Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/03830/2016**

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly	**Decision and Reasons Promulgated**
On 9 November 2017	**On 15 November 2017**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

GR
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Draycott, Counsel
For the respondent: Mr McVeety, Senior Home Office Presenting Officer

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original first Appellant in this determination identified as GR.

DECISION AND REASONS

Introduction

1. The appellant, a citizen of Iran, has appealed against a decision dated 4 February 2016 in which the respondent refused his protection and human rights claim and maintained the decision to deport him. In so doing the

respondent certified the asylum claim pursuant to section 72 of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act').

2. In a decision dated 15 August 2017 I identified errors of law in the decision of First-tier Tribunal Judge Pickup dated 26 November 2016. It was agreed that the decision should be remade by me and at the end of the re-hearing on 8 November 2017, I indicated that the appeal would be allowed on Refugee Convention grounds. I now give my reasons for this decision.

Background

3. The appellant arrived in the United Kingdom, when he was 17 years old, in April 2003, at which time he claimed asylum. His asylum claim was refused and an appeal to an Adjudicator was unsuccessful. However, Adjudicator Axtell made important positive findings of fact: the appellant was 17 at the time, as claimed; he worked for his brother, who was involved in anti-government activity; he was detained for reasons relating to this and "*would have been subject to some degree of ill-treatment*", and; he "*was very much affected by the experience he had undergone*".

4. Between 2004-7 the appellant was convicted of a number of offences in the United Kingdom. In 2007, he was transferred from HMP YOI Feltham to Manchester Royal Infirmary due to mental health concerns, before being released.

5. In 2008 the appellant applied for an EEA Residence Card, as the unmarried partner of a Portuguese national, who had completed gender realignment surgery. His appeal against the respondent's refusal to grant him a residence card was allowed by the First-tier Tribunal in a decision dated 15 November 2010, which accepted that the appellant had been in a genuine durable relationship with his EEA citizen partner since 2004. The appellant was granted a residence card valid until 2020.

6. The appellant was detained under the Mental Health Act 1983 ('the 1983 Act') on 17 November 2010 after a series of serious violent incidents. He attacked his community psychiatric nurse and a student nurse with a knife when they attended his home for a pre-arranged visit. He was an outpatient being treated for a recognised schizophrenic disorder manifesting with delusional ideas relating to the government spying on him. When the nurses ran away, he pulled a female from a stationary car, stabbing at her several times before driving off with the car. He hit an elderly lady with the car and when police officers attended the scene he struggled violently and attacked two of the police officers.

7. On 19 September 2011 the appellant was convicted of three counts of wounding with intent to do grievous bodily harm, dangerous driving, two counts of assault occasioning actual bodily harm and aggravated vehicle

taking. He was sentenced to a hospital order pursuant to sections 37 and 41 of the 1983 Act. The sentencing remarks note that the appellant was not complying with his medication regime and this led to catastrophic consequences: an attack on two nurses, which could have easily been a case of murder.

8. The appellant was originally admitted to the Edenfield Centre in November 2010 but was transferred to Ashworth in 2011. Whilst waiting for his transfer to Ashworth, the appellant assaulted a member of staff in the belief she was an actor in the employment of MI5. At Ashworth he became stabilised on clozapine and was transferred back to the Edenfield Centre in 2013. The reports describe him as having tolerated the less structured and physically secure environment well, and that he was successfully using escorted leave without incident from 2015.

9. The appellant was sent a liability to deportation notice in May 2014, which he returned claiming to fear for his life, if returned to Iran. He undertook a substantive asylum interview in October 2014. In March 2015, his residence card was revoked as his relationship with the EEA national had broken down in 2010 upon being hospitalised.

10. After a hearing on 29 July 2016 the First-tier Tribunal (HESC) Mental Health ('MHT') decided that a conditional discharge should be directed but that the necessary practical arrangements to implement the necessary conditions needed to be finalised. Having heard from Dr Sanderson and other members of the clinical team, the MHT found that the appellant had reached the point in his treatment at which he can be safely discharged, provided that discharge is conditional, the purpose of which is to support his recovery and with the power to recall him to hospital should his mental health deteriorate. The MHT found there to be "*clear, compelling and entirely persuasive evidence*" in support of the following uncontested propositions, inter alia: the appellant has schizoaffective disorder which is now successfully treated; he has been stable for some time and is fully accepting of and compliant with his treatment; there is a clear nexus between his mental health and the risk to others and it is therefore necessary for there to be conditions in place, including the power to recall to hospital.

11. On 21 November 2016, the appellant was conditionally discharged into the community. These conditions include the following: reside at supported accommodation as approved by the responsible clinician and to abide by the rules of such accommodation; comply with medication and treatment; allow access to the accommodation by the clinical team; abstain from alcohol and illicit drugs and submit to random drug and alcohol testing as directed by the responsible clinician; attend appointments with the clinical team.

12. Since his conditional discharge the appellant has resided at the Lighthouse, a supported accommodation placement, where he benefits from a detailed

programme and regular reviews by Dr Sanderson, his forensic community psychiatric nurse and his care co-ordinator. He regularly attends blood tests as part of his treatment with clozapine and these have all been normal.

13. The appellant maintains that he has a well-founded fear of persecution in Iran for reasons relating to an anti-regime political opinion likely to be attributable to him by reason of a combination of his particular characteristics and history including his past treatment in Iran, his time in the United Kingdom and relationship history and his religious views.

Hearing and issues in dispute

14. At the beginning of the hearing the representatives narrowed the issues in dispute considerably. Mr McVeety confirmed that the relevant facts underpinning the asylum claim are not disputed, in particular he accepted: the appellant was detained and ill-treated before exiting Iran illegally; the appellant is an atheist; the appellant had a longstanding relationship with a woman who had gender reassignment surgery and numerous "same sex" sexual relationships; the appellant has not undertaken military service. It was therefore accepted on behalf of the respondent, as it was before the First-tier Tribunal, that there was no need to call the appellant to give evidence as he would not be cross-examined.

15. Both representatives also agreed that that the only remaining disputed issue for the purposes of the section 72 certificate is whether the respondent displaced the burden upon her of establishing as at the date of hearing that the appellant is a "danger to the community" and that Dr Sanderson, the appellant's treating consultant forensic psychiatrist, and the responsible clinician for the purposes of the MHT, would give oral evidence about this issue. Dr Sanderson was taken to his reports and provided further detailed oral evidence both in examination in chief and under cross examination.

16. I then heard helpful submissions from both representatives. Mr McVeety dealt with the section 72 certificate very briefly before inviting me to find that the appellant would not be at risk of persecution when interviewed upon return as an illegal departee. I refer to his submissions in more detail below when making my findings. After Mr Draycott completed his submissions in relation to the applicability of the Refugee Convention, I indicated that I was satisfied that the appellant is not a "danger to the community" and I would be allowing the appeal on Refugee Convention grounds.

17. Both representatives agreed that having provided my decision that the appellant's deportation would breach the Refugee Convention, it was unnecessary, given the particular factual matrix of this case and all the circumstances, to go on to assess Article 8 of the ECHR in the alternative. The analysis below is therefore restricted to a consideration of whether: (i) the

appellant is a danger to the community, and; (ii) he has a well-founded fear of persecution for a Convention Reason.

Legal framework

18. The applicable legal framework is not disputed and can be summarised. The exercise of the power under the Immigration Act 1971 to make a deportation order is governed by sections 32 and 33 of the United Kingdom Borders Act 2007 ('the 2007 Act'). The appellant is a "foreign criminal" for the purposes of section 32(1) because he is not a British citizen, who has been convicted in the United Kingdom of an offence and sentenced to a hospital order – see section 38 of the 2007 Act and SSHD v KE(Nigeria) [2017] EWCA Civ 1382 at [15] to [16]. The respondent exercised her power to make a deportation order when the appellant was still under a hospital order.

19. In considering the appeal against the decision to make the deportation order, the representatives agreed that the first question that arises is whether Exception 1 applies i.e. whether removal of the appellant in pursuance of the deportation order would breach the United Kingdom's obligation under the Refugee Convention, or alternatively the appellant's ECHR rights.

20. An individual's removal will only breach the Refugee Convention if: (i) he is a refugee (usually because Art 1A(2) applies); and (ii) his removal is prohibited by Article 33(1). Removal will not be prohibited if Art 33(2) applies. For the purposes of this appeal, the effect of Art 33(2) is that a person who is a refugee may be refouled if he has been convicted of a "particularly serious crime" and constitutes a "danger to the community". Section 72 of the 2002 Act creates statutory presumptions that the requirements of Art 33(2) are met and, as a consequence, the prohibition against refoulement will not apply. These presumptions are rebuttable by evidence – see section 72(6) and EN (Serbia) v SSHD [2009] EWCA Civ 630.

Art 33(2) – "danger to the community"

21. For the reasons set out in my decision dated 15 August 2017 at [9] to [11] the First-tier Tribunal was entitled to find that the appellant was convicted of a "particularly serious crime" because section 72(11) applies and the statutory presumption had not been rebutted.

22. Mr McVeety accepted that the respondent has the onus of establishing that as at the date of hearing the appellant is a "danger to the community". Mr McVeety did not seek to discredit Dr Sanderson's evidence or qualifications and experience, and acknowledged that he faced an "uphill battle" given Dr Sanderson's clear and cogent evidence. He however submitted that although the appellant's current compliance is good, there remains the risk that this will cease as it has in the past, which led to the serious criminal offending.

23. I entirely accept the careful, detailed and cogent evidence provided by Dr Sanderson in the documentation and orally before me. This evidence was not disputed. I summarise the significant aspects of Dr Sanderson's evidence relevant to the assessment of whether the appellant is a danger to the community.

    (i) In a report dating back to December 2015 Dr Sanderson stated that the appellant could be safely discharged into the community. The appellant has been regularly reviewed and this has been repeated many times since.

    (ii) The MHT accepted Dr Sanderson's evidence and granted a conditional discharge. The MHT accepted and endorsed Dr Sanderson's opinion that: a) the appellant's schizoaffective disorder is now successfully treated and he is stable and has been so for some time; b) he is fully accepting and compliant with the treatment necessary to preserve his mental well-being; c) there is a clear nexus between his mental health and the risk he represents to others, as is evident from the index offences and so it is a condition precedent to his safe management that his progression to the community is supported by the architecture of a conditional discharge including the power to recall him to hospital; d) conditions would support the appellant and safely manage his potential risk.

    (iii) Dr Sanderson assessed the appellant as having coped very well and complied with all conditions since his conditional discharge. His compliance has been so good that Dr Sanderson is of the view that he should be transferred fully from supported accommodation into district services. His view is that the appellant's "*relapse signature is well understood and a local community mental health team would be able to support him in remaining well in the community*".

    (iv) The risk of reoffending is assessed as low given the appellant's stable mental health over an extended period of time and his complete compliance with all aspects of his treatment. Dr Sanderson directly links the commission of the offences to the untreated symptoms of his mental illness and notes that once treatment was optimised after the index offence, "*there have been no concerns regarding aggressive or anti-social behaviour for a sustained period of approximately six years*".

24. It is important to acknowledge that the appellant has committed very serious violent offences in 2010, when he was an outpatient. Prior to this he committed other less serious offences but was known to mental health services and receiving treatment in the community. The appellant also assaulted a

staff member at Ashworth in 2011 and requires time to be stabilised with appropriate treatment. The gravity of the appellant's past offending is at the serious end of the spectrum.

25. In the period leading to his hospitalisation in 2010, the appellant did not engage fully with treatment, and it is the opinion of Dr Sanderson, which I accept, that this directly led to his aggressive and paranoid behaviour. The appellant has fully complied with his treatment since becoming stabilised at Ashworth. Dr Sanderson regarded this to be an extended period of time such that the risk of any failure to respond fully to treatment and medication is now low. The corresponding risk of violence and danger to the community is also correspondingly low.

26. The medical evidence supports the proposition that the appellant has been successfully treated in hospital, such that the MHT accepted Dr Sanderson's recommendations in full. The MHT specifically endorsed Dr Sanderson's evidence that it was not necessary for the safety of others for the appellant to be detained in hospital for treatment. The MHT regarded conditions as necessary and the appellant has evidenced continued compliance in the community for about a year.

27. Dr Sanderson regarded the risk of the appellant ceasing to comply in the community to be low. This must be distinguished from the position prior to the index offences, when the appellant was not complying with treatment and medication. In any event I accept Dr Sanderson's evidence that even if the appellant ceases or reduces compliance, his well understood relapse signature and the relevant conditions in place are sufficiently robust to ensure steps are taken to protect the public, such as increased monitoring or a return to hospital, prior to any risk of reoffending.

28. When all the evidence is considered in the round, I do not regard the appellant to be a danger to the community for the purposes of the section 72 certificate or Article 33(2) of the Refugee Convention and the relevant Qualification Directive, as long as he complies with the conditions attached to his discharge, as required by his clinical team. Dr Sanderson, as head of the team is of the firm view, which I accept (and which was undisputed) that the risk of non-compliance is now low, given the extended period of compliance and the appellant's insight into his mental health and motivation to comply.

Art 33(1) of the Refugee Convention

Country guidance

29. In SSH and HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 00308, the Upper Tribunal accepted that if "particular concerns" arise when a person who departed Iran illegally is interviewed upon arrival, there is a risk of further questioning, detention and ill-treatment, and said this at [23]:

> "In our view the evidence does not establish that a failed asylum seeker who had left Iran illegally would be subjected on return to a period of detention or questioning such that there is a real risk of Article 3 ill-treatment. The evidence in our view shows no more than that they will be questioned, and that if there are any particular concerns arising from their previous activities either in Iran or in the United Kingdom or whichever country they are returned from, then there would be a risk of further questioning, detention and potential ill-treatment. In this regard, it is relevant to return to Dr Kakhki's evidence in re-examination where he said that the treatment they would receive would depend on their individual case. If they co-operated and accepted that they left illegally and claimed asylum abroad then there would be no reason for ill-treatment, and questioning would be for a fairly brief period. That seems to us to sum up the position well, and as a consequence we conclude that a person with no history other than that of being a failed asylum seeker who had exited illegally and who could be expected to tell the truth when questioned would not face a real risk of ill-treatment during the period of questioning at the airport."

30. Both representatives agreed that it followed from SSH that:

(i) as an illegal departee from Iran, the appellant would be questioned at the point of return to Iran;
(ii) the initial questioning would be for a "fairly brief period" (at [12] of SSH the Internal Organisation for Migration considered that in the context of voluntary returnees, questioning might take a few hours);
(iii) if "particular concerns" arose from previous activities either in Iran or in the United Kingdom, then there would be the risk of further questioning accompanied by ill-treatment;
(iv) the assessment of whether "particular concerns" are likely to arise turns upon all the individual factors, considered cumulatively;
(v) the appellant would be expected to tell the truth when questioned;
(vi) the evidence suggests no appetite to prosecute for illegal exit alone, but if there is another offence, illegal exit will be added on, the cases where illegal exitees were imprisoned show much more by way of specific activity, as opposed to simple imputation – see [31] of SSH;
(vii) this appellant is a failed asylum seeker who exited Iran illegally but there are additional matters relevant to his history and profile, which require careful scrutiny on a cumulative basis, in light of the country guidance.

31. Mr McVeety did not dispute the appellant's claim to have left Iran illegally. Indeed, he acknowledged it would be surprising if he was able to successfully apply for an exit visa at the time, given his age and accepted period in detention in Iran. Mr McVeety submitted that the appellant's activities were so long ago and of such a low profile that after brief questioning, the appellant would be released and no "particular concerns" are reasonably likely to arise. Mr Draycott invited me to find that the Iranian authorities are reasonably likely to have "particular concerns" about this appellant when the appellant's history and characteristics are viewed cumulatively. These include: his past detention in Iran; his atheism; his relationship history; his failure to complete military service and his mental health.

Approach to evidence and risk

32. I must apply the lower standard of proof when assessing whether the Iranian authorities will have "particular concerns" regarding the appellant. In SSH at [26] and [31], the country expert Dr Kakhki accepted there was a difference between people who were activists or protestors on the one hand and people on the other hand, such as the appellants in those cases, with no history save that they were failed asylum seekers who departed Iran illegally. Although there was agreement that the appellant is not in the latter "no history" category of returnee, the parties disagreed on the likely approach of the authorities to the appellant's characteristics and history. That assessment involves nuanced analysis. There is little specific guidance available on the nature, level and timing of activities or personal characteristics, likely to give rise to "particular concerns".

33. It is important that the assessment takes place in the context of what is known about the behaviour of the Iranian authorities more generally and in this regard I have taken into account and approached my assessment of how the authorities are likely to perceive this appellant, within the context of the general country background evidence. In AB and Others (internet activity – state of evidence) Iran [2015] UKUT 0257 (IAC) the Upper Tribunal summarised the country background evidence in the following way:

> "331. The US Department of State Report refers to the crackdown on civil society intensifying after the 2009 elections. There are reports of disappearances, cruel inhuman and degrading punishments, judicially sanctioned amputation and flogging, beatings and rape and other harshness. Although some prison facilities including Evin prison in Tehran, are notorious. There was evidence of there being unofficial secret prisons where abuse occurred and prison conditions generally being harsh and life-threatening. The point is made that although there are reassuring constitutional provisions in practice the authorities can and do detain people incommunicado, sometimes for weeks or even months, without trial or contact with their families. The "offences" attract attention are often vague by western standards and include such nebulous activity as "antirevolutionary behaviour", "moral corruption" and "siding with global arrogance". The point is that offences of this kind make it difficult to predict with any degree of accuracy just what kind of behaviour is going to attract adverse attention."

34. In AB the following caution was given:

> "456. The fact that people who do not seem to be of any interest to the authorities have no trouble on return is not really significant. Although Iran might be described as exceedingly touchy there is no reason to assume that the state persecutes everyone and the mere fact of being in the United Kingdom for a prolonged period does not lead to persecution. It may lead to scrutiny and this is what concerns us most."

Risk factors

35. Mr McVeety accepted that there is no reason to review the Adjudicator's findings that the appellant was detained in Iran in 2002 for reasons relating to his brother's anti-government activities, and during that time it is reasonably likely that he was ill-treated, an experience that has impacted upon him. I note that Adjudicator Axtell did not accept the appellant's claim to have escaped from prison, and found that he was released such that he could safely return to Iran.

36. Mr McVeety however invited me to find that these events took place a long time ago and the authorities would no longer be interested in these historical matters.

37. It is important to note, as the Upper Tribunal did in SSH at [31] that the examples of illegal departees who were imprisoned showed "*much more by way of specific activity than a simple imputation*". When assessing the appellant's history, I bear in mind that he was not involved in any anti-regime activities himself, but was probably perceived to have been involved in his brother's anti-government activities in some way. This was a long time ago, and he has not taken part in any related activities whilst in the United Kingdom.

38. In my judgment, it is reasonably likely that upon initial questioning, the appellant's past detention for reasons relating to perceived anti-government activities will become known. As pointed out in AB, the Iranian authorities remain concerned about nebulous activity such as "antirevolutionary behaviour", "moral corruption" and "siding with global arrogance" and it is difficult to predict with any degree of accuracy just what kind of behaviour is going to attract adverse attention. The appellant's history of detention for reasons relating to anti-regime activities, even though it is restricted to one occasion a considerable time ago and he did not ever know any details about his brother's activities, together with the length of time the appellant has been away from Iran in the United Kingdom, is reasonably likely to elicit suspicion and further questioning.

39. The appellant is likely to be very nervous and anxious when questioned upon return to Iran, as a consequence of his past treatment at the hands of the Iranian authorities as a young man and his underlying mental health condition even when appropriately treated with medication. As Dr Sanderson put it:

> "There is evidence that any related stimulus can reawaken things he has gone through. If exposed to interrogation, this is likely to have a more detrimental impact than someone without his underlying condition."

40. The assessment of risk when questioned is predicated upon the appellant telling the truth. The 'truth' as agreed includes the following:

(i) He left Iran unlawfully as a young man following his detention for reasons relating to perceived anti-government activities.

(ii) He has not attended the mosque since his arrival in the United Kingdom in 2003 and is an atheist.

(iii) He was permitted to stay in the United Kingdom, following the refusal of his asylum claim on the basis of a relation with a Portuguese national named Princess (who had gender reassignment surgery) but that broke down in 2010 and he has since had fleeting same-sex relationships.

(iv) He has committed serious acts of violence and been detained in hospital for a lengthy period. He has been diagnosed with schizophrenia.

(v) He has not completed military service and might be considered a draft evader. However, exceptions are made for those with schizophrenia – see 2.4.11 and 5.1.1 of the Home Office's Note on Military Service in Iran dated October 2016.

41. When asked straightforward questions such as: What did you do in the UK? What friends did you associate with? What relationships did you have? What mosques did you attend?, the appellant is reasonably likely to truthfully answer in accordance with the matters set out above. This is reasonably likely to lead the authorities to view him with increased adverse interest. As Dr Sanderson explained, the appellant is reasonably likely to find any such questioning very difficult indeed. This is particularly so given the appellant's subjective fears of the Iranian authorities after he was ill-treated in detention.

42. Dr Sanderson also cautioned about the difficulties many face in the UK when first imprisoned in accessing medication. Dr Sanderson highlighted that the failure to take Clozapine twice daily, could lead to a rapid risk of relapse.

Conclusion

43. When all the evidence is considered in the round and cumulatively, it is reasonably likely that the Iranian authorities will have "particular concerns" regarding the appellant's history and profile. In Iran, nebulous activity such as "anti-revolutionary behaviour" and "siding with global arrogance" are viewed as "offences" and worthy of adverse attention. The appellant's past detention, the reason for it, his religious outlook and relationship history, the lengthy period he has spent in the United Kingdom and his likely behaviour when interviewed must be considered together. When they are, it is reasonably likely that the Iranian authorities will be suspicious about the appellant's behaviour, associations and views. It is reasonably likely that they shall consider further questioning necessary, in order to elicit more details

and/or clarification regarding the appellant's current political and/or religious outlook and/or activities.

44. Mr McVeety accepted, consistent with SSH, that a further period of questioning is reasonably likely to be accompanied by detention and ill-treatment. This serious harm shall be for reasons relating to an imputed anti-regime political opinion.

45. It follows that the appellant has a well-founded fear of persecution for reasons relating to his imputed political opinion.

Decision

46. The appeal is allowed on asylum grounds and under Articles 2 and 3 of the ECHR.

Signed:

Ms M. Plimmer
Judge of the Upper Tribunal

Date:
13 November 2017