusion we find that the appellant remains a refugee for the same reasons as found by the First-tier Tribunal in 2004, that there is an insufficiency of protection, and it remains unduly harsh for the appellant to relocate within Colombia to avoid persecution.

Notice of Decision

The appeal is allowed.

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

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

Signed: T Kamara Date: 6 June 2022

Upper Tribunal Judge Kamara

No fee is paid or payable and therefore there can be no fee award.

Signed: T Kamara Date: 6 June 2022

Upper Tribunal Judge Kamara

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