IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-000573
First-tier Tribunal No: RP/00032/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 21 March 2023

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AA
(Anonymity Order made)

Respondent

Representation:
For the Appellant: Mr A Tan, Senior Home Office Presenting Officer
For the Respondent: Mr J Greer, instructed by AGI Criminal Solicitors

Heard at Manchester Civil Justice Centre on 24 January 2023

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing AA's appeal against the respondent's decision to revoke his refugee status and refuse his protection and human rights claims following the making of a deportation order against him.

2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and AA as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a national of Iran born on 7 April 1998. He entered the UK illegally on 7 August 2013, aged 14, with his parents and brother after they were refused entry clearance. His father made an asylum claim the same day, naming him

and his mother and brother as dependants, and they were all granted refugee status on 23 February 2015 and leave to remain until 22 February 2020. The appellant's parents and brother were granted indefinite leave to remain as refugees in August 2020.

4. On 15 April 2019, the appellant was convicted of rape of a female aged 16 years or over and sentenced to four years' imprisonment. The same day he was also convicted of sexual assault on a female by penetration and sentenced to four years' imprisonment to run concurrently, and two further counts of rape of a female aged 16 years or over for which he was sentenced to 30 months' imprisonment on each count to run concurrently. The two offences of rape were against his first girlfriend T and the offences of assault by penetration and rape were against his second girlfriend E.

5. The circumstances of the appellant's convictions, as set out in the sentencing remarks of the Crown Court Judge, are that he was 17 at the time of the offences against T and 18 at the time of the offences against E. In relation to T, he had been in a relationship with her for a period of ten months and had had consensual sex with her, but on at least two occasions she did not consent but he persisted. Shortly after the relationship finished with T, he met E, and on the second date with E he took her back to his house and, during sexual activity, he penetrated her despite her objection. The appellant was convicted on the basis of clear evidence in the form of text messages after the events.

6. As a result of his conviction, the appellant was served with a decision to deport him in accordance with section 32(5) of the 2007 Act, dated 29 May 2019, and he was invited to seek to rebut the presumption under section 72 of the Nationality, Immigration and Asylum Act 2002 that he had been convicted of a particularly serious crime and constituted a danger to the community. He responded on 17 June 2019, claiming that his deportation would breach his Article 8 rights and that he was at risk on return to Iran.

7. On 6 December 2019 the appellant was notified of the respondent's intention to cease his refugee status under Article 1C(5) of the Refugee Convention and paragraph 339A(v) of the immigration rules on the basis that the circumstances in connection with which he had been recognised as a refugee had ceased to exist. The respondent noted that the appellant had been granted refugee status in line with his father on the basis of his father's claim to be at risk on return to Iran. His father's claim, which had been accepted, was that he had been arrested, detained and tortured because he assisted people to escape during the demonstrations which followed the presidential elections of 2009, that he had become involved with the Green Party in 2013 distributing leaflets to campaign for a boycott of the election, that the man who led him to be involved in politics had been arrested and that he had gone into hiding, that his house had been raided and sealed and that a warrant had been issued for his arrest. The respondent considered there to be no evidence that the appellant had been involved in anti-government activity in the UK himself which would have attracted the adverse attention of the Iranian authorities and did not consider that he would face persecution on return to Iran as a result of any imputed political opinion or as a result of his father's activities. The respondent considered further that there was no evidence that the appellant's father or other family members were currently of interest to the Iranian authorities. The respondent concluded that returning the appellant to Iran would not be in breach of the Refugee Convention.

8. On 7 December 2019 the respondent notified the UNHCR of the intention to revoke the appellant's refugee status. Written representations were received from the UNHCR in response, on 5 March 2020.

9. On 11 June 2020 the respondent signed a Deportation Order against the appellant and made a decision to revoke his refugee status and to refuse his protection and human rights claims. In that decision the respondent considered that the appellant was a danger to society and certified that the presumption in section 72(2) of the NIAA 2002 applied to him and that Article 33(2) of the Refugee Convention applied such that the Convention did not prevent his removal from the UK. The respondent also considered that paragraph 399A(v) of the immigration rules and Article 1C(5) of the Refugee Convention applied to the appellant and that his refugee status had therefore ceased. The respondent considered that the appellant would not be at risk on return to Iran and that his return to that country would not breach his Article 3 human rights. The respondent considered that the appellant did not qualify for humanitarian protection and that he was excluded from a grant of humanitarian protection in any event, under paragraph 339D of the immigration rules, as a result of his conviction and sentence. As for Article 8, the respondent noted that the appellant did not have a partner or children in the UK. The respondent did not consider that his relationship with his father, mother and brother constituted a compelling reason why he should not be deported. The respondent did not accept that the appellant was socially and culturally integrated in the UK or that there were very significant obstacles to his re-integration in Iran. The respondent concluded that there were no very compelling circumstances outweighing the public interest in the appellant's deportation.

10. The appellant's appeal against that decision was heard on 28 May 2021 in the First-tier Tribunal by Judge Lang. The appellant and his father gave oral evidence before the judge. The judge found that the appellant could not succeed on Article 8 grounds. She found that the appellant had rebutted the presumption in section 72 of the NIAA 2002, noting that there was a period in excess of two years between the offences for which he had been convicted and the trial at which he was convicted during which time he had attended college and had not reoffended and that there was persuasive evidence of rehabilitation before his conviction and sentencing. The judge considered further that the appellant remained at risk on return to Iran and noted his evidence at the hearing that his father had confirmed that his family home had been searched as recently as last year by the Iranian authorities for information on his whereabouts. The judge considered that the appellant would be treated as having the imputed political opinions of his father, noting that the asylum status of his father, mother and brother had been confirmed as recently as last year. The judge accordingly allowed the appellant's appeal.

11. The respondent sought permission to appeal against that decision to the Upper Tribunal. Permission was refused in the First-tier Tribunal. The respondent then renewed her application to the Upper Tribunal on the grounds that the judge had erred by finding that the appellant was not a danger to the community and had erred by failing to consider the appellant's claim to be at risk on return to Iran in the light of the changed circumstances.

12. Permission was granted by the Upper Tribunal on 12 December 2021 and the appellant served a Rule 24 response opposing the appeal.

Hearing and Submissions

13. The matter then came before me. Both parties made submissions.

14. With regard to the first ground, Mr Tan submitted that the judge had erred in her finding that the appellant was not a danger to the community and he referred to relevant matters which had not been taken into account by the judge, including the

criminal process, the fact that the appellant remained in prison at the time of the hearing before the First-tier Tribunal, and that there were additional penalties to the sentence itself including being put on the sex offenders' register and the strict licence conditions. The judge had focussed on the period of time prior to the appellant's conviction and had failed to consider that he had gone on to commit a second offence, that he had been motivated not to offend because of his pending trial, and that he had pleaded not guilty at the trial and had been convicted on the clearest evidence. There was no evidence of remorse and the judge had failed to make a finding on that. The judge had relied upon the protective factors of the appellant's family, but they had failed to stop him offending before. As for the second ground, Mr Tan submitted that the judge had made no clear finding as to whether she accepted the claim that the appellant's family home had been raided in 2020 and had failed to give proper reasons for concluding that the appellant was at risk in Iran. The judge had failed to consider the change in the appellant's personal circumstances in line with the guidance in PS (cessation principles) Zimbabwe [2021] UKUT 283. Mr Tan submitted that there had been an inadequate assessment of elements of the appeal and an absence of reasoning and the judge's decision ought to be set aside and re-made in the Upper Tribunal.

15. Mr Greer accepted that the judge's decision was a generous one but he submitted that there were no errors of law and that the decision should stand. He submitted, with regard to the first ground, that it was clear from the judge's decision why she concluded that the presumption in section 72 had been rebutted by the appellant and she gave five reasons for concluding as such, all of which were rational reasons. With regard to Mr Tan's submissions on the judge's failure to consider the appellant's strict licence conditions, Mr Greer submitted that that was not a matter raised in the grounds and it was not clear that it was a matter raised before the judge. Mr Greer submitted that Mr Tan was wrong in asserting that the judge was only entitled to take into account rehabilitation after the conviction, when the judge was able to consider the entire period from when the appellant stopped offending including the period between the offending and the conviction. The judge was entitled to have regard to the protective factors taken as a whole, including the appellant's family, being on licence and attending college. The licence was part of the rehabilitation process. With regard to the second ground, Mr Greer submitted that it was clear why the judge concluded as she did. She essentially agreed with the UNHCR. The question of risk on return had to be considered in the light of the country guidance in SSH and HR (illegal exit: failed asylum seeker) Iran (CG) [2016] UKUT 308, where it was found that someone who had been absent from Iran and living in the West would be subjected to questioning. The judge accepted the appellant's claim about the raid on his family home and therefore the appellant would be at risk at the pinch-point of return. The judge had given sufficient reasons.

Discussion

16. It is Mr Greer's submission that the decision of Judge Lang was a generous one, but was one which was open to her and was lawfully made. There is clearly a distinction to be made between a decision which is generous but nevertheless lawful and one which omits relevant considerations and is legally erroneous for that or other reasons. Just because a decision is generous does not mean that it is unlawful, just as a disagreement with a generous decision does not mean that an error of law arises. However, having had careful regard to the evidence before the judge and to Mr Greer's helpful Rule 24 and submissions I have to conclude that the judge's decision is legally flawed.

17. It was Mr Tan's submission that the judge had erred by focussing on the appellant's lack of further offending in the two to three years prior to his conviction without having regard to various material matters. I do not agree with Mr Greer that Mr Tan was thereby asserting that the judge was only entitled to consider evidence of rehabilitation after conviction. Clearly that was not his submission, as Mr Tan confirmed. The point Mr Tan was making was that the judge, in considering whether the appellant continued to pose a risk to the community, had solely focussed on the period of time prior to conviction and had thereby failed to make a holistic assessment of his actions over time. I have to agree that that is the case. The judge failed to consider the period of time after the appellant's first offence when he was attending college and mixing with other students yet had gone on to commit the second offence. She failed to consider that the appellant's lack of offending during that period may well have been motivated by the fact that he was going through the criminal proceedings and was awaiting trial. She failed to take account of the fact that he had remained in prison the entire time including at the time of the First-tier Tribunal hearing and had therefore not been in the community post-conviction. She failed to note the additional penalties imposed upon the appellant beyond the term of imprisonment including being on the sex offenders register and being subject to onerous licence conditions and the implications of that in terms of the risk he was perceived to pose to the community. She also failed to take any account of the fact that the appellant had pleaded not guilty but had been convicted on clear evidence. Whilst it may be that, having had regard to all the evidence as she said at [28] that she had, the judge had considered all of these matters, but there is nothing in her decision to show that that was the case and the decision clearly lacks a full and proper engagement with these material concerns.

18. Additionally, aside from the lack of further offending prior to conviction, the only other factors considered by the judge in terms of rehabilitation were, at [45], that he had been unable to undertake rehabilitative courses in prison due to Covid and that he would be returning to a stable family life. However, as Mr Tan submitted, the burden was upon the appellant to produce evidence of rehabilitation to rebut the presumption that he posed a danger to the community. An inability to undertake courses due to Covid, albeit a neutral factor, did not provide such evidence. Likewise, in considering his family to be a protective factor, the judge failed to consider that the appellant's close relationship to his family had not prevented him from offending in the first place. In addition, as the grounds assert, the judge made no findings on the question of remorse. That was a matter specifically raised in the refusal decision at [23] but was not addressed by the judge despite being a material matter considering the appellant's plea of innocence at his trial. The evidence addressed by the judge was therefore limited and there was accordingly a clear failure to explain the basis upon which she had been able to find that the appellant had discharged the burden of rebutting the presumption for the purposes of section 72 of the NIAA 2002. In that respect, therefore, Judge Lang's decision is clearly materially flawed.

19. Turning to the judge's decision on the exceptions to deportation and her finding that the appellant remained at risk on return to Iran, the respondent asserts that there was a failure to give proper consideration to the change in the appellant's circumstances since the grant of refugee status. Again, I agree with Mr Tan that the judge's assessment of the risk the appellant would face on return to Iran was inadequately reasoned. The evidence before the judge was that the appellant's father had been politically inactive since leaving Iran in 2013, that the appellant himself had never been politically active and that none of the family members remaining in Iran after their departure had had any problems with the Iranian authorities. The judge referred to it being mentioned in oral evidence that the family home had been raided

the previous year but, as Mr Tan pointed out, it was significant that that had not been mentioned in the witness statements and the judge made no clear findings on that. Other than by way of accepting the assertion made by the appellant that he would be at risk in Iran and by reference to the representations from the UNHCR, which I note do not really go any further than recommending that the Home Office undertakes a thorough risk assessment before deciding to cease the appellant's refugee status, the judge provided no reasons, by way of evidence or country guidance or otherwise, for concluding that the appellant would be at risk on return to Iran. In the circumstances I conclude that the judge's decision is materially flawed in that respect too.

20. For all of these reasons Judge Lang's decision contains material errors of law and her decision has to be set aside. Mr Tan submitted that in the event that the decision was set aside, the judge's findings on the seriousness of the appellant's offending and on Article 8 could be preserved and the case retained in the Upper Tribunal. However I am in agreement with Mr Greer that, particularly in light of the passage of time since the appeal was heard in the First-tier Tribunal, the extent of the fact-finding is such that nothing can in reality be properly preserved and the case has to be heard afresh. The appropriate course, therefore, is for the case to be remitted to the First-tier Tribunal to be heard *de novo* before a different judge with no findings preserved.

Notice of Decision

21. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The Secretary of State's appeal is allowed and the decision is set aside.

22. The appeal is remitted to the First-tier Tribunal pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), to be heard before any judge aside from Judge Lang.

Anonymity

The First-tier Tribunal made an order pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal)(Immigration and Asylum Chamber) Rules 2014. I continue that order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed: S Kebede
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

25 January 2023