Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/11365/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Sent**
On 17 May 2013	**On 1 July 2013**

Before

UPPER TRIBUNAL JUDGE DEANS

Between

MR A K

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr O'Ceallaigh of Counsel
For the Respondent: Ms M Tanner, Home Office Presenting Officer

DETERMINATION AND REASONS

1) This is an appeal with permission against a decision by Judge of the First-tier Tribunal Oliver dismissing the appeal on asylum and human rights grounds.

2) The appellant was born on 21 June 1970 and is a national of Iran. He claimed asylum on arrival in the UK on 2 January 2008. His asylum claim was originally based on an incident which allegedly occurred when he was stopped at a Basij checkpoint. The Basij officers took away his mobile phone and ID. On the phone there was a joke about the supreme leader, a voice message from a friend and some pornographic material. As he was being taken to a police car he pushed away a guard and fled. He feared that because of the joke about the supreme leader he would face execution

on return to Iran. The asylum claim was refused by the respondent and in a subsequent appeal in September 2008 the appellant's claim was found to be lacking in credibility.

3) In October 2009 further representations were made on behalf of the appellant. It was said that in early 2009 the appellant had joined the Ahwazi Arab People's Democratic Popular Front (AAPDPF). His brother had been a member of this organisation, having joined in 2004, and had been killed by the authorities in Iran in 2006. The appellant said he had attended a demonstration on 3 May 2009 and a conference afterwards. He attended a demonstration in front of the Iranian Embassy on 25 October 2009 and another on 29 May 2009. He believed that the Iranian authorities had monitored these demonstrations by filming them.

4) These further representations led to reasons for refusal letter dated 28 July 2011 stating that the representations were not significantly different from previous submissions. Further representations were made again in August 2011 but these too were considered to be not markedly different from previous evidence and submissions and did not amount to a fresh claim. Following a judicial review a further refusal decision was issued on 3 December 2012 in which it was accepted by the respondent that the appellant was now associated with AAPDPF but the appellant's evidence about attendance at demonstrations was not accepted.

5) Following the hearing before the First-tier Tribunal in January 2013 the judge noted, in accordance with Devaseelan [002] UKAIT 00072, that the appellant had been found not to be credible in respect of the account on which he originally based his asylum claim. Since then two further matters had been advanced, namely the alleged murder of the appellant's brother in 2006 and the appellant's attendance at events on behalf of AAPDPF. The judge was not satisfied as to the credibility of the appellant's account of his brother's death but did consider it necessary to consider the consequences of the appellant's attendance at a number of meetings of AAPDPF.

6) In this regard the judge referred to the country guideline cases of BA (Demonstrators in Britain – Risk on Return) Iran CG [2011] UKUT36 and SB (Risk on Return – Illegal Exit) Iran CG [2009] UKAIT 00053. The judge commented that the appellant would fit the profile of an activist on his return to Iran only if his presence at the demonstrations was prominent. The judge accepted that the appellant had attended demonstrations at the places and dates which he claimed. When demonstrating in front of the Iranian Embassy he could have been photographed in a way in which the authorities could identify him. His presence, however, was not prominent; he attended at only some demonstrations; and he did not take a leading part. There was no evidence of any significant media coverage of the demonstrations, which were small. The judge was not satisfied the appellant would be at risk on return.

7) In the application for permission to appeal it was contended that the judge had misdirected himself in applying the country guideline case of BA. It was not necessary that the appellant's presence at the demonstrations be prominent in order to establish a real risk. It was accepted that the appellant had attended significantly more than only one or two determinations and, in terms of BA, this might give rise to an increased risk. He was a member of the party and he had attended about six demonstrations as well as attending a memorial service for the death of a poet. These attendances required serious consideration. The judge had not properly considered other risk factors, such as the appellant's membership of a separatist party.

8) In the application for permission to appeal reference is made to a further country guideline case, SA (Iranian Arabs – No General Risk) Iran CG [2011] UKUT 41. Submissions were made on the appellant's behalf at the hearing in relation to this but these were not considered in the determination. On the basis of the decision in SA it was argued that Iranian authorities viewed Arabs in general with suspicion and viewed London as the centre of separatist activity. Attending Ahwazi demonstrations in London could give rise to a risk of persecution for an Ahwazi Arab on return to Iran and undertaking low-level separatist activity in London would increase risk regardless of whether it was genuine. In addition, having left Iran unlawfully was a factor that increased risk on return.

9) In granting permission to appeal the judge noted that according to the application the judge failed to give adequate reasons for dismissing the appeal given that the judge accepted that the appellant had taken part in seven demonstrations in the UK, that he was a member of a political party and that he was an Arab from Iran. In view of the relevant country guideline cases and these findings of fact, the grounds were considered arguable.

Submissions

10) In his submission for the appellant, Mr O'Ceallaigh pointed out that it was accepted that the appellant was a member of an Arab separatist organisation and had attended various demonstrations. He had also attended a political event commemorating the death of an Iranian poet. Having found these facts, the judge should have applied the country guideline cases of BA and SA. The latter was a case concerning Iranian Arabs. According to the Judge of the First-tier Tribunal, at paragraph 31 of the determination, the appellant would only fit the profile of an activist if his attendance at demonstrations was prominent. This was contrary to the case law. The case of SA showed how the Iranian authorities would view such activity. Arab separatist activity was viewed very seriously. Accordingly to paragraph 48 of SA, the appellant might face vigorous interrogation on return and, as stated at paragraph 49, even if a person was not particularly sincere or particularly well-informed, links with a separatist group could provoke ill-treatment. It was accepted in that case that when someone had left Iran irregularly and had been in the UK for 6 years there was an

enhanced risk. At paragraph 54 it was pointed out that there was heightened suspicion towards anyone coming from London because of activities in opposition to the present regime that were said to be encouraged by the UK.

11) Mr O'Ceallaigh referred to the decision of the Supreme Court in RT (Zimbabwe) [2012] UKSC 38. He contended that when the appellant was interrogated on return he would be required to lie about his political beliefs and activities. This had not been taken into account by the judge, whose legal analysis was flawed. Mr O'Ceallaigh pointed out that the respondent's Rule 24 response of 29 April 2013 relied on the case of YB (Eritrea) [2008] EWCA Civ 360. Accordingly to the respondent, the Iranian authorities would be able to distinguish facts about the appellant including his lack of a political profile and the lack of a genuine claim. Mr O'Ceallaigh submitted that the respondent was making up reasons that were not in the determination to support the judge's findings. He pointed out that the case of YB was based on the situation in Eritrea some five years ago. The cases of BA and SA post-dated this case.

12) Ms Tanner acknowledged that it was accepted by the respondent that the appellant had had dealings with AAPDPF. The issue of whether the appellant would be regarded as an Arab separatist had to be addressed, even if findings had been made that the appellant's motives were cynical ones. According to SA, even low level support in the UK would lead to an increased risk. The judge had not referred to submissions in relation to SA in the determination, which was a matter for the Tribunal to consider.

13) Ms Tanner considered that the assessment of *sur place* activities in the case of BA was to be preferred to that of SA but she acknowledged that SA was concerned with Arab separatist activity. If there was found to be an error of law in the decision she would seek a further hearing.

14) In response to this Mr O'Ceallaigh argued that a further hearing was not required. There was no challenge to the findings made by the judge. The appellant's account of his activities in Iran had been rejected but his account of his activities in the UK had been accepted. There could be no new hearing before the Tribunal today because the appellant's supporting witness was absent.

15) There then followed some discussion of the evidence of the supporting witness at the hearing before the First-tier Tribunal. The evidence of the witness, Mr Abid Shaghuti, was recorded at paragraph 22 of the determination. The witness worked closely with the Secretary General of AAPDPF and confirmed that the appellant had been a supporter of this party since early in 2009. His involvement with the party had been genuine. The party was banned inside in Iran and for security reasons had to maintain a level of secrecy. The respondent was incorrect to have suggested at one point that AAPDPF had changed its name in 2007 to the Ahwazi Democratic Popular Front. This was a separate organisation. The party issued

supporting letters only when it was sure about a person's genuine commitment. There was mounting evidence of Iranian surveillance. The conference the appellant attended on 3 May 2009 was a private meeting but details of this with photographs had been published on a website.

16) Notwithstanding having recorded this evidence at paragraph 22 of the determination, the judge stated at paragraph 30 that the witness was not asked whether AAPDPF and APDF were separate organisations. This was clearly a matter which was recorded at paragraph 22 as having been covered by the witness in his evidence. The judge nevertheless made findings about the appellant's participation in AAPDPF and its activities.

17) I indicated at this point in the hearing that the decision would have to be set aside and re-made but I considered this could be done on the basis of the findings of the First-tier Tribunal and the country guideline cases without the need for any further evidence. Ms Tanner responded that if the decision was to be re-made at this hearing she would seek to make submissions on the substantive issues, which she then did. She submitted that the appellant had not attended a demonstration since 2011, although Mr O'Ceallaigh sought to correct this by stating that the appellant had attended a demonstration on 20 April 2012. Ms Tanner then referred to the appellant's supplementary statement, in which it was recorded that he had attended a demonstration in April 2012 and then the memorial service in November 2012. In December 2012 he had written an article which had been published on a website. Ms Tanner pointed out that the appellant was relying only on *sur place* activities before the Upper Tribunal. She submitted that the appellant had cynically manipulated everything he had done in order to bolster his claim. As was pointed out in SA, he would not be at risk just because of his ethnicity but some additional feature would be required to increase his risk. According to paragraph 52 of SA, the appellant in that case was somebody already known to the authorities, who were reasonably likely to have a record of his detention in Iran. A previous offence he had committed in Iran would come to light on his return. The appellant in that case was not at risk just because of his *sur place* activities.

18) Applying the decision in BA, Ms Tanner continued, the appellant was one of many who had participated in annual events on 20 April of each year. The appellant had managed to link this with Arab separatism but this had been done to enhance his claim. This would be recognised by the Iranian authorities who would differentiate between those who were perceived as a real threat to the regime and asylum seekers who were pursuing their own agendas. According to BA there was no facial recognition equipment at the airport in Tehran, although officials could recognise a lot of people. The procedures on arrival were haphazard and those who did not come to attention on arrival might be picked up subsequently. However, the appellant had only one of the risk factors identified in SA, namely his attendance at demonstrations, at which he was one of many. He did not require the benefit of the Refugee Convention.

19) In response, Mr O'Ceallaigh pointed out that the appellant's involvement was greater than this. It was not disputed that he attended all the demonstrations set out in his supplementary statement. The Judge of the First-tier Tribunal had not made a finding to the effect that the appellant's motives were cynical and in SA itself some of the claim had been rejected. The factors identified in SA as giving rise to a risk for Ahwazi Arabs did not apply only to those of whom the authorities had previously had knowledge. The Iranian authorities were not interested in whether someone was protecting their own interests but only in crushing dissent. As was pointed out at paragraph 65 of BA, it was the perception of the regime which had to be considered. The appellant had been photographed and had been participating in a separatist organisation in his own name. He had written about this in his own name. The risk factors were his Arab ethnicity; his illegal departure from Iran; his forced return from the UK; and his links to Arab separatist activity. He was likely to be interrogated. In terms of BA, he had attended more than one or two protests and he had been photographed on at least one occasion. He had attended a meeting and produced a publication. He was likely to be subject to interrogation in breach of Article 3. In terms of RT (Zimbabwe), even if the authorities were unaware of his activities in the UK he would be asked about what he had done and would have to lie to protect himself. On either basis the appellant was a refugee.

Discussion

20) I am satisfied there is an error of law in the decision by the Judge of the First-tier Tribunal. The judge failed to address the country guideline decision in SA, notwithstanding that he was referred to this at the hearing and it was directly in point.

21) Ms Tanner submitted that there should be a further hearing for the decision to be remade. On the basis of the findings made by the Judge of the First-tier Tribunal, which were unchallenged before me, I did not consider a further hearing was necessary. Directions were issued with the hearing notice but these appear to have been only to the effect that the parties should lodge prior to the hearing the documents on which they relied. The parties do not appear to have been directed to bring their witnesses to this hearing for the purpose of re-making the decision but I did not consider was necessary to hear any further oral evidence.

22) Ms Tanner challenged the motives of the appellant for his *sur place* activities and submitted that the Iranian authorities would be able to distinguish between those whose activities represented a genuine threat to the regime and those who were seeking to bolster or enhance an asylum claim. I response, Mr O'Ceallaigh referred to paragraph 65 of BA in which it is stated:

> "While it may well be that an appellant's participation in demonstrations is opportunistic, the evidence suggests that this is not likely to be a major influence on the perception of the regime. Although expressing dissent itself will be sufficient to result in a person having, in the eyes of the regime, a

> significant political profile, we consider that the nature of the level of the *sur place* activity will clearly heighten the determination of the Iranian authorities to identify the demonstrator while in Britain and to identify him on return. That, combined with the factors which might trigger enquiry would lead to an increased likelihood of questioning and of ill-treatment on return."

23) Having regard to the country guideline cases of SA and BA, I am satisfied that if the appellant were to be identified on return as having been involved in Arab separatist activities in the UK then the Iranian authorities would be unlikely to question his motives but would assume that he was an opposition activist.

24) This raises the question of whether the appellant would be identified on return. Ms Tanner submitted that, in terms of BA, there was no facial recognition technology at Tehran Airport for those returning, and she further pointed out that, unlike the appellant in SA, the appellant was not shown to have any previous record of detention at the hands of the Iranian authorities.

25) It seems that on the particular facts of SA the appellant's previous mistreatment weighed heavily with the Tribunal but nevertheless the conclusions expressed were of a general nature and do not necessarily depend on an appellant having previously come to the attention of the authorities. The lack of facial recognition technology would be compensated for, according to Mr O'Ceallaigh, by the appellant's illegal exit and forced return, which would give rise to interrogation at the airport. In SA the Tribunal accepted that an irregular departure from Iran combined with presence in the UK for 6 years were matters which would come to light in the event of the appellant's return to Iran and would enhance the risk to the appellant. The Tribunal considered that even "the most benign questions concerning his identity and the circumstances of leaving Iran would be at least reasonably likely to highlight the fact that he had left irregularly." The Tribunal then found that it would be "but a short step from there to find it reasonably likely that the appellant would be interrogated, and would have to admit he left without permission."

26) The difference that then arises between SA and this appellant's case is that in SA once the authorities had this information they would look up the appellant's records to find that he had been detained because of leafleting in the course of Arab separatism. In the present appeal the appellant has not established that he was previously detained in Iran. He has, however, now been in the UK for more than 5 years, having left Iran unlawfully. In terms of SA this would be sufficient reason for the authorities to question him on his return. Even though the authorities had no record of illegal activities in Iran, as was pointed out in paragraph 54 of SA there is heightened suspicion towards any Ahwazi Arab returning from London because the authorities believe the Arab separatist cause to be particularly well organised in London and they believe that opposition activities are encouraged by the UK.

27) Mr O'Ceallaigh's submission was that even if the authorities did not have any knowledge of the appellant having taken part in separatist activity in the UK, then he would still be entitled to the protection of the Refugee Convention if he was required to deny any such involvement, in terms of RT (Zimbabwe). According to SA, at paragraph 49, the links with separatist groups could easily provoke ill-treatment even if a person was not particularly sincere or particularly well-informed. There is a real risk that as an Ahwazi Arab making a forcible return to Iran after more than 5 years in London, after having left Iran illegally, the appellant would be subjected to interrogation on return and would be forced to lie about his political activities if they were not known to the Iranian authorities. In the event that the authorities were aware of these activities, of course, even though the appellant might not be sincere there would be a real risk of ill-treatment.

28) As was pointed out at paragraph 26 of RT (Zimbabwe), the principle in HJ (Iran) applies to a person who has political beliefs and is obliged to conceal them in order to avoid the persecution that he would suffer if he were to reveal them.

29) In any event, given the frequency of the activities undertaken by the appellant and their nature, I consider there is a real risk that these would have come to the attention of the Iranian authorities. Even if the appellant were not to be recognised on return to Iran, there is a real risk that the authorities would identify him as an opposition activist at a later stage. The appellant has not only attended demonstrations but he has attended a memorial service for a dissident poet and he has published opposition material of his own on a website. Having regard to the low standard of proof, I am satisfied that the appellant faces a real risk of persecution by reason of his political opinion were he to return to Iran.

Conclusions

30) The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

31) I set aside the decision.

32) I re-make the decision in the appeal by allowing it.

Anonymity

The First-tier Tribunal made an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005

I continue that order (pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Fee Award **(**Note: This is not part of the determination.)

In the light of my decision to re-make the decision in the appeal by allowing it, I have considered whether to make a fee award. I make no fee award on the basis that no fee has been paid or is payable.

Signed Date

Judge of the Upper Tribunal