Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10474/2019 (V)

THE IMMIGRATION ACTS

Heard at : Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On the 17 November 2021	**On The 23 November 2021**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FA
(Anonymity Direction made)

Respondent

Representation:
For the Appellant: Ms H Aboni, Senior Home Office Presenting Officer
For the Respondent: Ms Brakaj of Iris Law Firm

DECISION AND REASONS

1. This has been a remote hearing to which there has been no objection from the parties. The form of remote hearing was Microsoft Teams. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

2. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing FA's appeal against the respondent's decision to refuse his protection and human rights claim further

to a decision to deport him pursuant to section 32(5) of the UK Borders Act 2007.

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

Immigration History

4. The appellant is a citizen of Iran, born on 23 May 1979. He entered the United Kingdom on 4 July 2001 and claimed asylum. His claim was refused on 21 August 2001 and his appeal against the refusal decision was dismissed on 8 January 2003. He became appeal rights exhausted on 24 January 2003, but remained in the UK without leave.

5. On 5 January 2009 the appellant was convicted of resisting or obstructing a constable, driving other than in accordance with a licence and using a vehicle whilst uninsured, and failure to surrender to custody, for which he was fined. He made written representations on 11 December 2009, 1 February 2010 and 1 March 2010. He was then convicted, on 7 September 2010, of producing a controlled drug – Class B Cannabis, possessing a controlled drug of Class B – Cannabis and possessing a controlled drug of Class B –Amphetamine. He was sentenced to a period of four years' imprisonment on count one, with no separate penalty for the other two counts. As a result, the appellant was served with a liability to deportation notice, to which he responded on 9 November 2010 and included asylum and human rights representations. A Deportation Order was signed on 17 October 2012 and a notice of decision to deport was served on him on 18 October 2012. However that decision was withdrawn on 14 December 2012 and, following further representations by the appellant, the Deportation Order was revoked on 17 September 2013.

6. On 18 September 2013 the appellant was issued with a new liability to deportation notice and a section 72 notice was issued to him. On 4 July 2014 a new notice of decision to deport, dated 30 June 2014, and a new Deportation Order were issued and the appellant appealed against the decision. His appeal was dismissed on 2 October 2014 and permission to appeal to the Upper Tribunal was refused. He became appeal rights exhausted on 14 November 2014.

7. On 19 January 2017 the appellant made further representations on protection grounds, applying for the Deportation Order to be revoked, and he produced further evidence on 20 March 2018 and 19 July 2019. On 17 October 2019 the respondent treated the representations as a fresh protection and human rights claim and made a decision to refuse that claim. The appellant appealed against that decision and that is the appeal giving rise to these proceedings.

Basis of Claim

8. The basis of the appellant's asylum claim, as originally made in July 2001, was that he was at risk in Iran on the basis of his sexuality. He claimed to have been caught in bed with his employer's son at a gay party and was, as a result, detained and beaten and told that he would be beheaded. He claimed that he managed to escape from the hospital to which he was taken after being severely beaten and fled Iran. The respondent rejected the appellant's claim as lacking in credibility but an Adjudicator, in his appeal against the respondent's decision, accepted that he was homosexual, although rejecting his account of his detention and ill-treatment.

9. The appellant maintained his account in his further representations, claiming in a statement made in March 2013 that he had had relationships with both men and women in the UK and stating that the security forces had come to his family home looking for him to arrest him and had assaulted his sister leaving her paralysed from the neck downwards. He claimed that he would not be able to live discreetly in Iran. The respondent, in a decision that section 32(5) of the 2007 Act applied, dated 30 June 2014, noted the Tribunal's acceptance of the appellant's sexuality but considered that he had otherwise fabricated his claim, did not accept that he would not choose to live discreetly in Iran and concluded that he would not be at risk on return to Iran. The respondent further certified that the presumption under section 72 of the Nationality, Immigration Act 2002 applied, that the appellant had been convicted of a particularly serious crime and constituted a danger to the community, and considered that Article 33(2) of the Refugee Convention excluded him from the protection of the Refugee Convention.

10. In its determination dismissing the appellant's appeal against that decision on 2 October 2014, the First-tier Tribunal upheld the section 72 certification and found, in addition and on the basis of evidence of a two-year relationship with a female partner, that the appellant was not homosexual as previously accepted, and concluded that he was at no risk on return to Iran.

11. In his further representations of 19 January 2017, in which he applied to revoke the Deportation Order issued against him and raised protection and human rights grounds, the appellant pursued an entirely different claim based upon his conversion to Christianity and his baptism on 6 September 2015, claiming to be at risk on return to Iran on that basis and making no mention of his previous claim to be homosexual. He produced, in support of his new claim, a letter from Dr John Taylor, a licensed reader and member of the asylum case support team of Stockton Parish Church, testifying to the genuineness of his conversion, together with his baptism and confirmation certificates, some photographs and some Facebook posts. He subsequently produced a further letter of support from Dr Taylor and on 10 July 2019 he was interviewed by the respondent about his new claim.

12. The respondent, in refusing the appellant's claim in a decision of 17 October 2019, considered that the timing of his claimed involvement with the church undermined the credibility of his claimed conversion to Christianity. The respondent did not accept that the appellant was a genuine Christian convert

and did not accept that his Facebook profile and postings would put him at risk on return to Iran. The respondent did not accept that the appellant was at any risk on return and considered that his deportation to Iran would not breach his human rights. It was not accepted that he had a genuine and subsisting relationship with his claimed partner and it was not accepted that he met the exceptions to deportation on family or private life or on the basis of very compelling circumstances. The respondent found there to be no basis upon which to revoke the Deportation Order.

13. The appellant's appeal against that decision was heard on 26 October 2020 by First-tier Tribunal Judge Gumsley. It was recorded by the judge in his decision that the appellant had made it clear that he was no longer seeking to rely on his claim to be homosexual and that he went on to admit that the claim had been wholly fabricated. The appellant relied solely on his claimed conversion to Christianity. Judge Gumsley was satisfied that the appellant had rebutted the presumption under section 72 and found that he was therefore not excluded from claiming asylum or humanitarian protection. As for the substance of the claim, the judge, having heard from the appellant as well as from Reverend Miller of Stockton Parish Church, accepted that his conversion to Christianity was genuine and accepted that he would not wish to be discreet in his practice of his religion in Iran. The judge was therefore satisfied that the appellant would be at risk of persecution in Iran due to his religious beliefs and he allowed the appeal on that basis.

14. The Secretary of State sought permission to appeal to the Upper Tribunal on two grounds: that the judge had made a material misdirection in law by applying his own knowledge to address an apparent defect in the appellant's evidence in relation to his use of terms describing aspects of his religion; and that the judge had failed to give adequate reasons for his finding that the appellant had successfully rebutted the presumption in section 72.

15. Permission was granted and the appeal then came before me for a remote hearing by way of Microsoft teams.

16. Both parties made submissions before me.

17. Ms Aboni submitted that the judge had erred by applying his own knowledge to assess the terminology used by the appellant when referring to the term Black Friday rather than Good Friday and when referring to Stockton Church as a Catholic church rather than an Anglican church. She submitted that the judge, in concluding that the respondent had been mistaken in finding errors in the appellant's evidence in that regard, had failed to consider how come the term Black Friday, which was used in some parts of the world but not in the UK, would have been used in the prison chaplaincy or the church the appellant attended in the UK. Ms Aboni submitted further that the judge had failed to give proper reasons for finding that the appellant was a genuine convert when he had previously made a false claim to be homosexual. As for the second ground, Ms Aboni submitted that the judge had failed to identify evidence showing that the presumption in section 72 was rebutted and had

relied upon the appellant's length of time in the UK without giving full consideration to his criminality, the seriousness of his offending and the public interest in deporting foreign criminals from the UK.

18. Ms Brakaj submitted that the judge was simply applying his own knowledge to confirm that the respondent was wrong when considering the appellant had made mistakes in his use of certain terminology. There was no evidence from the respondent to show that the refusal decision was correct and that the judge was wrong. The judge had alerted the parties to the matter and had provided an opportunity for them to respond. There was no unfairness in the judge's approach and the ground of appeal was simply a disagreement. Likewise the second ground was also a disagreement. The judge had given proper reasons for finding that the presumption in section 72 had been rebutted and had provided a well-reasoned conclusion in that regard.

Discussion

19. Judge Gumsley's decision is a detailed one which takes into consideration all the evidence and on that basis I have been particularly concerned not to give weight to challenges made by the respondent which are essentially no more than a disagreement with his conclusions. However it seems to me that the challenges do in fact go beyond mere disagreement and disclose material errors of law in the judge's decision.

20. The first ground challenges the judge's conclusion that the appellant was a genuine convert to Christianity. The main basis of the challenge is the fact that the judge applied his own knowledge to fill in defects in the evidence in relation to certain terminology used by the appellant, namely his use of the term Black Friday rather than the usual term Good Friday for the day that Jesus was crucified (at question 86 of the interview) and his claim at question 44 to follow the Catholic denomination of Christianity despite stating that he attended and was baptised at an Anglican church. At [48] the judge used his own knowledge to provide an explanation for these matters, yet as Ms Aboni submitted, that explanation did not provide a reason why the appellant would not have used the more common and accepted terminology as used in the UK and, as the grounds assert, the judge did not consider that nor did he consider other reasons for the appellant having used such terminology such as his answers being contrived as the grounds suggest. Although the judge offered the parties an opportunity to reflect on the matter, the fact remains that there was no supporting evidence from the appellant to support his use of the terminology, despite the matter having been raised as a concern in the refusal decision. Moreover the appellant, in his statement of 4 February 2020, stated that he believed there to have been a mistake in the reference to Catholicism and Black Friday at his interview rather than an intention to use the appropriate terms, the implications of which the judge did not properly consider.

21. Ms Aboni, in her submissions, also challenged the judge's conclusions on the appellant's conversion on the basis that he had failed to give proper reasons for finding that the evidence demonstrated that the conversion was

genuine. I find there to be merit in that submission. It is indeed the case that the judge acknowledged that he had to exercise caution in relation to the appellant's new claim given his previous dishonesty in pursuing a fabricated claim based upon homosexuality and he assessed the new claim on that basis and with that in mind. Nevertheless, it seems to me that his reasoning for concluding ultimately that the conversion was genuine was somewhat limited and difficult to make out, particularly given the number of other concerns which he outlined.

22. At [43] and [44] the judge noted the concerns about the timing of the appellant's revelation of his previous false claim, at [45] he noted that the appellant was still maintaining his issues about sexuality as recently as his statement of February 2020 and considered that to be damaging to his credibility, at [46] he noted the respondent's concerns about the appellant's failure to mention his interest in Christianity and attendance at church in his previous appeal hearing, at [47] he noted the respondent's concerns about the appellant's delay in becoming baptised, at [48] and [49] he noted the concerns mentioned above in relation to the terminology used by the appellant and at [50], [51] and [57] he considered the appellant's limited recent attendance at church in 2019 and 2020. Although, having considered each of these concerns, the judge was prepared to accept the appellant's respective explanations as plausible, and whilst he said at [55] that he bore those concerns in mind, it seems to me that he did not adequately explain why, despite the number and extent of the concerns, the evidence before him was nevertheless sufficient to persuade him to accept the appellant's account.

23. The evidence which persuaded the judge to make the positive findings that he did appears to be limited to the oral evidence of Reverend Miller, two brief letters from Dr Taylor a reader from the church, some photographs and the certificate of baptism. Yet the judge, at [54], found that he could only attach limited weight to Dr Taylor's evidence, noting that he had not appeared as a witness. As for Reverend Miller's evidence, that is not set out in any detail at any point in the decision and does not appear in written form in a statement. Further, the judge's own findings on Reverend Miller's oral evidence at [46] are limited and it is therefore difficult to know what it was about his evidence that was so persuasive. No explanation has been provided by the judge as to why he gave that evidence so much weight, in particular considering his observations at [44] which suggested that Reverend Miller's knowledge about the appellant was limited.

24. It seems to me, therefore, in light of the numerous concerns about the appellant's circumstances and evidence, that it is difficult to understand from the judge's decision why he accepted the appellant's conversion to be genuine. Indeed, given those concerns, the judge's application of his own knowledge to address gaps in the appellant's evidence is all the more significant. As a result I simply cannot accept that his findings and conclusions in relation to the appellant's claimed conversion to Christianity are safe and sustainable. The first ground is therefore made out.

25. The second ground, challenging the judge's findings on the section 72 certification, is not entirely independent of the first ground, since the appellant's credibility as a whole is of course relevant to the consideration of his claim that he no longer posed a risk to the community. On that basis alone it seems to me that the judge's decision has to be considered as being infected by errors of law. However I find merit, in any event, in the assertion in the grounds that the judge accorded undue weight to the passage of time since the index offence and gave inadequate consideration to the appellant's criminality and to the public interest in his deportation. It is of note that, in relying at [31] upon the passage of time since the index offence and since the previous findings in the First-tier Tribunal's decision of 2 October 2014 on the risk he posed to the community, the judge failed to take account of the fact that the appellant has continued to be the subject of a deportation order and has thus had an incentive to refrain from offending. That is a material omission which undermines the judge's conclusions and, in all the circumstances, I also find merit in the second ground.

26. For all of these reasons I consider that the grounds are made out. In my view, Judge Gumsley erred in law in his decision and his decision has to be set aside in its entirety. It seems to me that, given the nature and extent of the errors, the appropriate course would be for the matter to be remitted to the First-tier Tribunal to be heard afresh, with no findings preserved.

DECISION

27. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside.

28. 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 Gumsley.

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 Dated: 18 November 2021