Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02265/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 4th August 2014	**On 4th September 2014**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MJ
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Miss C Johnstone, Senior Presenting Officer
For the Respondent: Miss S Javed, instructed on behalf of Thompson & Co Solicitors

DETERMINATION AND REASONS

1. This is the appeal of the Secretary of State against the decision of the First-tier Tribunal panel (Judge Cockrill and Mr J H Eames) who, in a determination promulgated on 22nd May 2014 allowed his appeal against the decision of the Respondent dated 23rd October 2013 to make a

deportation order by virtue of Section 5(1) of the Immigration Act 1971. The Respondent stated that Section 3(5)(a) of the Immigration Act 1971 applied upon the ground that the Respondent deemed it to be conducive to the public good to make a deportation order against him.

2. For the purposes of this decision, I shall refer to the Secretary of State as the Respondent and MJ as the Appellant, reflecting their positions as they were before the First-tier Tribunal panel. 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 his 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. I have made such a direction as the evidence before the Tribunal refers to confidential medical evidence in respect of the Appellant.

3. The Appellant is a citizen of the Islamic Republic of Iran.

4. The background of the Appellant can be briefly summarised. The Appellant entered the United Kingdom on 10th December 1996 with his mother. She sought asylum naming both the Appellant and his sister as her dependants. That application was refused on 17th November 1998 but the Appellant was granted exceptional leave to remain until 16th December 2002. On 10th February 2003 the Appellant was granted indefinite leave to remain.

5. On 28th August 2003 the Appellant was convicted at Snaresbrook Crown Court of an offence contrary to Section 18 of the Offences against the Person Act of wounding with intent to do grievous bodily harm. On 18th September 2003 he was sentenced by that court to a period of four years' imprisonment.

6. On 4th February 2005 he was served with a notice of liability to deportation and he responded to this on the basis that he feared persecution if returned to Iran. On 24th March 2006 he was given an opportunity to rebut the presumption that he was convicted of a serious crime and constituted a danger to the United Kingdom community and was also served with the letter informing him that he should report to the Asylum Screening Unit in order to take forward his asylum claim. An application was made by him on 14th September 2007 for a "no time limit stamp" to be placed on his passport. That remains outstanding. Further representations were made by a Member of Parliament in September 2010 and on 21st March 2013 he attended an asylum interview and further submissions were made on 5th April 2013 enclosing amendments to the asylum claim that the Appellant made. The decision to make a deportation order was made on 23rd October 2013.

7. The Secretary of State set out her reasons for deportation in a letter dated 23rd October 2013. The first issue related to Section 72 of the Nationality, Immigration and Asylum Act 2002. The Secretary of State took into

account the representations made on his behalf that he would not be a danger to the community but took into account at paragraph 12 the judge's sentencing remarks. On this basis it was considered that he was convicted of an extremely violent crime, that he had consistently refused to plead guilty and to recognise the seriousness of the offence. This was also a crime that was a continuation of behaviour that was not good character and he received a sentence of four years. Thus the circumstances of the offence involving a knife and having taken into account the Appellant's representations, the Secretary of State considered that it was not sufficient to rebut the presumption that he was convicted of a serious crime or that his continued presence in the United Kingdom would be a danger to the United Kingdom community thus at paragraph 14 of the letter, in light of the failure to rebut the presumption, in accordance with Section 72(9)(b) of the 2002 Act (as amended) the Secretary of State certified the presumption under Section 72. The effect of the certificate was that any appeal under Section 82(1) of the 2002 Act, the judge must consider certification first and if the judge upheld the certificate then the asylum aspect of the appeal would be dismissed without consideration of the asylum claim.

8. The letter went on to consider the basis of the asylum claim at paragraphs 16 to 38 and gave reasons taking into account the country information as to why he had not demonstrated that he would be at risk of serious harm or of persecutory treatment if returned to Iran. Consideration was given to discretionary leave at paragraphs 44 onwards and the Appellant's medical condition including his epilepsy and the medical evidence was considered in the light of the case of **N v The UK** and that of **Bensaid v The United Kingdom Number 44599/98 ECHR**. The Secretary of State considered the country materials relating to medical provision in Iran and reached the conclusion the Secretary of State was not satisfied that the Appellant had established a claim under Articles 2 or 3 on the grounds of his medical condition.

9. As to liability to deportation that was considered at paragraph 59 and that paragraph 396 provided that there was a presumption that the public interest requires the deportation of a person who is liable to deportation. Consideration under Article 8 took place at paragraphs 23-76 and reached the conclusion that as the Appellant was convicted of wounding with intent to do grievous bodily harm and received a sentence of four years' imprisonment the Appellant could not satisfy paragraph 399 or 399A and therefore paragraph 398 applied in that it would only be in "exceptional circumstances" that the public interest in deportation will be outweighed by other factors. The exceptional circumstances that have been put forward on his behalf were considered at paragraphs 69-76 but took into account his personal circumstances. The Appellant had stated that his parents resided in the United Kingdom who were both British citizens and that he had a sister who was disabled. The Secretary of State did not consider that there had been evidence to demonstrate further elements of dependency beyond normal emotional ties. The Secretary of State took into account that he had entered the United Kingdom in December 1996 at

the age of 16 and therefore had spent his youth and formative years in Iran and therefore would have knowledge of the traditions, customs and social norms of Iran having spent his life there. It was also considered that the Appellant had previously stated that he had a maternal grandmother and an uncle in Iran and therefore were able to assist and support any reintegration to Iranian society. The conclusion therefore was that the presumption of the public interest favoured deportation.

10. The Appellant appealed this decision under Section 82 of the Nationality, Immigration and Asylum Act 2002. The grounds were submitted on 8th November 2013 and relied upon his claim for asylum based on his political beliefs and also that the decision to remove him would be in breach of Article 8 of the ECHR. As to the Section 72 certificate, it was submitted that the presumption was rebuttable based on the fact that he had not been involved in any criminal activities since his release and had been a "model citizen" and also that he had been attacked in 2008 which resulted in him developing epilepsy and had been registered as disabled. There was nothing it was said since his release which would indicate that he was a danger to society. At paragraph 11 of the grounds it pleaded that the Appellant's immigration history and that of his family should be taken into account and that he is "unable to function without the support of his family members as he is dependent on them."

11. The appeal came before the First-tier Tribunal panel (Judge Cockrill and J H Eames) on 16th May 2014. It is clear from reading the determination that the Appellant was not in attendance at the hearing. He was represented by a solicitor who renewed an application for an adjournment. At paragraphs [60-73] of the determination, the panel considered the basis upon which the application for an adjournment had been based but reached the conclusion that there was no good prospect of the Appellant attending on any future date and therefore the case should proceed. Thus no oral evidence was given before the Tribunal.

12. In a determination promulgated on 22nd May 2014 the panel reached the conclusion that there were exceptional circumstances which outweighed the public interest in deportation and allowed the appeal on Article 8 grounds. Within the determination itself they considered the Section 72 certificate but did not uphold it for the reasons that they gave at [88-95]. As a result of not upholding the Section 72 certificate they considered the Appellant's case on protection grounds that had been advanced on the basis of his political beliefs and also in the alternative as to "sur place" activity carried out by the Appellant. However the panel reached the conclusion that he had not made out the factual matrix to support his claim for asylum and rejected his claim in that respect on all grounds. As to the decision under Article 8, they considered it on the basis of his private life at [105]. The panel observed that the Appellant's mother was not present at Taylor House to assist on any matter and also that she had not made any witness statement. At [107] they considered whether there were exceptional circumstances that were sufficient to outweigh the public interest. In this context they made reference to the Appellant's personal

circumstances and his medical condition. They had evidence from his general practitioner that he suffered from severe epilepsy and that had been the result of a violent attack upon him in 2008 in which he had received a stab to the head which had later triggered a condition of epilepsy. They took into account that he had difficulties in the short-term because he had nowhere to live as he had been evicted and that he had problems concerning the abuse of alcohol and drugs. At [109] they found that the Appellant had not been involved in any sort of "serious criminal activity whatsoever" and at [109] found that he was –

> "a man who has got a good deal of vulnerability and he would find it exceptionally hard to try and cope and survive in Iran, a country in which he has absolutely no meaningful support from family and friends."

They took into account that he was registered disabled although he had previously had shown a capacity to work and to study and that in the past he had suicidal tendencies and being suffering from depression. In looking at the public interest the panel at [111] said this:-

> "111. What is a factor that carries special weight with us in again looking at the matter overall is that this one offence, albeit very serious, was committed a long time ago back in 2003. It undercuts the force of the Respondent's argument that the public interest is to be served by deporting the Appellant, when it is something over ten years before this matter really reaches the Tribunal.
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> 112. In the meantime of course the Appellant has not committed offences and so he has not only displayed that he is not a danger to the community, but his particular combination of personal difficulties means in our judgment that he does fall into this exceptional category.
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> 113. His health needs are marked. He has got a relationship, we consider with his mother and sister although there was no oral evidence of course in this case. We accept the proposition made that the mother had been the Appellant's carer for some time.
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> 114. Looking at the matter and overall, the Appellant's situation falls sufficiently outside the norm in our judgment and right to say that the Appellant's case is an exceptional one."

13. The panel went on to say that he had spent half his life in the country and he had come as a teenager and therefore he had lost contact with his home country. Thus they concluded at [117] that whilst they were mindful of the "seriousness of his crime" but that the –

> "Appellant's case is sufficiently marked and exceptional for us to conclude that the public interest is indeed outweighed by the specific personal factors concerning the Appellant that have been outlined earlier in this determination."

14. The Secretary of State sought permission to appeal that decision and on 11th June 2014 First-tier Tribunal Judge Robertson granted permission for the following reasons:-

> "It is arguable, as submitted in the grounds of application, that the panel materially misdirected themselves in law in their consideration of whether the Appellant's circumstances were exceptional and this panel gave special weight to the period of time that had elapsed since the Appellant's offence, which they stated 'undercuts' the public interest in deportation. As submitted the public interest in deportation was not diminished by the length of time that had elapsed because the risk of re-offending represents a factor in deportation and is not the ultimate aim. It is also arguable that inadequate reasoning was given as to why it was found that the Appellant was living with his mother and cared for by her. All grounds are arguable."

15. The appeal came before the Upper Tribunal and the Appellant was in attendance along with his representative Miss Javed. The Secretary of State was represented by Miss Johnstone, Senior Presenting Officer. Miss Johnstone relied upon the written grounds submitted by the Secretary of State. In addition she made the following oral submissions. She submitted that the panel had erred in law in its consideration of what were "exceptional circumstances". At [105] the case was advanced on private life grounds but in reaching the finding concerning the length of time since he was last convicted at [111] it did not take into account the public interest properly. The Tribunal applied too much weight to the length of time since his conviction. The circumstances considered by the panel to be exceptional were summarised as the Appellant's epilepsy, his familial ties to his mother and sister and the duration that had elapsed since the Appellant's offence in 2003. As regards his personal circumstances, she submitted that they had not been demonstrated to fall within the "exceptional category". No consideration was given by the judge to the country materials placed before the Tribunal concerning medical provision in Iran. They did not take that into account when reaching their conclusions at [109]. The panel also fell into error by reaching a finding at [113] that his mother had been the Appellant's carer for some time. The evidence before the Tribunal was that he was not living with his family in the United Kingdom and there was no evidence that his mother was his carer there being no witness statement from the Appellant or his mother dealing with this. Thus the assessment was flawed.

16. Miss Javed on behalf of the Appellant relied upon the Rule 24 response. She submitted that there was evidence to support his personal circumstances and to demonstrate that he suffered from severe epilepsy and also that he suffered from depression and had had suicide attempts in the past. The finding as to his vulnerability therefore was supported by the evidence. At K2 there was a reference to family members and that he had not seen them since he left Iran. Thus the First-tier Tribunal made findings as to the level of family life and support the Appellant upon return to Iran. They properly took into account that he was registered disabled and therefore it was open to the panel to take into account the Appellant's

medical condition, his lack of links to Iran, his established family in the UK and that the offence took place in 2003 to demonstrate that these were "exceptional circumstances". Miss Javed referred to the Appellant's relationship and dependency on his mother. She accepted that his mother was not present at the hearing nor was there any witness statement. Nonetheless she submitted he had family in the UK that were a form of support and the exceptional circumstances could be seen in the light of his medical history, his condition and his dependency on his mother. The homelessness was a temporary measure (see [108] and [109]). Thus the assessment made by the First-tier Tribunal was not in error. She submitted that if there had been an error, the appeal should be remitted to the First-tier Tribunal as the Appellant was now able to give evidence which he was not able to do before the First-tier Tribunal.

17. I reserved my determination.

18. I have considered with care as to whether or not the grounds relied upon by the Secretary of State and set out in the written grounds and also in the oral grounds amount to a disagreement with the decision of the panel or if they demonstrate that the panel erred in law. I have reached the conclusion after careful consideration that the Secretary of State has made out her grounds and that there are errors of law in the determination of the panel.

19. The first error relates to their consideration of the public interest. There can be no doubt that the offence of which the Appellant was convicted of was an extremely serious offence. He was convicted of an offence contrary to Section 18 namely wounding with intent to do grievous bodily harm. The sentencing judge's remarks are included in the case papers at D1-D4. The judge makes reference to the Appellant having pushed the knife into the victim's stomach and that he was fortunate that he did not kill him. The victim had a two centimetre stab wound to the left lower abdomen which extended to the fatter muscle into the abdominal cavity. He had spent several days in hospital in intensive care but even after released into the care of his family was unable to leave the house for several weeks. It resulted in the separation from his girlfriend and had suffered flashbacks and was very uncomfortable; it being hard for him to be out of the house. His mental health was affected for a period of time although he had been perfectly stable before that. He has been left with a large surgical scar. It is also plain from the sentencing remarks that the Appellant had not pleaded guilty and that the issue had been one of intent. The judge made reference to the Appellant having been drinking excessively and took into account that he was not a man of good character but that there was a common assault in May 1998 and criminal damage. Thus the judge sentenced the Appellant to a term of imprisonment of four years. The panel recognised and paid weight to that index offence of one that was sufficiently serious to justify removal that being a sentence of four years for an offence of Section 18 of wounding with intent. However at [111] the panel said this:-

> "What is a factor that carries special weight with us in again looking at the matter overall is that this one offence, albeit very serious, was committed a long time ago back in 2003. It undercuts the force of the Respondent's argument that the public interest is to be served by deporting the Appellant, when it is something over ten years before this matter really reaches the Tribunal."

20. The panel at [112] went on to say that he has not committed any further offences.

21. This in my judgment dilutes the public interest and leaves out the count a material consideration whereby the panel did not factor into the balance all the facets of the public interest that are well established (see **DS (India) [2009] EWCA Civ 554**). The public interest in deportation of those who commit serious crimes goes well beyond depriving the offender in question of a chance to re-offend and extends to the prevention and deterrence of serious crime and uphold the public abhorrence of such offending. The panel in its determination reduced the public interest to a one dimensional matter.

22. The panel further fell into error at [112] when they placed weight on the length of time since his conviction. Whilst the panel were entitled to give full account to any developments since sentence had been passed (relying on the **Uner** criteria), in this context the panel did not consider or give any reasons for the length of time that had elapsed and the question of delay. In that sense, they could not hold the delay against the Secretary of State without looking at the reasons or causes for that delay and taking into account that since the Appellant was served with a notice of liability to deportation on 4th February 2005 that the Appellant had been pursing a claim for asylum which had caused delay to the process and which the panel ultimately found was not justified. Thus the panel left out of its consideration a further material matter.

23. The grounds also identify a further error and that relates to the panel's consideration of the elements of his private life. The panel at [105] went on to consider his case under Article 8 of the ECHR and found that his case was "better presented in relation to a right to respect for private life." In this context they took into account his medical condition which had been evidenced by a general practitioner's report. The panel went on to state at [106] that it had been unfortunate that the Appellant's mother was not present at the hearing nor had she made any witness statement. At [113] they considered the relationship with his mother and sister noting that there was no oral evidence of this but went on to state "We accept the proposition made that the mother had been the Appellant's carer for some time." This also had relevance to their findings at [109] where they reached the conclusion that this was a man –

> "who has got a good deal of vulnerability and would find it exceptionally hard to try and cope and survive in Iran, a country in which he has got absolutely no meaningful support from family and friends."

The panel's findings are flawed in this respect. There was no evidence before the panel that his mother was the Appellant's carer. The evidence before the panel was that the Appellant was not living with his mother but was living with a friend in Suffolk. The reasons for deportation letter made reference to the lack of dependence upon his mother and that it did not go beyond normal emotional ties despite his condition. The panel failed to address that issue either on the evidence or by addressing the test set out in **Kugathas v SSHD [2003] EWCA Civ 31**. The submissions made by Miss Javed before the Tribunal were that the Appellant was relying upon his relationship and dependency upon his mother. Indeed the Grounds of Appeal that were provided before the First-tier Tribunal made reference to his dependency on his mother. However that evidence was not before the Tribunal nor did the panel give any consideration to the issues of dependency given that the Appellant was an adult and thus their finding that his relationship with his mother and that this sister should carry weight was not based on an objective evaluation of the Appellant or his family member's circumstances.

I also find that the panel erred in law in its finding at [109] that the Appellant on the grounds of vulnerability would find it exceptionally hard to cope and survive in Iran which was a country in which he would have no "meaningful support from family and friends". In this context also there was no explanation or reasoning by the panel as to why he would not receive any support from family and friends nor was there any consideration of the availability of medical treatment for the Appellant's medical condition available in Iran. The reasons for deportation letter and also the evidence in the form of the Operational Guidance Note for Iran had been placed before the Tribunal which made specific reference to medical treatment available. That was not considered and thus the findings in this respect were also flawed.

24. For those reasons, the decision of the panel must be set aside. As to the re-making of the decision, Miss Javed invited the Tribunal to determine the appeal by way of a fresh oral hearing by way of remittal to the First-tier Tribunal. She submitted that the Appellant was now able to give evidence in support of his appeal and would also seek to call oral evidence on his behalf. There was also further medical evidence available that had not been provided before the First-tier Tribunal which was of relevance and required further consideration.

25. By reason of the nature of the error of law, none of the findings of fact can be preserved and therefore a fresh oral hearing will be required. I am satisfied that the appropriate course to follow is the one that Miss Javed invited the court to adopt, namely to remit the appeal to the First-tier Tribunal. Whilst it is not the ordinary practice of the Tribunal to remit cases to the First-tier Tribunal, there are reasons why in this case such a course should be adopted, having given particular regard to the overriding objective of the efficient disposal of appeals and also that there are issues of fact that require determination which will be required to be assessed in

the light of the Appellant being able to now give oral evidence and also that of his witnesses.

26. Therefore the decision of the First-tier Tribunal is set aside and the case is remitted to the First-tier Tribunal at Taylor House for a hearing on a date to be fixed in accordance with Section 12(2)(b) of the Tribunals, Courts and Enforcement Act paragraph 7.2 of the Practice Statement of 10th February 2010 (as amended).

Direction Regarding Anonymity – Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005

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 Date

Upper Tribunal Judge Reeds