**Upper Tribunal**
**(Immigration and Asylum Chamber)**

Mugwagwa (s.72 – applying statutory presumptions) Zimbabwe [2011] UKUT 00338 (IAC)

**THE IMMIGRATION ACTS**

**Heard at North Shields** **Determination Promulgated**

**On 6 May 2011**

**20 July 2011**

**Before**

**MR C M G OCKELTON, VICE PRESIDENT**

**SENIOR IMMIGRATION JUDGE GRUBB**

**IMMIGRATION JUDGE HOLMES**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**OBRIEL TAMUKA MUGWAGWA**

Respondent

**Representation :**

For the Appellant: Ms R Pettersen, Senior Home Office Presenting Officer

For the Respondent: Mr G Brown instructed by Miles Hutchinson and Lithgow, Solicitors

1. The First-tier Tribunal (Immigration and Asylum Chamber) is required to apply of its own motion the statutory presumptions in s.72 of the Nationality, Immigration and Asylum Act 2002 to the effect that Art 33(2) of the Refugee Convention will not prevent refoulement of a refugee where the factual underpinning for the application of s.72 is present even if the Secretary of State has not relied upon Art 33(2) and s.72.

2. Equally, the Secretary of State is entitled to take the point before the Upper Tribunal in the event of an appeal.

3. The obligation of the First-tier Tribunal (or Upper Tribunal) is subject to the common law requirement of fairness. If the Secretary of State has not raised the s.72 point in the refusal letter, then an unrepresented appellant may need to be warned of the statutory provisions which raise the rebuttable presumptions against him and be given the opportunity to deal with them.

## DETERMINATION AND REASONS

1.
The Secretary of State appeals against a decision of the First-tier Tribunal (Immigration Judge Zucker and Mr A Armitage) allowing an appeal against the Secretary of State's decision that s.32(5) of the UK Borders Act 2007 ("the 2007 Act") applied and to make a deportation order.

2.
For convenience, in this determination we continue to refer to the parties as appellant and respondent respectively as they were before the First-tier Tribunal.

**Background**

3.
The background to the appeal is as follows. The appellant is a citizen of Zimbabwe who was born on 10 August 1972. He arrived in the United Kingdom on 13 December 2001 and claimed asylum. That claim was rejected by the Secretary of State and the appellant's appeal was dismissed by Mrs R Goldfarb, an Adjudicator, following a hearing on 11 April 2002. Subsequently the appellant committed a number of criminal offences culminating in his conviction on 27 August 2008 at Teesside Crown Court of the offence of conspiring to supply a controlled drug (heroin) for which he received a sentence of 33 months' imprisonment following a guilty plea. On 6 November 2009 the appellant was served with notice of his liability to be deported under the automatic deportation provisions of the 2007 Act and on 23 December 2009 a deportation order was made. He appealed to the First-tier Tribunal.

4.
The Tribunal allowed the appeal on the basis that the appellant was a refugee and that his removal to Zimbabwe would breach Art 3 of the European Convention on Human Rights ("ECHR"). Although Tribunal expressed some concerns about the credibility of the appellant, in part on the basis of a previous finding made by the Adjudicator in the earlier appeal, the Tribunal found that the appellant "had a low level of activity in the MDC" and on the basis of the relevant country guidance case law, namely RN (Returnees) Zimbabwe CG [2008] UKAIT 00083 and HS (Returning Asylum Seekers) Zimbabwe CG [2007] UKAIT 00094, that the appellant was at risk on return to Zimbabwe. Consequently, the appellant was entitled to the benefit of 'Exception 1' in s.33(2) of the 2007 Act.

5.
The Secretary of State sought permission to appeal on two grounds: (1) that the Tribunal in allowing the appeal on refugee grounds had failed to apply s.72 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), such that despite being a refugee within the meaning of the Refugee Convention, the appellant was nevertheless removable by virtue of Art 33(2) of that Convention because he had been convicted of an offence for which he received a sentence of at least two years' imprisonment; and (2) that the Tribunal had erred in finding on the facts that the appellant would be at risk on return to Zimbabwe.

6.
On 8 November 2010, the Upper Tribunal (Senior Immigration Judge Grubb) granted permission to appeal. At the hearing Ms Petterson, who represented the Secretary of State, indicated that she no longer pursued the second ground on which permission to appeal was sought. She relied exclusively upon the first ground of appeal.

**Submissions**

7.
Ms Petterson submitted that in allowing the appeal the First-tier Tribunal had erred in law in failing to apply s.72 of the 2002 Act. Although, as she accepted, the appellant was at risk on return to Zimbabwe on the Tribunal's findings, he fell within the presumptive provisions in s.72(2) in that he had been convicted of an offence in the UK for which he had been sentenced to a period of imprisonment of at least two years. Therefore, by virtue of s.72(2) it was to be presumed that he had been convicted by a final judgment of a "particularly serious crime and to constitute a danger to the community of the United Kingdom". On that basis, his removal to Zimbabwe, despite the fact that he was a refugee, would not be a breach of the Refugee Convention by virtue of Art 33(2). Ms Petterson submitted that, subject to any issues of fairness that might arise in a particular case such as putting an appellant (if unrepresented) or his representatives on notice of the case he had to meet under s.72 and of having a fair opportunity to present evidence to rebut the presumption, the First-tier Tribunal was under a legal obligation to apply s.72 even if it had not been raised by the Secretary of State in the decision letter or explicitly by the Presenting Officer at the hearing.

8.
Mr Brown candidly accepted that the Tribunal had erred in failing to apply s.72 even though the Secretary of State had not placed any reliance upon it before the First-tier Tribunal. His case was that, in re-making the decision, we should find on the basis of the evidence before the First-tier Tribunal, namely the Offender Assessment System ("OASys") Report dated 26 November 2008, that the appellant had rebutted the presumption under s.72 that he constituted a danger to the community of the United Kingdom.

**Section 72 of the 2002 Act**

9.
The starting point is Art 33 of the 1951 Refugee Convention. Art 33(1) of the Refugee Convention sets out the prohibition against "expulsion or return" of a refugee in the following terms:

"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."

10.
That provision enshrines a state's obligation not to return (' refouler' ) a refugee falling within Art 1A(2) of the Refugee Convention to a place where he or she has a well-founded fear of persecution for a Convention reason ( R v SSHD ex p Sivakumaran [1988] AC 958).

11.
However, sub-paragraph (2) of Art 33 sets out an exception to that prohibition against refoulement . It is in the following terms:

"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 judgment of a particularly serious crime, constitutes a danger to the community of that country."

12.

It is that underlying provision which the Secretary of State argues in this appeal applied to the appellant. The provisions of Art 33 – in particular Art 33(2) – are replicated in Art 21 of the Qualification Directive (Directive 2004/83/EC).

13.
For our purposes, the effect of Art 33(2) is that a person who is a refugee falling within Art 1A(2) of the Convention may be refouled if he has been convicted of a "particularly serious crime" and "constitutes a danger to the community". The burden of proving the requirements of Art 33(2) lies upon the Secretary of State. (The provisions excluding a person from humanitarian protection in para 339D are similar but are not in identical terms.)

14.
Section 72 of the Nationality, Immigration and Asylum Act 2002 contains a number of provisions which apply,

"For the purpose of the construction and application of Article 33(2) of the Refugee Convention (exclusion from protection)".

15.
In particular, s.72 creates statutory presumptions that (1) a crime is a "particularly serious crime" and (2) an individual convicted of certain offences is a "danger to the community". These presumptions relate to certain crimes committed in the UK (s.72(2) and (4)) and abroad (s.72(3)). The presumptions are rebuttable by evidence (s.72(6) and EN (Serbia) v SSHD [2009] EWCA Civ 630). We concentrate on s.72(2) which is relevant to this appeal and which provides that:

"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."

16.
We should also set out sub-sections (9) and (10) which set out a certification process and the procedure to be followed by the First-tier Tribunal (or Upper Tribunal when re-making a decision) where such a certificate has been issued by the Secretary of State. Sub-sections (9) and (10) provide that:

"(9) Subsection (10) applies where -

(a) a person appeals under section 82, 83 or 101 of this Act or under section 2 of the Special Immigration Appeals Commission Act 1997 (c. 68) wholly or partly on the ground that to remove him from or to require him to leave the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention, and

(b) the Secretary of State issues a certificate that presumptions under subsection (2), (3) or (4) apply to the person (subject to rebuttal).

(10) The Tribunal or Commission hearing the appeal -

(a) must begin substantive deliberation on the appeal by considering the certificate, and

(b) if in agreement that presumptions under subsection (2), (3) or (4) apply (having given the appellant an opportunity for rebuttal) must dismiss the appeal in so far as it relies on the ground specified in subsection (9)(a)."

17.
In this appeal, no certificate was issued under sub-section (9) of the 2002 Act. If it had, the terms of sub-section (10) are such that the Tribunal would have been required to begin its substantive deliberation of the appeal by considering whether the certificate – and the statutory presumptions relied upon within it – had been established such that Art 33(2) of the Refugee Convention applied.

18.
The Secretary of State relies upon the terms of s.72(2) which, it is submitted, demonstrably apply to the appellant. As we have indicated, Mr Brown did not demur from the Secretary of State's submissions that the Tribunal had a duty to apply s.72(2). He was right not to do so.

19.
In an automatic deportation case such as the present appeal, an individual who relies upon the Refugee Convention to challenge a deportation order prays in aid 'Exception 1' in s.33(2) of the UK Borders Act 2007 which applies, so far as relevant,

"where removal of the foreign criminal in pursuance of the deportation order would breach –

(a)
… or

(b)
the United Kingdom's obligations under the Refugee Convention."

20.
The terms of s.33(2) of the 2007 Act mirror the relevant ground of appeal generally applicable in appeals under s.82 of the 2002 Act found in s.84(1)(g):

"that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention…."

21.
The position would appear to be the same where the appeal is an 'upgrade' appeal under s.83 or s. 83A of the 2002 Act brought by an individual where leave has been granted but it has been decided he is not a refugee. The ground of appeal in both instances remains whether the individual's removal would breach the Refugee Convention (see s.84(3) and 84(4) respectively).

22.
An individual's removal will only breach the Refugee Convention if

(i)
he is a refugee (usually because Art 1A(2) applies); and

(ii)
his removal is prohibited by Art 33(1).

Removal will not be prohibited if Art 33(2) applies.

23.

Section 72(2) creates statutory presumptions that the requirements of Art 33(2) are met and, as a consequence, the prohibition against refoulement will not apply. Section 72 is in mandatory terms: "[a] person shall be presumed…". In our judgment, where s.72(2) or any of the other statutory provisions creating presumptions in s.72 applies, the Tribunal is under a duty to apply s.72 to the individual in the appeal. Given the evidential base provided by these presumptions, subject to rebuttal, Art 33(2) will apply in such circumstances so that that a refugee's removal will not be a breach of the Refugee Convention. Of course, the individual will, whilst he fulfils the definition in Art 1 of the Refugee Convention, still have the status of a refugee in international law; and he cannot be removed from the UK to his country of nationality as that would inevitably infringe Art 3 of the ECHR. However, given the terms of the 2002 and 2007 Acts, his appeal relying on 'asylum' or 'refugee' grounds cannot succeed.

24.
Mr Brown referred us to the decision of Bean J in R (TB) v SSHD [2007] EWHC 3381 (Admin). In the end, Mr Brown did not rely upon the decision in TB in his submissions. The case is, however, important not least for what was said by the Court of Appeal ([2008] EWCA Civ 977) concerning the Tribunal's obligation to apply s.72 of the 2002 Act. We are not clear why Mr Brown omitted to refer us to the Court of Appeal's decision.

25.
In TB , the Secretary of State decided to deport the claimant who had been convicted of an offence for which, following reduction on appeal, he received a sentence of three years and ten months' imprisonment. Following the decision, the claimant successfully appealed to an Immigration Judge who allowed his appeal on refugee and human rights grounds. The Secretary of State did not seek to challenge that decision. Subsequently, the Secretary of State refused to recognise the claimant as a refugee and to grant him the appropriate leave on the basis that Art 33(2) of the Refugee Convention, read with s.72 of the 2002 Act, applied to him. The claimant sought to challenge that decision by way of judicial review. Bean J held that the Secretary of State's decision was unlawful on the basis that it amounted to an abuse of process for the Secretary of State to raise the s.72 issue after the Immigration Judge's decision had been given.

26.
The Court of Appeal upheld Bean J's decision although preferring to characterise the Secretary of State's decision as an abuse of power (see [36]). For our purposes, it suffices to identify the Court of Appeal's reasoning at [32]:

"32. As a matter of principle, it cannot be right for the Home Secretary to be able to circumvent the decision of the IAT by administrative decision. If she could do so, the statutory appeal system would be undermined; indeed, in a case such as the present, the decision of the Immigration Judge on the application of the Refugee Convention would be made irrelevant. That would be inconsistent with the statutory scheme." ( per Stanley Burnton LJ):

27.
It was the Secretary of State's reliance upon s.72 after the Tribunal proceedings were completed (and during which proceedings s.72 had not been raised) that was unlawful. The Court of Appeal was led to this conclusion not least by the fact that the Secretary of State could have relied upon s.72 at the initial hearing and, further, if the judge had failed to apply it, that the Secretary of State could have challenged the Tribunal's decision on the basis that the judge had erred in law. At para [29] Stanley Burnton LJ said:

“29. Given the general wording of subsection (1) [of s.72], I accept that the presumptions are to be applied generally, both by the Secretary of State when making a decision on an application for asylum and by the Tribunal on the hearing of an appeal. (For present purposes, it is unnecessary to consider proceedings before the Special Immigration Appeals Tribunal separately.) In my judgment, once the facts giving rise to the statutory presumptions have been established, it would be an error of law for an Immigration Judge to fail to apply a presumption required by the section, irrespective of whether or not the Secretary of State had issued a certificate under subsection (9)(b).”

28.
Then at para [30], his Lordship added:

“30. … it was open to the Secretary of State to seek to establish that Article 33.2 applied to TB on the hearing of his appeal; and it was open to the Secretary of State to seek to appeal the determination of the Immigration Judge on the ground that in failing to apply the statutory presumption she erred in law . She did not do so, and it is not easy to see why, if she is bound by the Immigration Judge's decision, she should be able to take the same point subsequently.” (our emphasis)

29.
The emphasised words were said in the context of a case where the Secretary of State had not relied upon s.72 before the Immigration Judge. That is the situation in this appeal. But this is also not a case in which reliance is placed upon s.72 after the completion of the appeal proceedings.

30.
Subsequent to the hearing in this appeal, in AQ (Somalia) v SSHD [2011] EWCA Civ 695 the Court of Appeal emphatically endorsed TB and concluded that the presumptions in s.72 apply whether or not the Secretary of State has issued a certificate under s.72(9): see especially per Sullivan LJ at [27]-[30]: at [29] his Lordship noted that “the meaning of Section 72 is plain”.

31.
What is said in TB and (now) AQ strongly supports the view we had reached independently and which, without sight of the Court of Appeal’s decision in TB , was accepted by the parties before us.

32.
In our judgment, the First-tier Tribunal is required in principle to apply s.72 of its own motion in an appropriate case where the factual underpinning for the application of s.72 is present. Equally, the Secretary of State is entitled to take the point before the Upper Tribunal in the event of an appeal.

33.
There is, of course, the caveat that appeal proceedings must be fair, and so if the Secretary of State has not raised the point in the letter setting out the reasons for her decision, then an unrepresented appellant may need to be warned of the statutory provisions which raise the rebuttable presumptions against him and be given the opportunity to deal with them. It may be that this could sensibly be done by the First-tier Tribunal at the stage of any pre-hearing review when a judge could make the necessary directions and timetable for the hearing of the appeal to ensure that the appellant has a fair opportunity to call evidence to rebut the statutory presumptions. The same steps are less likely to be required where an appellant is legally represented because such representatives can be taken to be familiar with the statutory provisions and able to inform the First Tier Tribunal of what evidence (if any) is to be relied upon to rebut the presumptions and a timetable for its availability. These are, however, matters for the First-tier Tribunal. What is legally important is that any hearing is conducted fairly.

**Application of s.72(2) to this appeal**

34.
In this appeal, s.72(2) created presumptions that, if not rebutted by evidence, would have led the Tribunal to a finding that, even though the appellant was a refugee because he would be at risk on return, his removal to Zimbabwe would nevertheless not be a breach of the Refugee Convention by virtue of the exception to the prohibition on refoulement set out in Art 33(2) of that Convention. For the reasons we have given, we have concluded that the First-tier Tribunal erred in law in failing to apply s.72 to the appellant.

35.
That said, it is clear that that error was not material to the First-tier Tribunal's decision. Mr Brown submitted that on the evidence before the First-tier Tribunal, the presumption that the appellant was a "danger to the community" was rebutted. The evidence before the Tribunal concerning the appellant's risk to the community, including the risk of his re-offending, was contained with the OASys Report following an assessment on 26 November 2008. At page 6 of 39 the report states that the risk of reconviction by the appellant for "other offences", that is non-violent or sexual offences, within two years of release was "low". It will be recalled that the appellant had been convicted of the offence of conspiring to supply a controlled drug, namely the Class A drug heroin. Again, at page 6 of 39, the report notes that the appellant has no history of committing offences of violence or sexual offences. The report concludes that the risk of re-imprisonment within two years of release is "low". Those conclusions are expanded upon later in the report when the circumstances of the appellant are analysed.

36.
It is not necessary for us to set out in any further detail the OASys Report because, on behalf of the Secretary of State, Ms Petterson accepted that this evidence rebutted the presumption that the appellant was a "danger to the community" created by s.72 of the 2002 Act. On this evidence, we agree that the presumption that the appellant is a danger to the community in s.72(2) of the 2002 Act is rebutted.

**Decision**

37.
For these reasons, although we are satisfied that the First-tier Tribunal erred in law in failing to apply s.72 of the 2002 Act, the decision to allow the appeal was correct and stands. 'Exception 1' in s.33(2) of the 2007 Act applied because the appellant's removal from the UK would breach the Refugee Convention.

38.
The First-tier Tribunal also allowed the appeal under Art 3 of the ECHR which was not challenged before us and that decision also stands.

39.
For these reasons, the appeal to the Upper Tribunal by the Secretary of State is dismissed.

Signed

Senior Immigration Judge Grubb

Judge of the Upper Tribunal