IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001558

First-tier Tribunal No: RP/00006/2022
RP/50016/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 19 December 2024

Before

UPPER TRIBUNAL JUDGE O'BRIEN

Between

Dawit Aibu
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr B Lams of Counsel, instructed by TNA Solicitors
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

Heard at Field House on 3 October 2024

DECISION AND REASONS

1. Pursuant to rule 42 of the 2008 Procedure Rules, this decision corrects (and replaces) a corrupted version of the decision erroneously sent to the parties on or around 19 November 2024.

2. The appellant was born on 5 March 1991 and is a national of Eritrea. He appeals against the decision of First-tier Tribunal Judge Clarkson (the judge) promulgated on 24 January 2024 to dismiss his appeal against the respondent's decision to revoke his protection status.

Background

3. The appellant arrived in the United Kingdom on 10 January 2007 and, although his asylum claim was refused, was granted discretionary leave as a minor until 5 September 2008. On 2 September 2008, the appellant applied for further leave to remain and on 25 May 2010 was subsequently granted refugee status (it would appear on the basis of religious belief and imputed political opinion). The

appellant was granted limited leave to remain until 25 May 2015 and, although his application on 24 April 2015 for indefinite leave to remain was refused, he was granted further leave to remain until 18 June 2018.

4. On 4 October 2028, the appellant was convicted on 2 counts of attempted robbery for which he was sentenced on 11 October 2018 to 2 concurrent terms of 3 years' imprisonment. On 26 November 2028, the respondent served on the appellant a notice of decision to deport him together with notice of certification under s72 of the Nationality, Immigration and Asylum Act 2002. A stand-alone s72 notice was served on the appellant on 28 June 2019.

5. On 5 November 2019, the respondent gave notice of her intention to revoke the appellant's refugee status. The decision to revoke the appellant's refugee status was made on 23 September 2020, on the basis of the appellant's above criminal conduct.

6. The appellant appealed against that decision on 1 October 2020. On 20 July 2021, before his appeal could be heard, the appellant was convicted of a number of offences including possession of a bladed article in a public place and assault on an emergency worker for which he was sentenced to terms of imprisonment of 12 months and 6 months respectively to be served consecutively. As a result of this conviction, the respondent made a further decision on 18 September 2021 to deport the appellant.

7. Following a hearing on 12 January 2024, the judge dismissed the appellant's appeal. She found that the presumption prescribed in s72 applied, and that he had failed to rebut that presumption. In doing so, the judge found (amongst other things) that the sentences for all of the appellant's offending had been passed before 28 June 2002 [12], that the appellant's conviction was for a period of more than 12 months (and so he was presumed to have been convicted of a serious crime for the purposes of para 339AC of the Immigration Rules, and also to constitute a danger to the community of the United Kingdom) [14-15], that the appellant continued to abuse alcohol [30].

8. The appellant applied unsuccessfully to the First-tier Tribunal for permission to appeal on the grounds that the judge had failed to take into account relevant facts when considering whether the s72 presumption had been rebutted and/or had reached a perverse conclusion on the issue. When renewing his application to the Upper Tribunal for permission to appeal, the appellant also alleged that the judge had applied the incorrect s72 threshold, which rendered her conclusions arguably unsafe. I granted permission on the latter point, on the basis that it was an arguably material error of law.

The Law

9. The material provisions of s72 Nationality, Immigration and Asylum Act 2002 ('Matters to be considered') applicable to convictions pre-dating 28 June 2022 are:

> '(1) This section applies for the purpose of the construction and application of Article 33(2) of the Refugee Convention (exclusion from protection).
> (2) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is—
> (a) convicted in the United Kingdom of an offence, and
> (b) sentenced to a period of imprisonment of at least two years.
> ...
> (6) A presumption under subsection (2), (3) or (4) that a person constitutes a

> danger to the community is rebuttable by that person.
> ...'

10. For convictions on or after 28 June 2028, the above provisions are amended by s38 Nationality and Borders Act 2022 as follows:

> (1) This section applies for the purpose of the construction and application of Article 33(2) of the Refugee Convention (exclusion from prohibition of expulsion or return).
> (2) A person is convicted by a final judgment of a particularly serious crime if he is —
>
> (a) convicted in the United Kingdom of an offence, and
> (b) sentenced to a period of imprisonment of at least 12 months.
>
> ...
> (5A) A person convicted by a final judgment of a particularly serious crime (whether within or outside the United Kingdom) is to be presumed to constitute a danger to the community of the United Kingdom.
> (6) A presumption under subsection (5A) that a person constitutes a danger to the community is rebuttable by that person.
> ...

Submissions

11. It is not in issue that the judge applied s72 as amended by the Nationality and Borders Act 2022 to apply to offences committed on or after 28 June 2022. The question is whether that was a material error of law.

12. Put simply, the respondent argues that the index offences in respect of which the appealed revocation decision was made satisfied not only s72 as correctly understood but also s72 as mistakenly understood by the judge. The error was therefore immaterial, even more so because the appellant had subsequently reoffended.

13. The appellant argued that the judge must, when considering whether the s72 presumption had been rebutted, have taken into account the extent to which his sentence exceeded the threshold. It is likely, therefore, that she had required greater evidence to be satisfied that the appellant had rebutted the presumption than had she realised that the sentence for index offences was only one year and not two years greater than the threshold.

Conclusions

14. I can only find an error of law to be immaterial if satisfied that the outcome would inevitably have been the same had the error not been made (IA (Somalia) v Secretary of State for the Home Department [2007] EWCA Civ 323). Regrettably, I am unable so to find in this case.

15. When considering whether the appellant had rebutted the s72 presumption, the judge has regard to the nature and seriousness of the offences in 2018 and 2021. Given that s72 (as incorrectly applied by the judge) prescribes that an individual 'is convicted by a final judgment of a particularly serious crime if he is convicted in the United Kingdom of an offence, and sentenced to a period of imprisonment of at least 12 months', it cannot be ruled out that the judge formed the erroneous view that the 2021 offences were 'particularly serious' by operation of law. Certainly, she formed the view that they were 'serious crimes' for that very reason (see [13-14]). Moreover, as submitted by Mr Lams, it cannot also be ruled out that the judge formed her view on the seriousness of all of the offences by reference to how much the consequential sentences exceeded the 12-month threshold.

16. Whilst it does seem likely when reading the decision as a whole, I cannot in the circumstances be certain that the judge would have upheld the presumption had she considered s72 as it correctly applies to convictions pre-dating 28 June 2022.

17. I have considered whether it would be appropriate to retain the case to remake the decision in the Upper tribunal. However, I am persuaded by the parties that the matter should be reheard on the basis of up-to-date evidence with no findings of fact preserved and that, in the circumstances, it is appropriate to remit the appeal to the First-tier Tribunal.

Notice of Decision

1. The appeal is allowed.

2. The judge's decision on the appeal involved the making of an error of law.

3. The appeal is remitted to the First-tier Tribunal to be dealt with by a different judge with no findings of fact preserved.

Sean O'Brien

Upper Tribunal Judge O'Brien

Judge of the Upper Tribunal
Immigration and Asylum Chamber

19 December 2024