Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2021-000699
PA/09589/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 December 2022	**On 10 March 2023**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

XX
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms S. Akinbolu, Counsel instructed by CK Solicitors
For the Respondent: Mr E. Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of the Secretary of State dated 19 September 2019 to refuse the appellant's asylum and human rights claims in the context of making a decision to deport him from the United Kingdom pursuant to the automatic deportation provisions contained in the UK Borders Act 2007 ("the 2007 Act").

2. The appeal was originally heard and dismissed by First-tier Tribunal Judge Abebrese ("the judge") in a decision promulgated on 29 September 2021. By a decision promulgated on 2 September 2022 ("the error of law

decision"), a panel on which I sat with Deputy Upper Tribunal Judge Jarvis found that the decision of the judge involved the making of an error of law and set it aside, with certain findings of fact preserved.

3. The error of law decision directed that the appeal be reheard in this tribunal, and it is in those circumstances that the matter has resumed before me, pursuant to section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007. The appeal to the First-tier Tribunal was brought under section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

Factual background

4. There is an anonymity order in force, the consequences of which are that it is appropriate only to include outline details of the factual background in this decision.

5. The appellant is a citizen of an island state. He has resided in the United Kingdom, largely without leave to remain, since 1999. He was a young man when he arrived and is now in his early 40s. In late 2014, he pleaded guilty to a single count of conspiracy to import Class A drugs, and, in early 2015, was sentenced to in excess of 10 years' imprisonment. While awaiting trial, he was remanded in custody. He was to be tried alongside D2, who was on bail throughout. D2 fled the jurisdiction of the court before the trial, and was tried in his absence, and later convicted. D2 was sentenced to a lengthier term of imprisonment. D2 remains at large.

6. The sentencing judge took the same "starting point" for the sentence of each offender; the appellant's lower sentence is attributable to his plea of guilty and, on his case, assistance he provided to the prosecution. The appellant had proffered a basis of plea which sought to minimise his involvement in the conspiracy to which he pleaded guilty. The trial judge rejected the basis of plea, having heard the evidence concerning D2, and found that the appellant was fully aware of the extent of the conspiracy, and had a full understanding and awareness of the nature of the extensive criminal operation in which he was involved. The conspiracy imported many kilograms of cocaine annually and was estimated by the prosecution to have been worth tens of millions of pounds in total. This was a significant operation by an organised crime group in which this appellant was fully involved, the sentencing judge found.

7. The appellant's conviction and sentence engaged the automatic deportation provisions in the 2007 Act. The Secretary of State invited representations from him concerning whether any of the stated exceptions to deportation contained in that Act were engaged. In response, the appellant claimed asylum and made a human rights claim on 15 May 2019. The basis of those claims was that he would face a real risk of serious harm upon his return to his home country from D2 and their criminal associates, on account of his, the appellant's, assistance to the authorities during the trial process. He would be viewed as a "grass" and

would be beyond the protection of the authorities in his country of nationality. He would be unable internally to relocate.

8. The Secretary of State refused the asylum and human rights claims by her decision dated 19 September 2019. She certified under section 72(9)(b) of the 2002 Act that the presumptions contained in section 72(2) of the Act applied to the appellant (see paragraph 18, below). She did not consider the appellant to have provided a credible account of having been threatened by D2's associates. His claim for asylum was only made after he been informed that he was to be subject to a deportation order. Accordingly, section 8(5) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 was engaged, and his credibility was harmed as a result. In any event, his claim for asylum was not for a Convention reason under the Refugee Convention, and he did not face a real risk of serious harm upon his return in any event. The Secretary of State also refused the appellant's Article 8-based human rights claim.

9. The First-tier Tribunal judge accepted that the appellant had provided some assistance to the prosecution during the trial process, but ultimately rejected his claim to be at risk upon his return. It is not necessary to outline the decision of the First-tier Tribunal in any length, other than to set out the findings reached at paragraph 16, which have been preserved by the error of law decision:

> "I found the appellant to be credible and consistent on the issue of his plea of guilty during his criminal trial. I also find him to be credible regarding the role of [D2] and that he [D2] did flee the UK and did not take part in the criminal trial. It is also credible that the appellant did provide information during the course of the criminal trial regarding the role played by [D2]."

10. All other findings reached by the judge were set aside by the error of law decision.

ISSUES TO BE DETERMINED

11. At the resumed hearing on 20 December 2022, I agreed with the parties that the following issues required determination:

a. The first issue: whether the appellant has rebutted the presumption under section 72(2) of the 2002 Act, namely that he has been convicted of a particularly serious crime and that he constitutes a danger to the community of the United Kingdom;

b. The second issue: as a matter of fact, has the appellant demonstrated that he is would be at real risk of serious harm on account of the threats he claims to have received, upon return to the country of his nationality;

c. The third issue: if so, does the appellant face being persecuted as the member of a "particular social group"?

12. The judge below dismissed the Article 8 limb of the appellant's appeal and there has been no appeal against those findings. Ms Akinbolu agreed that the sole issues to be determined are those set out above.

13. I note that by a letter from the appellant's solicitors to the Secretary of State dated 26 October 2020, and by an application for naturalisation dated 31 December 2020, the appellant contends that he is a British citizen from birth, on account of what he claims his father's (British) nationality was at the time. I have not been asked to make findings on this issue. It does not form part of the agreed issues outlined above. While it is not clear what the Secretary of State's position in relation to this issue is, she is clear, through Mr Tufan, that she maintains her opposition to the appellant's deportation appeal on the basis that he is a "*foreign* criminal" (see section 32(1) of the 2007 Act). I therefore proceed on the footing that the appellant is not a British citizen.

THE HEARING

14. At the hearing, the appellant relied on his bundle before the First-tier Tribunal, plus a total of six supplementary bundles; four supplementary bundles from the hearing before the First-tier Tribunal, and a further two supplementary bundles prepared for the proceedings in this tribunal. I admit the further bundles under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

15. In addition, Ms Akinbolu relied on a skeleton argument prepared for the resumed hearing.

16. The appellant gave evidence, adopted his statement, and was cross-examined.

17. I do not propose to set out the entirety of the evidence and the submissions but will do so to the extent necessary to reach and give reasons for my findings of fact.

THE LAW

18. Section 72 of the 2002 Act applies for the purposes of Article 33(2) of the Refugee Convention. Section 72(2) states:

> "(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."

19. Section 72(10) provides that, where the Secretary of State has certified under section 72(9)(b) that the subsection (2) presumption applies to an appellant, the tribunal must begin substantive deliberation on the appeal

by considering the certificate. If, having given appellant an opportunity for rebuttal, the tribunal agrees that the relevant presumption applies, it must dismiss the appeal in so far as it relies on the ground specified in subsection (9)(a), that is, a ground of appeal under section 82 of the 2002 Act. The burden of proving that the section 72 presumption applies lies on the Secretary of State, to the balance of probabilities standard.

20. Article 3 of the ECHR provides that no one shall be subjected to torture or to inhuman or degrading treatment. This is for the appellant to establish to the lower standard.

21. In relation to the appellant's claim for asylum, it is for the appellant to demonstrate, to the lower standard, that he is a person:

> "… who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

DISCUSSION AND FINDINGS

22. I reached the following findings having considered the entirety of the evidence, in the round.

The first issue: the section 72(2) presumption

23. The presumption under section 72(2) is engaged in light of the length of the appellant's sentence. The question is whether the appellant has rebutted that presumption. His written evidence is that he is a reformed individual; he has expressed remorse for his offending and wants to turn his life around. Ms Akinbolu highlighted the most recent OASys report, in which the appellant is assessed to represent an 8% possibility of reoffending within one year and 16% within two years. In additional evidence in chief, the appellant explained that his regular supervision sessions with the probation service as part of his post-release licence arrangements have decreased to monthly intervals. They are set to decrease to every three months next year. The appellant does not "constitute a danger to the community of the United Kingdom", Ms Akinbolu submitted.

24. I disagree, for the following reasons. First, the sheer gravity of the appellant's offending, reflected in the length of his sentence and the complexity of his criminal activity, demonstrates that this appellant is an individual who was willing and able to engage in a very serious and well-organised international drugs conspiracy. The impact and misery caused by such large wholesale importation of drugs will be significant across the community of the United Kingdom as a whole. Secondly, while the appellant has purported to express a degree of remorse, I consider that

the wholly unrealistic basis of plea that he proffered in the Crown Court undermines the extent to which he is able to demonstrate the claimed degree of remorse and rehabilitation, when viewed in the context of the chronology of the case as a whole. The appellant initially sought to plead guilty on the basis that he had merely been involved in money laundering. That offer was rejected. He subsequently sought to plead guilty on the basis that he had been under the direction of D2, and that initially thought that he was involved in transporting wholly innocuous goods from the United States. The Crown Court judge, having heard the evidence in relation to D2, said that he was satisfied that that was wholly inaccurate, and that the appellant had a full understanding and awareness of the nature of the operation in which he was involved.

25. The appellant's attempts to minimise his involvement at the point of sentence have continued into his post-sentence supervision. Looking to the most recent OASys report, dated 22 June 2022, part 2.1 records the appellant continuing to maintain that international money transfers had been made in his name, which was contrary to the prosecution case, and contrary to the findings reached by the sentencing judge. He also maintained that he was merely in the wrong place at the wrong time. That led the author of the report at part 2.8 to observe that the appellant was evasive in relation to his involvement in the conduct to which he pleaded guilty, and that he failed to take full responsibility for what took place, including using feigned unawareness of the extent of his involvement in the offending conduct as a "denial factor".

26. I accept that, with the passage of time, the appellant has given some indications that he has begun to accept the scope of the offending conduct with which he was involved. However, when assessing the appellant's prospective danger for the purposes of subsection (2), it is of significance that any realisation to that effect on the part of the appellant has evolved at only a very late stage. Any recent remorse is not representative of his attitude and mindset over the course of the seven years that have elapsed since he pleaded guilty. The OASys report observes (part 2.12) that the appellant sought to minimise his previous convictions which pre-dated the drugs conspiracy. It also noted that he has a conviction dated 3 December 2015 for perversion of the course of justice, commenting that that conviction:

> "Once again highlight[s] a pattern of false information in order to evade responsibility."

27. Against that background, I turn to the OASys report's overall assessment of the appellant's risk of reoffending. Contrary to the submissions of Ms Akinbolu, even taking the report at face value, a 16% chance of committing further offences is, when viewed in the context of the seriousness of the offence for which the appellant faces deportation, a not insignificant risk. A 16% chance of committing a very serious offence represents a relatively high overall risk. Furthermore, I consider that the report fails to engage with the proffered basis of plea, and the relative

longevity of the appellant's attitude in continuing to deny responsibility for having committed the offences in question.

28. I find that, having given the appellant the opportunity to rebut the section 72(2) presumption, he has not done so. The Secretary of State has demonstrated that the presumption continues to apply. I therefore dismiss this appeal in so far as it relies on the ground of appeal contained in section 82(1)(a) of the 2002 Act.

29. Pursuant to *Essa (Revocation of protection status appeals)* [2018] UKUT 00244 (IAC), it is nevertheless necessary to determine the asylum ground of appeal in any event, pursuant to the duty upon this tribunal to do so under section 86(2)(a) of the 2002 Act. In order to do so, it is necessary to reach findings of fact concerning the appellant's prospective risk upon his return. Those findings will also go to the appellant's Article 3 ECHR case in any event.

The second issue: risk upon return – findings of fact

30. I will address:

a. The level of the appellant's claimed assistance to the authorities;

b. Whether any threats have been made against him, and why they were made;

c. In light of the above analysis, the appellant's prospective risk profile upon his return to the country of his nationality

(a) Assistance provided

31. I accept, as found by the judge in the First-tier Tribunal, that the appellant provided some information to the prosecution authorities. The judge below did not make a finding that the assistance was of material value to the authorities, and the sentencing judge in the Crown Court did not make a finding to that effect either.

32. I find that the information the appellant provided was insignificant and of no material assistance to the authorities. There is no evidence that it provided the assistance to the authorities claimed by the appellant. As the appellant's basis of plea records, his offer to give evidence for the Crown was rejected on the basis that the Crown was not willing to proffer him as a "witness of truth." The appellant's criminal barrister, in her Advice on Appeal Against Sentence (page 214 of the appellant's third supplementary bundle) records that there was no "*text*" prepared by the police or prosecution, because the appellant's offer of assistance was of no utility: see para. 5. A "text" is the informal term given to a document, provided to a sentencing judge on an *ex parte* basis by the police or prosecution, recording assistance provided by the offender to the authorities, in the expectation of a possible reduction in sentence. It is significant that in the appellant's criminal proceedings there was no "text",

as it demonstrates that assistance offered by the appellant was of no value.

33. I note that the appellant's criminal barrister advised that it was "strongly arguable" that the sentencing judge erred by minimising the appellant's assistance, and that:

> "… it is arguable that the Learned Judge should have given much more credit over and above his guilty plea for information provided in his defence statement **which led to the arrest and conviction of [D2] and the willingness to assist the police. It is strongly argued that the naming of [D2]** had the same effect of providing valuable information to the police and in other circumstances would have led to a text. It is arguable that the sentence did not reflect this." (Emphasis in original)

34. While that was plainly the legal advice received by the appellant and is likely to have formed the basis for the proposed grounds of appeal, the appellant's application for leave to appeal was refused by the Court of Appeal (Criminal Division). The appellant was refused leave to appeal on the papers by a single judge and he did not renew the application to the full court. It therefore follows that the appellant's actual assistance to the prosecution authorities in relation to D2 was minimal. It amounted to nothing more than a willingness to provide ineffective assistance.

(b) Threats against the appellant

35. I find that the appellant's accounts of being threatened for seeking to assist the authorities in relation to D2 are inconsistent with the chronology of the criminal proceedings.

36. At question 75 of the substantive asylum interview on 23 June 2019, the appellant said that the first threat was made against him in September or October 2014, and, at Q76, after he had been on remand for six months. The appellant was remanded into custody in April 2014, meaning that it would have been – on his account – October 2014 at the latest that he was first threatened. Yet it was not until the sentencing hearing in January 2015 that there was any public reference to the assistance he offered, and then even it was in oblique terms.

37. In her advice on appeal against sentence, the appellant's criminal barrister emphasised the steps that she took to ensure that the prospective assistance offered by the appellant to the prosecution authorities was kept from D2's legal team. At paragraph 3 of her advice, she emphasised that one of the hearings in the Crown Court had to be adjourned "without the knowledge of counsel for [D2]". At paragraph 5, she wrote that she saw the judge in chambers, along with prosecution counsel, but "without counsel for [D2]", and that:

> "I also raised matters that I wished to advance in mitigation but would not wish to raise in open court for fear that it might reveal that the

> appellant had given information to the police about [D2]'s anticipated whereabouts and the fear that such knowledge were it to get back to [D2] could put his life at risk particularly if he were to be deported to [his country of nationality] where such a reputation as an informant is particularly condemned."

38. In light of these materials, I find that the legal team instructed by the appellant had taken steps to ensure that D2's legal team were not privy to the appellant's then willingness to assist the authorities. I reject the appellant's case that there were regular and repeated references in open court to his apparent willingness to assist the prosecution, during D2's trial in November 2014.

39. The only evidence before me of any public reference to the appellant's willingness to do so may be found in the sentencing remarks, in late January 2015, in which the Crown Court judge said:

> "it is pointed out to me, by [the appellant's criminal barrister] that [the appellant] had indicated that he might be willing to give evidence, and I have the benefit of the sentencing note from [prosecution counsel] and the Opening Note for trial…"

40. I accept that that appears to be a reference that was made, in open court, to the appellant's willingness to "give evidence". Realistically, that can only have been an indication that the appellant would have been willing to give evidence for the Crown, if called. I accept that what the sentencing judge said could, if reported back to D2, reveal a willingness to give evidence against D2, even though, in the event, the appellant did not do so. However, the timing of this information being made public – Jan 2015 – is at odds with the appellant's claim to have been threatened *before* this information was made public. In light of the steps recorded by the appellant's criminal barrister that she took to ensure that there was no prior revelation of the appellant's willingness to assist the authorities, I reject the appellant's case that he was threatened before this time on account of his willingness to assist the authorities.

41. At questions 80 and 98 of the asylum interview, the appellant said that he was last threatened three years previously, and 18 months previously, respectively. I find that this inconsistency undermines the credibility of the appellant's account to have been threatened.

42. I am prepared to accept that the appellant's involvement with the major criminal conspiracy will have exposed him to a number of criminal associates. It would be surprising if as a result of the fallout arising from what had been a very successful, multi-million pounds drugs conspiracy, there had been no threats of reprisals made when the entire operation collapsed with the trial of two significant operatives with leading roles in the conspiracy (the appellant and D2). At question 106 of his asylum interview, the appellant said that his criminal associates attributed the loss of £460,000 (presumably of criminal proceeds) to him. That is entirely plausible; a drugs conspiracy with the turnover of that with which this

appellant was concerned may well have entailed the appellant being entrusted with the custody of such a large amount of money. The money, on the appellant's account, went missing in circumstances that were attributed to him by other members of the criminal syndicate.

43. I find that any threats arising from the loss of the money in the UK were nothing to do with the secret (but ultimately ineffective) assistance the appellant had offered to provide to the authorities. Rather it was the normal fallout from a major criminal operation being thwarted, and the appellant being held on remand while the proceeds of the criminal enterprise went missing on the appellant's watch.

(c) The appellant's prospective risk profile

44. The appellant's representatives have obtained a letter from a police officer in the appellant's country of origin, dated 6 October 2021, addressed "to whom it may concern". I refer to the author of the letter as "ZZ". ZZ states, essentially, that the appellant has been involved with "some extremely dangerous individuals", and that:

> "I can categorically state that there would be a definite risk to [the appellant's] life should he come back here. It is common knowledge that [the appellant] implicated his co-defendant [D2] in proceedings which led to his arrest and subsequent prosecution… In and around 2015 [the appellant] and his case were big news on the island and the matter was being repeatedly reported in the news here. Following on from this, he would be a target as [D2] would almost certainly be seeking reprisal against him."

45. This is a document to be assessed in the round along with the remaining evidence in the case, to the lower standard. The appellant has obtained a letter dated 1 August 2022 from the diplomatic representation of the country in question, verifying that the letter was "duly authored and signed by [ZZ]", stating the rank and division of the police force in question. I accept that the letter is genuinely from ZZ.

46. The question is whether what ZZ writes is reliable. Mr Tufan submits that it is not. Ms Akinbolu submits that it is. Having reflected on the letter with anxious scrutiny, I have the following credibility concerns arising from the letter.

47. First, the appellant's attempts to obtain such a letter were not in evidence before the First-tier Tribunal at the hearing in June 2021, despite ZZ stating that he was aware of the request from the appellant's legal team in 2019. There appears to have been no suggestion before the First-tier Tribunal that contact had been made with the police in the appellant's country of nationality, nor that a response was awaited. The appellant's statement dated 29 September 2020 thus post-dates what ZZ's letter represents were attempts to obtain verification from the police in-country, yet it is silent as to the fact this approach had apparently been made. The statement refers to the difficulties the appellant had encountered in trying

to verify the existence of the threats he claims to have been made against him (para. 7), but attributes those difficulties to his incarceration, not, as ZZ's letter now implies, a delay in obtaining confirmation from ZZ's police force.

48. Secondly, ZZ's letter states that the appellant's cooperation with the authorities led to D2's arrest and prosecution. That is at odds with the minimal assistance actually provided by the appellant, as discussed above: there was no "text". The letter appears to reiterate an incredible feature of the appellant's case in this tribunal.

49. Thirdly, the letter states that D2 lives on the Island, and had done for some six and a half years, but that "regrettably we have to date failed in pinpointing his exact location." It is not clear how the author of the letter is able simultaneously to conclude that D2 has both resided on the island for a considerable period, and yet evade detection by the authorities.

50. Fourthly, the letter states that the appellant's trial was "big news" on the island and "repeatedly reported in the news here". This is the first mention of the trial's apparent prominence in the country; there was no suggestion to this effect before the First-tier Tribunal. Moreover, copies of such reports would be relatively easy to procure, especially if the story was "repeatedly reported", yet there is no supporting documentary evidence of this sort.

51. Fifthly, the letter states that the case was "big news" in *2015*. The trial took place in 2014; all that took place in 2015 was a relatively short sentencing hearing. Again, there is nothing to demonstrate that there was so much as a single news report.

52. Sixthly, drawing the above factors together, the letter has the appearance of having been written to order. The Secretary of State's *Country Policy and Information Note* concerning the country in question is replete with references to the authorities there being impacted by serious corruption. Nothing in the diplomatic mission's verification of the authenticity of the letter demonstrates that any steps were taken to verify the truth of the contents. While Ms Akinbolu submits that the Secretary of State has not taken steps independently to verify the contents of the letter for herself, that is nothing to the point. It is for the appellant to prove his case.

53. For the above reasons, I place little weight on the contents of the letter.

54. Finally, it is significant that, despite the appellant's case being that he was first threatened in 2014, he did not claim asylum until after being notified, on 21 March 2019, of a decision to deport him. That is a factor that harms his credibility.

55. Drawing the above analysis together, I find that the appellant has not demonstrated to the lower standard that there is a real risk that any

threats he may have received from his criminal associates in this country have anything to do with his failed offer of assistance to the authorities. I accept that he may have received some threats from his criminal associates, but they would have been part and parcel of the appellant's involvement of a multi-million pounds drug conspiracy, and the fallout from the operation being thwarted by the authorities, combined with the loss of a considerable amount of money on the appellant's watch. Further, on the appellant's own case, the last threat was a considerable period ago. There is nothing to demonstrate that the appellant is at any risk in the country of his nationality, or that his removal will causally increase the likelihood of him being subject to a real risk of serious harm in that country. The appellant may be removed the country of his nationality without being exposed to a real risk of serious harm.

The third issue: particular social group

56. In light of the above findings of fact, it follows that I do not need to consider whether the appellant is a member of a "particular social group" for the purposes of the Refugee Convention. He is not at a real risk of serious harm or being persecuted in the country of his nationality, so this question falls away.

CONCLUSION

57. I dismiss the appeal on asylum grounds, pursuant to section 72(10). I determine the asylum ground of appeal by dismissing it. In light of my findings of fact, the appellant's Article 3 case must also fail.

ANONYMITY

58. I maintain the anonymity order already in force so as to prevent the contents of this decision giving rise to a risk not currently faced by the appellant.

Notice of Decision

The decision of Judge Abebrese involved the making of an error of law and is set aside.

I remake the appeal, dismissing it on asylum and human rights grounds.

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

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

Signed Stephen H Smith Date 13 January 2022

Upper Tribunal Judge Stephen Smith