IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006265

First-tier Tribunal No:
PA/54838/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

27th September 2023

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

Secretary of State for the Home Department

Appellant

and

MSA
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr P Lawson, Senior Home Office Presenting Officer
For the Respondent: Miss A Hussain, Legal Justice Solicitors

Heard at Birmingham Civil Justice Centre on 21 September 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellant in the appeal before me is the Secretary of State for the Home Department and the respondent to this appeal is SMA. However, for ease of reference, in the course of this decision I adopt the parties' status as it was before the FtT. I refer to SMA as the appellant, and the Secretary of State as the respondent.

2. The appellant is a national of Afghanistan. He claims to have arrived in the UK illegally on 21 December 2006 with the help of an agent. On 03 May 2011, he made a Human Rights Article 8 claim which was refused on 27 June 2011 with no right of appeal. On 21 January 2014 he claimed asylum. That claim was refused by the respondent 01 September 2014 and attracted a right of appeal. The appellant's appeal against that decision was dismissed and the appellant had exhausted all rights of appeal on 24 February 2016.

3. In May 2017, the appellant's representatives made further representations to the respondent relying upon Articles 2, 3 and 8 ECHR. On 12 October 2017, the appellant was convicted of rape of a female aged 16 years or over and sentenced to 5 years' imprisonment. He was also required to sign the sex offenders register indefinitely. In response to a Notice of Decision to Deport, the appellant claimed deportation would place him at risk as an Afghan Sikh who will face persecution due to the violent situation in Afghanistan. The appellant was released from prison on 11 April 2020 and released from immigration detention on 22 April 2020.

4. On 28 September 2021 the respondent made a decision to refuse the appellant's protection and human rights claims. The respondent concluded the appellant has not rebutted the presumption that his crime was particularly serious and his continued presence in the UK would constitute a danger to the community. In any event, although the respondent accepted the appellant is from Afghanistan, she concluded it is not unreasonable to expect the appellant to return to Kabul or to relocate to another part of Afghanistan and as such the appellant does not qualify for international protection. The respondent also concluded the deportation of the appellant would not be contrary to Articles 2, 3 and 8 ECHR.

5. The appellant's appeal against that decision was allowed by First-tier Tribunal Judge Dixon on protection and human rights grounds (Articles 3 and 8) for reasons are set out in a decision dated 01 December 2022.

6. The respondent claims that in reaching his decision that the appellant has rebutted the presumption that he poses a danger to the community, the judge failed to consider the severity of the index crime. The Judge refers to the appellant's good behaviour in prison and lack of reoffending, but fails to have regard to the fact that according to the sentencing remarks the appellant has shown no remorse for his offence. The judge also failed to have regard to the appellant's evidence before the Tribunal that he was wrongly convicted but accepted the decision, and he has been assessed as posing a 'medium risk'. The respondent claims the judge failed to have any regard to the impact on the victim. The respondent also claims:

a. The judge found the appellant has no family in Afghanistan and is not in contact with them, despite a finding by a judge previously that the appellant is not a witness of truth and that his family had not come to harm in Afghanistan in the manner described by the appellant.

b. The judge erred in placing significant weight on the report of the trauma therapist who was found to lack objectivity in her assessment of the appellant's mental health and his vulnerability, in finding his mental health and vulnerability would have an adverse impact on his reintegration on return to Afghanistan.

c. In considering s117C of the 2002 Act, the judge erroneously concluded there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

d. In the absence of cogent expert medical evidence the judge erred in allowing the appeal on Article 3 grounds.

7. Before me, Mr Lawson adopted the grounds of appeal. He submits that in considering whether the appellant has rebutted the presumption that he constitutes a danger to community, at paragraph [49] of his decision, the judge had regard to factors that weigh in favour of the appellant. He refers to the circumstances of the offence, the lack of re-offending and evidence that the appellant is subject to relatively low-level management and is managed as a medium risk, and the evidence that the appellant has demonstrated a high standard of engagement and compliance. However in reaching his decision, the judge failed to have regard to other factors that weigh against the appellant. In his sentencing remarks, Judge Mason had noted the appellant was convicted by a jury of rape. He said the offence of rape is the grossest degradation of a woman and no matter the circumstances, what the appellant did was wholly unacceptable and an affront to females. The judge said the appellant had shown no remorse in relation to the particular incident. Mr Lawson submits that at paragraph [18] of his decision, the judge records the evidence of the appellant before the Tribunal that he still believes in his heart that he was wrongly convicted, but respects and now accepts that decision. The evidence relied upon by the appellant from PC David Hale, was that the appellant is managed as a 'medium risk' and the risk is based upon an assessment by the probation service. Mr Lawson submits that it is in all the circumstances irrational to conclude the appellant has rebutted the presumption.

8. In reply, Miss Hussain submits that it was open to the judge to find that the appellant has rebutted the presumption that he poses a danger to the community for the reasons given. She accepts that in allowing the appeal on Article 3 grounds, the judge does not refer to the decision of the Supreme Court in AM (Zimbabwe) [2020] UKSC 17, having found that the appellant has not been diagnosed with PTSD. Miss Hussain accepts that although the judge accepted the appellant has very significant mental health needs such that he is vulnerable, he does not address whether the evidence demonstrates there are substantial grounds for believing that, if removed, the appellant would be exposed to a real risk of being subjected to treatment contrary to Article 3 on health grounds. Miss Hussain submits

that in any event, it was open to Judge Dixon to allow the appeal on Article 8 grounds for the reasons set out in the decision.

Decision

9. The respondent certified her decision to refuse the appellant's protection claim under s.72(2) of the 2002 Act on the basis that the appellant had been convicted of a particularly serious crime and constitutes a danger to the community of the United Kingdom. The respondent claimed there is therefore a rebuttable presumption that the appellant constitutes a danger to the community. On an appeal under s82 of the 2002 Act, the Tribunal must begin substantive deliberation of the appeal by considering the certificate and if in agreement that the presumption has not been rebutted, must dismiss the appeal insofar as it relies on the ground that the removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention.

10. I consider first the finding that the appellant has rebutted the presumption that he poses a danger to the community. It appears to have been uncontroversial that the appellant's crime was particularly serious. The focus of the assessment was therefore on whether the appellant had rebutted the statutory presumption that he represents a danger to the community of the UK. The judge sets out his reasons for the finding that the appellant has rebutted the presumption at paragraph [49] of his decision. The judge was plainly cognisant of the appellant's case in this regard, and accepted the circumstances of the offence are unlikely to be replicated, and that the appellant's behaviour was very much out of character. The judge also noted the appellant's sustained good behaviour since release and the evidence before the Tribunal that the appellant is subject to relatively low-level management.

11. I remind myself of what was said by the House of Lords in SSHD v AH (Sudan) [2007] UKHL 49[2008] 1 AC 678 and by the Supreme Court in Perry v Raleys Solicitors [2019] UKSC 5; [2020] AC 352. The FtT is a specialist body, tasked with administering a complex area of law in challenging circumstances. It is likely that, in doing so, it will have understood and applied the law correctly. Appellate judges should not rush to find misdirection merely because the judge at first instance might have directed themselves more fully or given their reasons in greater detail. There is a real rationale for the deference which an appellate court will display towards a trial judge's findings of fact, and proper restraint must be exercised before deciding to interfere with such findings. I have borne those principles firmly in mind, but reach the conclusion that the judge erred in reaching his conclusions regarding the s72 certificate.

12. The judge considered a variety of evidence which militated in favour of the appellant, but does not address in his consideration, the evidence that militated against. Evidence that militates against the appellant is an important consideration because the default position is defined by statute; the appellant committed an offence for which he was sentenced to more than 2 years' imprisonment and the law therefore presumes that he continues to represent a danger to the community. In his sentencing remarks, Judge Mason remarks the appellant has shown no remorse for his

offence. He was convicted following a trial before a jury. The circumstances of the offence are described in the appellant's witness statement. He is required to sign the sex offenders register indefinitely. In his witness statement dated 24 November 2021, prepared for the hearing of his appeal before the First-tier Tribunal, the appellant maintains at paragraph [5] that he still believes in his heart that he was wrongly convicted. He claims that he has accepted the decision and is trying to move on with his life. The appellant relied upon an email from PC Hale, an Offender Manager confirming the appellant is managed "*as a medium risk with home visits set as a minimum of once every 6 months..".* The evidence before the Tribunal regarding the likelihood of the appellant committing further offences and the impact in the event that he did re-offend was limited and vague. The appellant had been released from prison on 11 April 2020 and released from immigration detention on 22 April 2020. He remained under supervision and the sustained good behaviour since his release must be assessed in that light. The failure to have regard to factors that weigh against the appellant are such that I cannot be satisfied that if the judge had regard to those factors, he would have reached the same decision regarding the s72 certification. The decision to allow the appeal on protection grounds must therefore be set aside.

13. I can deal with the decision to allow the appeal on Article 3 grounds briefly since Miss Hussain, quite properly in my judgement, accepts that in allowing the appeal on Article 3 grounds, the judge does not refer to the decision of the Supreme Court in AM (Zimbabwe) [2020] UKSC 17, having found that the appellant has not been diagnosed with PTSD. She concedes the judge does not address the test whether the evidence demonstrates there are substantial grounds for believing that, if removed, the appellant would be exposed to a real risk of being subjected to treatment contrary to Article 3 on health grounds. The decision to allow the appeal on Article 3 ground must therefore also be set aside.

14. Finally, Judge Dixon allowed the appeal on Article 8 grounds. To that end, Judge Dixon concluded on the evidence before him that the appellant does not have family in Afghanistan for the reasons set out in paragraph [50]. He accepted the appellant's evidence in that respect to be credible. Judge Dixon noted that Judge Zucker had not previously made any express finding as to whether the appellant has family in Afghanistan and whether he is still in contact with them. The fact that Judge Zucker previously found that the appellant was not a witness of truth did not prevent Judge Dixon reaching the finding that he did. The appellant's evidence before Judge Dixon was internally consistent and consistent with the background material before the Tribunal that 'very few Hindus and Sikhs remain in Afghanistan following the Taliban takeover'. As the judge properly noted, at [51], since the advent of the Taliban taking power, there has been an exodus of the already tiny Sikh population such at that population appears reasonably likely to be on the verge of extinction. He quite properly noted that the situation now is significantly different from the situation which pertained before Judge Zucker in 2015.

15. The appellant has been sentenced to a period of imprisonment of at least four years. Section s117C(6) of the 2002 Act, makes it clear that the public interest requires the appellant's deportation unless there are very compelling circumstances over and above those described in Exceptions 1 and 2. The phrase used in section 117C(6) does not mean that a foreign criminal facing deportation is altogether disentitled from seeking to rely on matters falling within the scope of the circumstances described in Exceptions 1 and 2. The appellant is entitled to rely upon such matters, but he must point to features of his case of a kind mentioned in Exceptions 1 and 2, or features falling outside the circumstances described in those Exceptions, which make his claim based on Article 8 especially strong.

16. Judge Dixon found that there would be very significant obstacles to the appellant's integration into Afghanistan for reasons set out at paragraph [56] of his decision. He was undoubtedly entitled to make that finding for the reasons that he gives. He accepted that looking at all the evidence holistically, there are very compelling circumstances which outweigh the public interest including the vulnerability of the appellant arising from his ethnicity and his poor mental health. Taking all matters together, including the background material regarding the circumstances in which the appellant would find himself in as a Sikh in Afghanistan, the vulnerability of the appellant arising from his ethnicity and his poor mental health, that in my judgment was a finding that was open to the Judge. It was in all the circumstances open to Judge Dixon to allow the appeal on Article 8 grounds.

Remaking the decision on the international protection and Article 3 claims

17. Both Mr Lawson and Miss Hussain accept there is no reason why I cannot remake the decision as far as it relates to the s72 certification and the Article 3 claim.

18. As far as the s72 certificate is concerned, I accept, as Judge Dixon did at paragraph [49] of his decision, that there are factors that weigh in favour of the appellant including, importantly, that the appellant has no prior convictions and that he has not reoffended since his release from immigration detention in April 2020. The email relied upon by the appellant from PC Hale is dated 13 January 2022. It confirms the appellant is managed as a 'medium risk' without any further elaboration. Miss Hussain was unable to direct me to any other evidence to establish that with the further passage of time, that risk has in some way diminished. I accept there is no evidence before me of any further offending since the index offence and since the appellant's release from detention in April 2020, but he has during a significant period of that time remained on licence following his release having completed half of this custodial sentence. He has also remained the subject of a decision to refuse his protection and human rights claims that are the subject of this appeal. It will be highly unlikely that a person who has fought so vehemently to avoid his removal from the United Kingdom would act in such a manner in the interim by committing further offences that would completely undermine the case he is advancing in support of his appeal. The appellant was convicted following a trial before a jury and as Judge Mason noted in his sentencing remarks, the appellant showed no remorse. His evidence as

set out in his witness statement that he still believes he was wrongly convicted, is of some concern, and in my judgment is indicative of an individual who still fails to appreciate the gravity of the offence he committed, which was described in the sentencing remarks as an offence that is the grossest degradation of a woman, whether through drink or otherwise and conduct that is wholly unacceptable. In my judgement taking a step back, and even giving credit to the appellant for matters that weigh in his favour as already outlined, I do not accept the appellant has rebutted the presumption that he constitutes a danger to the community of the United Kingdom.

19. I find that the presumption under s72(5A) that the appellant constitutes a danger to the community of the United Kingdom has not been rebutted. It follows that I must dismiss the appeal insofar as the appellant relies on the ground that the removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention.

20. As far as Article 3 is concerned, the appellant does not challenge the previous finding that there is no proper diagnosis of PTSD. Like Judge Dixon before, I am satisfied the appellant has significant mental health needs and that he is vulnerable.

21. In AM (Zimbabwe) v SSHD [2020] UKSC EWCA Civ 64, Lord Wilson noted the ECtHR set out requirements (at paras 186 to 191) for the procedure to be followed in relation to applications under Article 3 to resist return by reference to ill-health. It is for the appellant to adduce evidence capable of demonstrating that there are substantial grounds for believing that, if removed, he would be exposed to a real risk of being subjected to treatment contrary to Article 3. The Supreme Court confirmed that that is a demanding threshold for an applicant. His or her evidence must be capable of demonstrating "substantial" grounds for believing that it is a "very exceptional case" because of a "real" risk of subjection to "inhuman" treatment.

22. In the end, as Miss Hussain quite properly accepted before me, on the evidence before me, I cannot be satisfied that the appellant has established that there are substantial grounds for believing that he would face a real risk of being exposed to either a serious, rapid and irreversible decline in the state of his mental health resulting in intense suffering or the significant reduction in life expectancy as a result of either the absence of treatment or lack of access to such treatment in Afghanistan. It follows that I dismiss the appeal on Article 3 grounds.

Notice of Decision

23. The decision of First-tier Tribunal Judge Dixon to allow the appeal under the Refugee Convention and on Article 3 grounds is set aside.

24. I remake the decision under the Refugee Convention and Article 3 and dismiss the appeal on those grounds.

25. I dismiss the respondent's appeal against the decision of First-tier Tribunal Judge Dixon to allow the appeal on Article 8 grounds. That decision stands.

V. Mandalia
Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal
Immigration and Asylum Chamber

25 September 2023