Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09928/2018

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 09 April 2019 **On 19 August 2019**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

H H
(ANONYMITY DIRECTION MADE)
Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Anonymity was granted at an earlier stage of the proceedings because the case involves protection issues. I find that it is appropriate to continue the order. 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.

Representation:
For the appellant: Mr I. Hussain of Syeds Law Office Solicitors
For the respondent: Mr S. Kotas, Senior Home Office Presenting Officer

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DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 27 April 2018 to refuse a human rights claim in the context of deportation proceedings (refusal to revoke a deportation order).

2. The appellant entered the UK on 30 October 2004 and claimed asylum. The protection claim was refused and a subsequent appeal was dismissed. His appeal rights came to an end on 18 May 2005. On 24 July 2006 he was sentenced to 6 months' imprisonment for using a false instrument with intent and was recommended for deportation. At the time, the appellant was liable to removal in any event. A deportation order was signed on 09 January 2007. The appellant was removed to Iran, with his consent, on 28 February 2007.

3. The appellant returned to the UK in breach of the deportation order and made a further protection claim on 05 July 2008. The application was refused on 12 August 2008. A series of further submissions, applications for leave to remain and decisions refusing leave to remain followed between 2009 and 2017.

4. On 15 August 2017 the appellant applied for leave to remain on human rights grounds based on his relationship with a British citizen of Iranian origin who was formerly recognised as a refugee. The respondent treated it as an application to revoke the deportation order on human rights grounds. The application was refused on 27 April 2018. The decision is the subject of this appeal.

5. First-tier Tribunal Judge Lodge ("the judge") dismissed the appeal in a decision promulgated on 28 September 2018. The judge described the decision under appeal as a decision "to refuse a human rights claim by virtue of Section 5(2) of the Immigration Act 1971". The judge summarised the evidence given by the appellant and his partner at the hearing. He began his findings by stating that the appellant appealed the decision to refuse to revoke the deportation order. The judge only referred obliquely to the relevant legal framework by way of a summary of the submissions made by the appellant's representative.

> "26. Mr de Mello conceded that the appellant cannot meet Paragraph [399]. Briefly, and for the avoidance of doubt, that must be the case he cannot meet [399](b) because the relationship he has formed with the sponsor was at a time when he was unlawfully in the UK. He cannot meet 339A(a) because he has not been lawfully in the UK most of his life.
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> 27. Having regard to Paragraph 339D the appellant's submission under Article 8 can only succeed if there are very exceptional circumstances over and above the circumstances described in the exceptions to deportation.
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> 28. It is submitted on the appellant's behalf that there are exceptional circumstances; the sponsor cannot return to Iran and the appellant's association with the sponsor is known to the

> authorities in Iran or even if it is not known he will be at risk of enquiry on return to Iran. He will be at risk of enquiry all the more so because he left Iran illegally."

6. The judge went on to give reasons for rejecting the appellant's claim, apparently only raised for the first time at the hearing, that he would be at risk on return because of his association with his partner, who was previously recognised to have a well-founded fear of persecution in Iran. The judge concluded:

> "43. I cannot find that the decision to refuse the appellant leave to remain and not to revoke the deportation order is disproportionate having regard to the maintenance of immigration control."

7. The appellant appealed the First-tier Tribunal decision on the following grounds:

   (i) The judge failed to consider paragraph 391 of the immigration rules, which was relevant to an application to revoke a deportation order. The judge failed to consider whether the fact that 10 years had passed since the making of the deportation order was a relevant factor. The test under paragraph 391 was arguably lower than the test of 'very exceptional circumstances' seemingly applied by the judge under 399D.

   (ii) The judge unfairly took against the appellant the fact that he did not mention being questioned at the airport on return to Iran or his flight from the airport previously without giving the appellant an opportunity to provide an explanation. In fact, it is asserted, the appellant mentioned this fact in the asylum interview in 2008.

   (iii) It is asserted that the judge erred by misrecording the evidence given by the appellant's partner.

Legal framework

8. The following paragraphs of the immigration rules were relevant to the revocation of the deportation order.

> A362. Where Article 8 is raised in the context of deportation under Part 13 of these Rules, the claim under Article 8 will only succeed where the requirements of these rules as at 28 July 2014 are met, regardless of when the notice of intention to deport or the deportation order, as appropriate, was served.
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> 362. A deportation order requires the subject to leave the United Kingdom and authorises his detention until he is removed. It also prohibits him from re-entering the country for as long as it is in force and invalidates any leave to enter or remain in the United Kingdom given him before the Order is made or while it is in force.
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> ...
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> 388. Where a person returns to the UK when a deportation order is in force against him, he may be deported under the original order. The

Secretary of State will consider every such case in the light of all the relevant circumstances before deciding whether to enforce the order.

...

390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:

(i) the grounds on which the order was made;

(ii) any representations made in support of revocation;

(iii) the interests of the community, including the maintenance of an effective immigration control;

(iv) the interests of the applicant, including any compassionate circumstances.

390A. Where paragraph 398 applies the Secretary of State will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors.

391. In the case of a person who has been deported following conviction for a criminal offence, the continuation of a deportation order against that person will be the proper course:

(a) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of less than 4 years, unless 10 years have elapsed since the making of the deportation order, when, if an application for revocation is received, consideration will be given on a case by case basis to whether the deportation order should be maintained; or

(b) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of at least 4 years, at any time,

Unless, in either case, the continuation would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees, or there are other exceptional circumstances that mean the continuation is outweighed by compelling factors.

391A. In other cases, revocation of the order will not normally be authorised unless the situation has been materially altered, either by a change of circumstances since the order was made, or by fresh information coming to light which was not before the appellate authorities or the Secretary of State. The passage of time since the person was deported may also in itself amount to such a change of circumstances as to warrant revocation of the order.

392. Revocation of a deportation order does not entitle the person concerned to re-enter the United Kingdom; it renders him eligible to apply for admission under the Immigration Rules. Application for revocation of the order may be made to the Entry Clearance Officer or direct to the Home Office.

9. Paragraph 390A makes clear that where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention paragraph 398 of the immigration rules would be considered. Paragraph 398, 399 and 399A contain the

Secretary of State's policy as to where a fair balance is struck in cases involving deportation of foreign criminals. Those provisions are also put on a statutory footing by way of section 117C of the Nationality, Immigration and Asylum Act 2002 ("the NIAA 2002").

10. Finally, under the heading, "Deportation and Article 8" paragraph 399D of the immigration rules was introduced by way of Statement of Changes in the Immigration Rules HC 532, which came into force on 28 July 2014.

> 399D. Where a foreign criminal has been deported and enters the United Kingdom in breach of a deportation order enforcement of the deportation order is in the public interest and will be implemented unless there are very exceptional circumstances.

11. In *Smith (paragraph 391(a) – revocation of deportation order)* [2017] UKUT 00166 the Upper Tribunal considered the terms of the immigration rules and reviewed the Court of Appeal decisions in *SSHD v ZP (India)* [2015] EWCA Civ 1197 and *IT (Jamaica) v SSHD* [2016] EWCA Civ 932 before setting out the following general guidance.

> (i) In cases involving convictions for an offence for which the person was sentenced to a period of imprisonment of less than 4 years, the Secretary of State's policy, as expressed in paragraph 391(a) of the Immigration Rules, is that the public interest does not require continuation of a deportation order after a period of ten years has elapsed.
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> (ii) However, paragraph 391(a) allows the Secretary of State to consider on a case by case basis whether a deportation order should be maintained. The mere fact of past convictions is unlikely to be sufficient to maintain an order if the 'prescribed period' has elapsed. Strong public policy reasons would be needed to justify continuing an order in such circumstances.
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> (iii) Paragraph 391(a) will only be engaged in a 'post-deportation' case if the person is applying for revocation of the order from outside the UK. Nothing in the strict wording of the rule requires the ten-year period to be spent outside the UK. However, the main purpose of deportation is to exclude a person from the UK. Any breach of the deportation order is likely to be a strong public policy ground for maintaining the order even though a period of ten years has elapsed since it was made.
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> (iv) In 'post-deportation' applications involving sentences of less than four years made before the end of the ten-year period, and 'post-deportation' applications involving sentences of four years or more, appropriate weight should be given to the Secretary of State's policy as expressed in the 'Conventions exception' and 'sweep-up exception' with reference to paragraphs 398-399A and 390A of the Immigration Rules.

Decision and reasons

12. It is necessary to put the background to this appeal in context. The decision the appellant seeks to appeal is a response to an application

made on 15 August 2017 for leave to remain as the unmarried partner of a British citizen. The application was made on form FLR(FP). The representations that accompanied the application were dated 14 August 2017. They also made clear that the application was confined to the appellant's family life with his unmarried partner.

> "This is an application for further leave to remain on basis of unmarried partnership. It is submitted that our client is in a genuine and subsisting relationship with his partner who is present and settled in the UK. There are insurmountable obstacles to family life continuing outside of UK as his partner is a political refugee from Iran and it has already been accepted by the Home Office that she has a genuine fear of death and persecution upon return and accordingly Home Office cannot expect her to go and live with him in Iran."

13. The representations went on to say:

> "In relation to paragraph 353, please note that our client's asylum claim has no involvement in this case. Therefore the consideration is whether there would be a realistic prospect notwithstanding the reasons for refusal. In that respect we submit that there is a realistic prospect due to the fact that this case may ultimately come down to the consideration of EX.1 and a tribunal could find insurmountable obstacles where our client's spouse is a refugee from the same country where she is now being expected to go and live with our client."

14. Although the representations recognised that the applicant had a previous conviction, they argued that it was spent under the Rehabilitation of Offenders Act 1974. Nowhere in the representations was there any recognition of the fact that the appellant was removed subject to a deportation order and had returned to the UK in breach of the order. The application was put squarely on the basis of the immigration rules without any recognition of the deportation elements involved in the case and without making submissions on the revocation of the existing deportation order.

15. What was made expressly clear in the initial representations was that the appellant was <u>not</u> relying on protection issues. In so far as his partner was previously recognised as a refugee from Iran the issue was argued squarely with reference to the 'insurmountable obstacles' test contained in paragraph EX.1 of Appendix FM. In other words, the application was made solely on grounds relating to the applicant's right to family life under Article 8 of the European Convention.

16. The respondent treated the application as an application to revoke the deportation order. This was the correct approach given that the applicant was remaining in the UK in breach of a deportation order.

17. The starting point for consideration of an application to revoke a deportation order in the case of a person who has already been deported (a 'post deportation' case) is paragraphs 390 and 391 of the immigration rules. In this case the appellant was sentenced to a period of imprisonment of less than four years. The Secretary of State's policy set

out in paragraph 391(a) states that he will consider an application from outside the UK to revoke the deportation order in such cases when a period of 10 years has elapsed since the making of the deportation order. Consideration will be given on a case by case basis to whether the deportation order should be maintained. Paragraph 391 states that consideration will be given to whether continuation of the order would be contrary to the Refugee or Human Rights Conventions ("the Conventions exception") or whether there are other exceptional circumstances to show that continuation of the order is outweighed by compelling factors ("the sweep up exception").

18. The appellant explicitly did not argue that he would be at risk on return to Iran with reference to the Refugee Convention. The application for leave to remain, which was treated as an application to revoke the deportation order, relied solely on Article 8 of the European Convention. In such circumstances, paragraph 391 of the immigration rules states that the Secretary of State will consider whether continuation of the order would be contrary to the European Convention. In doing so, it was open to the respondent to consider the provisions contained in the immigration rules relating to the assessment of Article 8 in cases involving deportation. The provisions are found at paragraphs A398-400 of the immigration rules under the heading "Deportation and Article 8".

19. This section of the rules applies when a foreign criminal claims that his deportation would be unlawful under section 6 of the Human Rights Act 1998 ("the HRA 1998") because it would breach his rights under Article 8 of the European Convention. Paragraph 399D is to be read in this context. As the Upper Tribunal in *Smith* noted at [25], the fact that a person returns to the UK in breach of a deportation order is a serious matter that should be given significant weight in favour of the public interest in maintaining the order. The more stringent test of "very exceptional circumstances" outlined in paragraph 399D reflects the significant weight that must be given to the breach of the deportation order in favour of the public interest when a person claims that the continuation of the order would breach Article 8 of the European Convention.

20. Having outlined the context in which the application was made and the relevant legal framework I turn to consider the First-tier Tribunal decision.

21. It appears that the appellant raised for the first time in this claim the possibility that he might be at risk on return because he left the airport without permission when he returned to Iran and because of his association with his partner, who was recognised to have a well-founded fear of persecution in Iran. It is not clear whether this was argued to be a breach of Article 3 or Article 8. If it was argued as an Article 3 issue it would come squarely within the realm of paragraph 391 of the immigration rules. If it was argued to be an exceptional circumstance that outweighed the public interest in maintaining the deportation order

for the purpose of Article 8, it would come within the realm of paragraph 399D.

22. Given that the judge concluded that the appellant would not be at risk on return, it makes sense to consider whether his factual findings were sustainable before considering whether he applied the correct legal framework. The appellant only relies on two points in order to argue that the judge's findings were not sustainable.

23. It is difficult to see how the first point could have made any material difference to the judge's overall conclusion regarding risk on return. Even if the appellant mentioned the fact that he was questioned at the airport in the asylum interview in 2008, it seems that he was, as a matter of fact, able to enter Iran and to remain there for a number of months without coming to the attention of the authorities before returning to the UK. The mere fact that the Iranian authorities sought to question him after his removal from the UK does not necessarily indicate that he was of interest to the authorities. It is understandable that they might want to question the appellant in the circumstances. Although this claimed incident happened after the first determination of this asylum claim in 2005, it was open to First-tier Tribunal Judge Lodge to take as a starting point the fact that the appellant was not found to be a reliable or honest witness by the previous judge.

24. Nothing in the subsequent decisions made by the Home Office relating to the further submissions made in 2008 or 2011 suggest that this formed any meaningful part of the claim made after his return to the UK in which he asserted that he would be at risk because of his claimed sexual orientation. Although the appellant prepared a witness statement in support of this appeal the issue was not raised as a reason why the deportation order should be revoked. No copy of the interview record is adduced in evidence to support what is said in the grounds of appeal. Some of his responses in interview in 2008 were summarised in the respondent's decision dated 07/5/14 but they only serve to undermine the appellant's credibility even further [paragraphs 28-33, pg. G4 respondent's bundle]. They indicate a lack of seriousness in interview about the core aspect of the claim he made at that time i.e. that he would be at risk because of his claimed sexual orientation. Even if the claim that he mentioned the incident at the airport in interview is taken at its highest, the evidence suggests that it would have made no material difference to the judge's assessment of the appellant's credibility as a witness or the likelihood of risk on return.

25. The second point relates to the judge's summary of the evidence given by the appellant's partner as to whether the authorities were likely to be aware of her relationship with the appellant. The judge made the following findings:

> "35. In evidence before me [his partner] said her father was being persecuted by the authorities. Initially she said that the Iranian authorities would know about her relationship with the appellant

because they monitored phone calls between her and her parents, "they are listening to phone calls". When she was pressed, however, she said that communication took place usually over WhatsApp and the internet which were not monitored. She then added that her father had been interrogated and had revealed to the authorities that she was in a relationship "with someone". That interrogation happened in February 2018. He had been arrested a number of times before that but had never said anything "because he did not want to give information to the authorities about me". She said he did give information, however, because he was being assaulted. The authorities knew the appellant's name. Once again I note that this appears to be the first time that this evidence has been forthcoming. There is nothing in the sponsor's witness statement about her father being persecuted by the authorities and the authorities knowing the appellant's name.

36. I am at a loss to understand why it was not part of his FLR application. I appreciate that the application is dated 14th August 2017 before the assault but on the evidence the authorities have been monitoring the phone calls before August 2017 and so the sponsor and the appellant were aware that the appellant's association with the sponsor was known to the authorities.

37. I reject the sponsor's evidence. On her account her father has been arrested several times before and never mentioned the appellant's name and the fact that he was in a relationship with his daughter. I cannot accept he would have it beaten out of him. I cannot accept that the authorities would go to the trouble of beating it out of him if they already knew about the relationship because the phone calls were being monitored.

38. Having said that I cannot accept that the sponsor would be naming the appellant in her phone calls when she knew as a refugee and asylum seeker and someone who has had problems with the authorities that they were likely to be monitoring the phone calls. I cannot accept that in a phone call she would be mentioning the appellant with his surname. Am I supposed to imagine that in conversations with her parents she refers to her relationship with [appellant's name]? She would simply say my partner [H] and I are doing this or that.

39. What, however, finally gives the lie to this concocted tale is that the appellant's family live in Iran and have not been the subject of any attention from the authorities. That was the evidence of the sponsor, and the appellant has not suggested that his family have been contacted by the authorities because of his relationship with the sponsor."

26. In a further statement submitted with the grounds of appeal to the Upper Tribunal the appellant's partner says that the judge misunderstood her evidence. She said that the authorities in Iran knew about her relationship with the appellant because members of his family spoke with her family members over the phone and it was likely that those calls were monitored. The difficulty, as the judge pointed out, is that if this was an important aspect of the claim, it should have been set out clearly in a

witness statement. It was clearly not considered to be at the date when the appellant's partner prepared her initial statement on 03 September 2018 shortly before the First-tier Tribunal appeal. It was open to the judge to take this into account in assessing the plausibility of this aspect of the evidence given by the appellant's partner. The appellant's partner makes statements about what her evidence was at the hearing, but they are not supported by a note from counsel or any other contemporaneous note of the evidence. Even if the evidence she gives in the subsequent statement is taken at its highest, it would still have been open to the judge to reject this aspect of their account for the reasons given at [39].

27. For these reasons I conclude that the judge's findings relating to the credibility of the witnesses do not disclose any errors of law that would have made any material difference to his conclusion relating to risk on return. Having found that the appellant would not be at risk under Article 3 of the European Convention, which could only be relevant to the Conventions exception under paragraph 391 of the immigration rules, the third point made in the grounds of appeal cannot succeed.

28. In assessing whether the Conventions exception applied for the purpose of Article 8 of the European Convention, the judge was obliged to consider the more stringent test of 'very exceptional circumstances' contained in paragraph 399D of the immigration rules. The appellant's partner entered into a relationship with him at a time when he knew that his immigration status was precarious and he should have known that he re-entered the UK in breach of a deportation order. Even if his partner could not return to Iran because of her own fear of persecution, having found that the appellant was not likely to be at risk on return, the facts of the case did not disclose very exceptional circumstances that might otherwise outweigh the public interest in maintaining the deportation order given the appellant spent most of the 10 year exclusion period living in the UK in breach of the order. Deportation would not necessarily lead to a complete severance of the relationship when it might still be possible for the couple to continue their relationship through meetings in a third country. Any interference with the appellant's family life is justified and proportionate given the significant weight that must be placed on the public interest in maintaining a deportation order when a person has breached its conditions in such a wholesale way.

29. I conclude that the First-tier Tribunal decision did not involve the making of an error of law that would have made any material difference to the outcome of the appeal. The decision shall stand.

DECISION

The First-tier Tribunal did not involve the making of an error on a point of law.

Signed Date 13 August 2019

Upper Tribunal Judge Canavan