



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: UI-2021-
000599
(RP/00079/201
9)

THE IMMIGRATION ACTS

**Heard at Field House
On 12 September 2022**

**Decision & Reasons
Promulgated
On 24 October 2022**

Before

**UPPER TRIBUNAL JUDGE NORTON-
TAYLOR DEPUTY UPPER TRIBUNAL
JUDGE SAFFER**

Between

**SECRETARY OF STATE FOR THE HOME
DEPARTMENT**

Appellant

and

**MRBM
(ANONYMITY DIRECTION
MADE)**

Respondent

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, 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 MRBM or members of his family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Representation:

For the appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the respondent: Ms S Ferguson, Counsel, instructed by Freemans Solicitor

© CROWN COPYRIGHT 2022

DECISION AND REASONS

Introduction

1. We shall refer to the parties as they stood before the First-tier Tribunal. Thus, Secretary of State is once again “the respondent” and MRBM is “the appellant”.
2. The respondent seeks to challenge the decision of First-tier Tribunal Judge Aldridge (“the judge”), promulgated on 11 August 2021 following a hybrid hearing on 29 July 2021. By that decision, the judge allowed the appellant’s appeal against the respondent’s decision, dated 31 July 2019, revoking his refugee status, which had been granted on 31 December 2012.
3. The appellant is a citizen of Iran, born 1984. He came to the United Kingdom in late 2012 and claimed asylum shortly thereafter. He was granted refugee status some three weeks later.
4. In April 2018, the appellant was convicted of possession with intent to supply Class A drugs, for which he received sentences of 33 and 10 months’ imprisonment, to run concurrently. As result of this, the respondent initiated revocation action. Relevant notification letters were issued, cumulating in the revocation decision. The respondent also excluded him from humanitarian protection and relied on a certificate issued under section 72 of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”). It was accepted that a return to Iran would violate Article 3 ECHR.
5. The appellant appealed to the First-tier Tribunal under section 82(1)(c) of the 2002 Act, relying on the sole ground of appeal available to him under section 84(3).
6. That appeal was first heard by the First-tier Tribunal in February 2020. It was allowed, but the decision set aside by the Upper Tribunal in April of that year and the appeal remitted with a single preserved finding, namely that the appellant’s 2018 conviction related to a “particularly serious crime” for the purposes of section 72 of the 2002 Act.
7. Following the remittal, in December 2020 the appellant was convicted of driving with excess alcohol. He was fined and disqualified from driving for 12 months.

The judge’s decision

8. The judge correctly identified the core issue in the appeal as being a need to

determine whether the appellant represented a danger to the community of the United Kingdom, pursuant to the second limb of the rebuttable presumption under section 72(2) of the 2002 Act (the first limb - whether the appellant had been convicted of a “particularly serious crime” - was no longer live, given the preserved finding from the 2020 First-

tier Tribunal decision). He directed himself to EN (Serbia) [2009] EWCA Civ 630, [2010] 2 WLR 182 as being the appropriate authority.

9. We will consider the judge's findings and reasons in greater detail later in our decision. For present purposes, we summarise his decision as follows. Having considered a number of factors (including courses undertaken whilst in prison, the prospect of employment, and the new relationship), the judge found that it was unlikely that the appellant would again engage in drugs-related criminality and on that basis the appellant did not represent a danger to the community: [32], [34], and [35]. He addressed the drink-driving conviction. On an assessment of the circumstances surrounding that offence, the judge concluded that its occurrence did not go to demonstrate a danger to the community. The appellant had rebutted the second limb of the statutory presumption and the appeal was allowed.
10. We note in passing that the judge also purported to conclude that the appellant was not excluded from a grant of humanitarian protection. However, as the appellant was still a refugee, he was not also entitled to humanitarian protection and so this particular aspect of the judge's decision was, in effect, superfluous. Nothing turns on this.

The procedural issue: background

11. What followed after the promulgation of the judge's decision created an unusual procedural situation, with which the Upper Tribunal has had to grapple.
12. Unhappy with the result, the respondent made an in-time application for permission to appeal to the First-tier Tribunal. That application was refused by First-tier Tribunal Judge Moon on 6 October 2021.
13. The respondent then made an in-time renewed application for permission to appeal directly to the Upper Tribunal. It was then that the difficulties began. It remains unclear as to precisely what took place, but it appears as though the in-time renewed application was accompanied by either the grounds of appeal relating to the challenge brought by the respondent to the 2020 First-tier Tribunal decision only, or both those grounds and the grounds challenging the judge's decision. Whilst we have not been able to uncover any definitive evidence of which scenario applied, we do have a copy on file of the IAUT-1 form, dated 12 November 2021, which includes the latest grounds of appeal at section F.
14. When the file came up for a decision on permission, an Upper Tribunal Judge erroneously considered the 2020 grounds of appeal and granted permission to the respondent by a decision dated 18 January 2022. Whilst that Judge correctly acknowledged that the decision under appeal was that of Judge Aldridge, the reasons for the grant of permission clearly related to the previous challenge made against the 2020 First-tier Tribunal decision.

15. Following the grant of permission, the respondent provided a skeleton argument, dated 30 March 2022. In this, the error relating to the grant of permission was acknowledged and it was submitted that the respondent was in fact relying on the latest grounds of appeal.
16. In his original rule 24 response, the appellant indicated that he had no objection to the respondent relying on the correct grounds of appeal, and the merits of those grounds were addressed in some detail.
17. The error of law hearing was then listed before a panel, comprising Hill J (sitting as a judge of the Upper Tribunal) and Upper Tribunal Judge Norton-Taylor, on 18 May 2022. For reasons which need not be set out here, that hearing was adjourned. A detailed Directions Notice was sent out to the parties on 25 May 2022. In this, the panel articulated its provisional view that the difficulty caused by the grant of permission on an apparently erroneous basis could best be dealt with by having a “rolled-up” hearing at which the issue of permission would be considered and, if permission were granted, a consideration of the merits of the respondent’s challenge to the judge’s decision. It was also stated that, as the respondent’s renewed application for permission was made to the Upper Tribunal in-time, an extension of time did not seem necessary. Finally, the panel stated its provisional view that the respondent’s correct grounds of appeal appeared to be arguable.
18. The appellant then provided an amended rule 24 response. This stated that the appellant did in fact take objection to the respondent being able to rely on her latest grounds of appeal. It was also asserted that there was no valid application for permission to appeal before the Upper Tribunal and it was therefore not right to say that any application had been made in-time.
19. A new hearing was listed. Unfortunately, due to an administrative issue on the respondent’s part, the relevant Senior Own Office Presenting Officer had not been allocated the cases and once again the hearing had to be adjourned.
20. The hearing on 12 September 2022 was effective. At the outset, we asked the representatives whether they had any specific objections to the course of action proposed in the Directions Notice of 25 May 2022. Mr Whitwell was content with it. Ms Ferguson did not raise any specific points on the day.

The procedural issue: our approach

21. As the procedural issue in this case appears to be highly unusual, we deem it appropriate to set out our approach in some detail.
22. Some of the ground contemplated by the original constitution of the panel in this case has now been covered by the decision in SA (Non-compliance with rule 21(4)) Bangladesh [2022] UKUT 00132 (IAC). Paragraph 1 of the

judicial headnote states that:

“1. An in-time application [for permission to appeal] which does not comply with rule 21(4) in one or more ways is nevertheless a valid application which must be decided by the Upper Tribunal. If it had been intended otherwise, the UT Rules could easily have said so.”

23. Rule 21(4) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (“the Rules”) sets out the various requirements of an application for permission to appeal. Rule 21(4)(e) refers to the need to provide the grounds on which the party seeking permission relies.
24. Rule 7(1) of the Rules provides that an irregularity resulting from the failure to comply with any requirement of the Rules does not of itself render void the proceedings or “any step taken in the proceedings.”
25. In the present case, we are satisfied that the respondent’s renewed application for permission to appeal was made in-time. The grant of permission states this to have been the case, the date of the IAUT-1 form, 12 November 2021, is, as far as we can see, consistent with the relevant timeframe, and there is no other no other countervailing evidence brought to our attention which suggests that it was in fact late.
26. Thus, the requirement that an in-time application had been made, as set out in SA, is satisfied.
27. Turning to rule 21(4)(e), we have already highlighted the fact that we cannot be certain as to whether only the 2020 grounds of appeal were provided with the application, or whether the latest grounds of appeal were also provided. On balance we are prepared to accept that both sets of grounds were provided (it would follow from this that the respondent significantly contributed to the difficulties which subsequently arose). In reality, it makes no material difference. The application for permission was made in- time and any deficiencies in terms of the grounds provided did not render that application void.
28. It follows that there was a valid application requiring a decision by the Upper Tribunal.
29. The permission decision made was plainly erroneous in that it related to the 2020 grounds of appeal (whether or not the latest grounds of appeal were also before that Judge). That fact does not, in our judgment, render void the respondent’s application. Our view on this is supported by what is said in SA, in combination with rule 7(1) of the Rules.
30. There then arises the issue of the appropriate manner in which to deal with the erroneous basis of the grant of permission. In the Directions Notice of 25 May 2022, it was stated that treating the latest grounds of appeal as an amendment to the 2020 grounds might not be the best approach: see paragraph 7. However, on reflection, this may not in fact be objectionable. Rule 5 of the Rules permits for documents (including grounds of appeal) to be amended. It could permissibly be said that the latest grounds were an

amendment (albeit, wholesale) of the grounds which were considered by the Upper Tribunal Judge to grant of permission.

31. Alternatively, it may be that the decision granting permission is set aside. This would not be by virtue of the Rules (the power under rule 43 relates only to decisions which dispose of proceedings – a grant of permission would not fall into that category), but the “supplementary powers” under section 25 of the Tribunals, Courts and Enforcement Act 2007, in particular sub-section (2)(c), which gives the Upper Tribunal the same powers as the High Court in relation to “all other matters incidental to the Upper Tribunal’s functions.” Section 25 of the 2007 Act has been given a broad interpretation: Singh [2019] EWCA Civ 1014, [2019] Imm AR 1275.
32. On balance, we take the view that the former approach is the better of the two, but see merit in the second as well. Ultimately, whichever is adopted makes no difference in the present case.
33. What is of crucial importance is to ensure fairness to the parties. On the respondent’s side, she provided grounds which should have been considered on their merits at the time of the renewed application, but were not, or at least she had applied to amend the erroneous grounds. On the appellant’s side, the respondent has been granted permission to appeal on an erroneous basis, placing the judge’s favourable decision at potential risk of being set aside.
34. With the above in mind, the appropriate means of resolving the situation is to consider the issue of permission afresh at an oral hearing. This provided the parties with an opportunity to argue their respective cases prior to the Upper Tribunal formally considering whether the judge in fact made errors of law.

The procedural issue: decision on permission to appeal

35. We informed the representatives that we would hear their submissions on the issue of permission and the merits together. We would then consider whether permission should be granted and then, if necessary, go on to deal with the determination of whether the judge’s decision contained errors of law.
36. The respondent’s ‘correct’ grounds of appeal can be summarised as follows. The judge erred in law by “failing to give adequate rational reasons for his findings.” There was a reliance on evidence which predated the drink driving conviction. That conviction “is indicative” that the appellant represented a danger to the community of the United Kingdom. The judge had given “very little weight” to the drink-driving conviction and had seemed to “make excuses” for the appellant’s behaviour. Paragraph 14 and the grounds asserts that:

“... for the judge to rely on alcohol awareness course taken in prison, only for the appellant to be convicted of drink-driving after his release from prison, as showing that this appellant is not a danger to the UK

community is irrational.”

37. At the hearing, Mr Whitwell confirmed that the respondent’s case was predicated on both a reasons and a rationality challenge, in reliance on the grounds of appeal and

her skeleton argument. In short, the judge had failed to consider the whole range of relevant factors. In respect of the reasoning, it was insufficient to support the conclusion that the appellant's overall conduct did not make him a danger to the community. The absence of aggravating factors relating to the drink-driving offence did not amount to the presence of mitigating factors.

38. The alleged errors were, it was submitted, both arguable and, as a matter of substance, made out.
39. Ms Ferguson submitted that the judge had clearly had regard to both offences and had formed a holistic view on the question of whether the appellant represented a danger to the community. The assessment and conclusions were not arguably or substantively irrational. She confirmed that she was not contending that each and every offence committed by an individual had to cross the "particularly serious crime" threshold. However, every case is fact-specific and the judge had conducted such an exercise here. Questions of weight were a matter for the judge.
40. At the end of the hearing, we informed the parties of our decision that permission was granted. The reasons and rationality challenges were both arguable, albeit that the latter only just crossed that threshold.
41. We reserved our decision on the question of whether the judge had materially erred in law.

The substantive issue: conclusions on error of law

42. Before turning to our analysis of this case we remind ourselves of the need to show appropriate restraint before interfering with a decision of the First-tier Tribunal, having regard to numerous exhortations to this effect emanating from the Court of Appeal in recent years: see, for example, Lowe [2021] EWCA Civ 62, at paragraphs 29-31, AA (Nigeria) [2020] EWCA Civ 1296; [2020] 4 WLR 145, at paragraph 41, and UT (Sri Lanka) [2019] EWCA Civ 1095, paragraph 19 of which states as follows:

"19. I start with two preliminary observations about the nature of, and approach to, an appeal to the UT. First, the right of appeal to the UT is "on any point of law arising from a decision made by the [FTT] other than an excluded decision": Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"), section 11(1) and (2). If the UT finds an error of law, the UT may set aside the decision of the FTT and remake the decision: section 12(1) and (2) of the 2007 Act. If there is no error of law in the FTT's decision, the decision will stand. Secondly, although "error of law" is widely defined, it is not the case that the UT is entitled to remake the decision of the FTT simply because it does not agree with it, or because it

thinks it can produce a better one. Thus, the reasons given for considering there to be an error of law really matter. Baroness Hale put it in this way in *AH (Sudan) v Secretary of State for the Home Department* at [30]:

"Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently."

43. Following from this, we bear in mind the uncontroversial propositions that the judge's decision must be read sensibly and holistically and that we are neither requiring every aspect of the evidence to have been addressed, nor that there be reasons for reasons.
44. We have considered with care the written and oral arguments put forward by both parties.
45. It is common ground that the judge identified the core issue in the appeal and the relevant judicial guidance on section 72 of the 2002 Act in the form of EN (Serbia). It was incumbent on the judge to conduct a holistic assessment of the appellant's conduct and whether, on the evidence provided, he represented a danger to the community of the United Kingdom. That danger had to be "real". A real risk of the repetition of a particularly serious crime would be likely to demonstrate a danger, although no causal connection is required as a matter of law.
46. The respondent's challenge is focused on the judge's approach to the drink-driving conviction and the assessment of this when considering the ultimate question of whether the appellant represented a danger to the community. Whilst not therefore specifically a live issue, for the sake of completeness we state our conclusion that the judge did not err in respect of his assessment of the index offence, namely the drugs conviction from 2018, and whether there was a real risk of the appellant engaging in similar conduct in the future. The judge took proper account of the seriousness of that offence: [30]. He rightly considered the absence of employment as potentially disclosing a risk of falling back into the lifestyle which had resulted in the index offence. The same is true of the fact that the appellant had been in employment when he committed that offence and that there had been a financial motivation: [31]. It was open to the judge to take account of a variety of other factors including: courses undertaken in prison; the fact that since release there had been "no indication whatsoever" that the appellant had returned to his "previous ways"; that he had begun a new relationship and had married in 2020; and that he had recently obtained (but not yet started) what was described as "realistic" employment: [32], [34], and [35]. The assessment as a whole was balanced and the conclusion was both rational and adequately reasoned.
47. Having said that, if we were to conclude that the judge erred in his approach to the drink-driving offence, the sustainable conclusions relating to the index offence could not save the decision as a whole.
48. We turn, then, to the drink-driving conviction of December 2020. There was no requirement for this to be classified as a "particularly serious crime" for the purposes of section 72 of the 2002 Act, and Ms Ferguson quite rightly did not seek to suggest otherwise. In our judgment, once an

individual has been convicted of such a crime, the first limb of section 72 is engaged and any subsequent convictions (or for that matter, conduct in respect of which no convictions have been accrued) can be relevant to the

question of whether the individual represents a danger to the community, whether or not they are “particularly serious”.

49. The judge plainly addressed his mind to the drink-driving offence, regarding it as being of “particular note” and properly recognising the “force” of the respondent’s case against the appellant. The relevant passage within [30] reads:

“... the appellant has committed a particularly serious offence and has now gone on to commit a further criminal offence. It is also correct to note that the offence relates to the abuse of alcohol which the appellant claims to have benefited from counselling and training whilst in prison. There can be no doubt that the offence of drink-driving exists because of the danger that all drunk drivers represent to the community.”

50. Reading the judge’s decision sensibly and appreciating that he was appraised of all the evidence and submissions before him, we are satisfied about three matters arising from this passage. First, the judge had in mind the specific argument relied on by the respondent to the effect that the second offence, when viewed together with the index offence, was indicative of a propensity to offend, which in turn went to the question of whether the appellant represented a danger to the community. Second, he was cognisant of the reliance placed by the respondent at the hearing on the connection between the drink-driving offence and the alcohol awareness courses undertaken in prison (the same submission featured in paragraph 14 of the grounds of appeal). Third, the judge recognised the serious implications of drink-driving in a general sense.
51. On the last point, we see no contradiction between the final sentence of [30] and the judge’s ultimate conclusion that the appellant did not represent a danger to the community. It is tolerably clear that, in respect of the former, he was making a generalised statement which formed part of the overall context to the fact-specific assessment subsequently undertaken.
52. We turn to what the judge said at [33]. This paragraph has caused us pause for thought. The judge’s expression that the drink-driving offence caused him “dismay” adds nothing to his reasoning; it was in reality simply an observation. The judge then set out a number of factors which, on his assessment, demonstrated that, notwithstanding the offence in question, the appellant did not represent a danger to the community. The factors included the minimum sentence imposed for the offence and the absence of any aggravating factors such as the standard of driving and its location. Whilst not expressly stated at that point in the decision, there appears to have been no dispute that the appellant had been only fractionally over the relevant alcohol limit when breathalysed by the police, who had in fact stopped to help him change a tyre on his car: [21]. The judge expressly stated that the offence was “serious”.

53. We harboured a concern that the judge was potentially taking the absence of aggravating features and/or the existence of what might be described as mitigating features, as negating the seriousness of the drink-driving conviction and its relevance to the holistic assessment of the danger to the community issue. However, exercising the appropriate restraint identified earlier in our decision, and reading the judge's decision sensibly and in the round, we have ultimately concluded that no error of law

has been committed in this regard. As stated in the previous paragraph, the judge expressly recognised that the offence was indeed serious and he said much the same thing at the end of [30]. In our judgment, and not without some hesitation, we are satisfied that [33] represents a fact-sensitive approach, which is required in cases concerning section 72 of the 2002 Act. There is, we find, merit in Ms Ferguson's submission that a contrary conclusion (i.e. that the very fact of a drink-driving conviction, without more, must have led to a conclusion that the appellant did constitute a danger) would in effect negate the fact-specific nature of the assessment in cases such as the present. In short, we conclude that the judge was rationally entitled, as a matter of law, to take account of the particular circumstances of the drink-driving offence.

54. The next issue to be considered is whether the judge's reliance on the drugs and alcohol awareness courses undertaken whilst the appellant was in prison was irrational, as argued in paragraph 14 of the grounds of appeal. Demonstrating irrationality is a difficult task. Here, the particular challenge put forward is that the judge was simply not entitled to rely on those courses "as showing that this appellant is not a danger to the UK community". We reject that contention for two reasons. First, the judge was rationally entitled to take those courses into account as one factor amongst many. In particular, the judge saw them as relevant to any future danger relating to offending behaviour similar to that evidenced by the index offence. Second, and following from the first reason, the judge was plainly not relying on those courses as being decisive of his overall assessment.
55. Before the judge, the respondent undoubtedly had a strong argument that the committal of the drink-driving offence after the appellant had undertaken the courses in prison was indicative of him being a danger to the community. Yet it cannot be said that the only rational outcome was for the judge to have concluded that such a danger in fact existed as result of that offence. As both representatives have acknowledged, the assessment was fact-specific. We are satisfied that the judge was mindful of the significance of the offence and how it sat in relation to the index offence, the prison courses, and the serious nature of drink-driving in general. These matters are all expressly stated by the judge at various points in his decision. The respondent may disagree with the attribution of weight to some of the factors taken into account, but that was a matter for the judge, subject to any rationality challenge. Such a challenge does not succeed in the present case.
56. In many respects, the respondent's rationality challenge is intertwined with the reasons challenge: paragraph 11 of the grounds of appeal contended that the judge had failed to give "adequate rational reasons". In light of what we have already said about a number of aspects of the grounds and additional submissions, we conclude that the judge did explain himself with sufficient clarity so as to permit the respondent to understand why the appeal was being allowed. He set out the competing arguments, together

with the various factors being taken into account. Through his analysis, he gave what we consider to be adequate reasons as to why, taken as a whole, the evidence went to rebut the presumption under the second limb of section 72(2) of the

2002 Act. Additional or better reasons could potentially have been given, but that of itself does not disclose any errors of law.

57. The respondent has not meaningfully argued that the judge viewed the two offences in complete isolation. In any event, we see no indications in the judge's approach which would satisfy us that such an erroneous approach had been adopted. He was bound to separate the two offences out for the purposes of analysis within the decision, but that was nothing more than a matter of structure. The manner of the representatives' submissions before him and the way in which he considered the evidence points towards a holistic approach. This is supported further by the statement at the beginning of [36], which precedes the conclusion that the appellant did not represent a danger to the community; "In the circumstances of the evidence which is before me..."
58. The grounds of appeal, at paragraph 16, suggest that the judge was seeking to "make excuses" for the drink-driving conviction. We do not read what is said at [33] and [34] as representing "excuses". Indeed, to assert that a judge would have acted in such a way amounts, in our view, to an accusation which is not made out here.
59. Having applied the appropriate level of restraint identified earlier in our decision, we conclude that, whilst we might have reached a different conclusion at first instance, the judge's decision does not contain any errors of law. For us to have concluded otherwise would, in truth, have been to substitute our view of the case for his. That is not a proper basis on which to interfere with a decision of the First-tier Tribunal.

Anonymity

60. The First-tier Tribunal made an anonymity direction, presumably because of the relevance of the Refugee Convention claim. We have considered for ourselves whether a direction should be made at this stage of proceedings. Having regard to the importance of open justice and the Guidance Note No.2 of 2022, we have concluded that a direction should be made. This is on the basis that the appellant is still a refugee.

Notice of Decision

61. **The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law and that decision stands.**
62. **The appeal to the Upper Tribunal is accordingly dismissed.**

Signed: *H Norton-Taylor*
2022 Upper Tribunal Judge Norton-Taylor

Date: 15 September