Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/02249/2011

THE IMMIGRATION ACTS

Heard at Field House	**Determination Sent**
On 14 August	**On 22 October 2013**
and 1 October 2013	

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

DZ
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:	Ms J Fisher (14 August) and Ms S Akinbolu (1 October) instructed by Simman Solicitors
For the Respondent:	Mr P Deller (14 August) and Mr G Saunders (1 October), Senior Home Office Presenting Officers

DETERMINATION AND REASONS

1. This appeal is subject to an anonymity order made by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind the order and I continue it

pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

2. The appellant is a citizen of Iran whose date of birth is now accepted to be 21 March 1993. He arrived in the United Kingdom on 5 May 2009 and claimed asylum. The Secretary of State refused his application on 1 July 2009 but, as an unaccompanied minor, was granted discretionary leave until 21 September 2010. On that date, the appellant applied for an extension of his leave on the basis that he would be persecuted for a Convention reason if returned to Iran. On 7 February 2011, the Secretary of State refused to vary the appellant's leave to remain and refused the appellant's application for asylum and humanitarian protection for the reasons previously set out in the decision letter of 1 July 2009.

3. The appellant appealed to the First-tier Tribunal. In a determination dated 28 April 2011, Immigration Judge Pedro dismissed the appellant's appeal on all grounds. On 27 July 2011 UTJ Jordan granted the appellant permission to appeal to the Upper Tribunal. Following a hearing on 24 January 2012, the Upper Tribunal (UTJ Grubb and DUTJ Drabu) set aside the decision of the First-tier Tribunal as it had erred in law in failing to grant the appellant an adjournment to deal with what, was disputed at the time, namely the appellant's age. Following that decision, it was directed that a resumed hearing should take place before Judge Drabu alone in the Upper Tribunal. In a determination dated 26 April 2012, Judge Drabu dismissed the appellant's appeal on all grounds. On 11 December 2012, Moses LJ granted the appellant permission to appeal to the Court of Appeal. On 17 June 2013, a Consent Order of the Court of Appeal quashed the decision of the Upper Tribunal and remitted the appeal to the Upper Tribunal.

4. The appeal was first listed before me on 14 August 2013 when Ms Fisher represented the appellant and Mr Deller, the Secretary of State. At my instigation, the appeal was re-listed for further submissions on 1 October 2013 on the sole issue of whether the appellant could fall within a 'particular social group' ('PSG') for the purposes of the Refugee Convention when the appellant was represented by Ms Akinbolu and the Secretary of State by Mr Saunders.

Initial Matters

5. At the outset of the initial hearing I drew to both representatives attention the fact that I had been a member of the panel sitting in the Upper Tribunal which had found an error of law in the initial First-tier Tribunal decision of Judge Pedro and had set it aside. I had taken no part in the Upper Tribunal's decision subsequently to dismiss the appellant's appeal which had been successfully appealed to the Court of Appeal.

6. Having taken time to consider the matter, Ms Fisher indicated that she had no objection to me hearing the appellant's appeal now. Mr Deller also indicated that he had no objection on behalf of the Secretary of State.

7. A further preliminary matter arose, namely the scope of the current appeal in the Upper Tribunal.

8. The issue boils down to this. In remitting the appeal to the Upper Tribunal the "Statement of Reasons" states at para 4 that:

> "It is agreed between the parties that the determination dated 1 May 2012 should be remitted to the Upper Tribunal (Asylum and Immigration Chamber) on the basis that there was a failure to give sufficient consideration to the report of Dr Kakhki."

9. Ms Fisher submitted that Dr Kakhki's report dealt both with matters going to the appellant's credibility and also the objective risk to him on return to Iran including any risk as a person returning who had illegally exited Iran. She pointed out that the grounds of appeal to the Court of Appeal challenged the Upper Tribunal's decision both in regard to its adverse finding on credibility and risk on return by failing to take Dr Kakhki's report into account. She submitted, therefore, that the Court of Appeal had in all probability remitted the appeal to the Upper Tribunal to hear *de novo*.

10. Mr Deller accepted that the "Statement of Reasons" accompanying the Court of Appeal's Consent Order was broad enough to show that the Court of Appeal had intended to set aside the Upper Tribunal's decision both in relation to credibility and risk on return. However, he drew to my attention the terms of the grant of permission to appeal by Moses LJ which, in para 1, appeared to restrict the grant of permission (based upon the Upper Tribunal's failure to consider Dr Kakhki's report) solely in respect of any risk to the appellant as a result of his illegal exit from Iran. Mr Deller submitted that it was not clear, therefore, what was intended to be the effect of the Court of Appeal's Consent Order. However, he accepted that in the interests of justice, given that the appellant had sought to challenge the adverse credibility finding on the basis of a failure to consider Dr Kakhki's report, that I should conclude that the Court of Appeal had set aside the Upper Tribunal's decision in respect both of its adverse credibility finding and its finding in relation to risk on return.

11. Having heard the parties' submissions, I indicated that, in my view, the Court of Appeal had by its order set aside the Upper Tribunal's decision both in respect of its adverse credibility finding and in relation to any risk on return to Iran.

12. The appeal, therefore, proceeded on the basis of a *de novo* hearing in relation to the appellant's claim under the Refugee Convention, for humanitarian protection and under Arts 3 and 8 of the ECHR. It was, however, accepted by both representatives that Judge Drabu's finding in relation to the appellant's age should stand, namely that he was born on 21 March 1993 and not in 1995 as he claimed. The appellant was, as a consequence, 16 years of age when he arrived in the UK and when he was interviewed in relation to his asylum claim. The appellant is, therefore, now 20 years of age.

The Appellant's Claim

13. The appellant's claim is set out in his screening interview on 5 May 2009, his asylum interview on 8 June 2009; in three witness statements dated 3 June 2009, 15 April

2011 and 9 July 2012 which the appellant adopted in his oral evidence; and, finally, in his brief oral evidence given at the hearing.

14. The appellant's claim is that he formed a relationship with a girl in Iran, "F". That relationship was platonic and one of friendship only. F was born in March 1994. She is, in other words, approximately one year younger than the appellant. Their relationship began in August/September 2008 when the appellant was 15 years of age and F was 13. They met when the appellant saw F outside her school whilst he was passing on his motorbike. They noticed each other and the appellant stopped. He walked in front of F and left on the pavement a piece of paper with his mobile phone number. F picked up that piece of paper and subsequently phoned the appellant and their relationship began. The appellant phoned F from a telephone box after she had phoned him to let him know that it was safe to call. The appellant used a telephone box because he did not want a record of the telephone calls on his mobile phone or hers. The appellant and F met regularly on Fridays in secret because their relationship was illegal as it was one outside marriage. The appellant says that the meeting occurred because F would make an excuse to go and see her aunt and would meet the appellant. Their relationship went on for some six to seven months.

15. On F's birthday in 2009, the appellant wanted to meet F in order to give her a present that he had bought for her. They arranged to meet secretly in the afternoon in a building which had a shop on the ground floor but private accommodation above. F knew this shop because she went there to buy things. They met and went to the second floor.

16. Whilst they were there, F's father came up the stairs. He worked for the local government and was wearing his uniform. He saw the appellant and F and became furious. He questioned the appellant and grabbed hold of the appellant, beating him and saying that he would kill the appellant. The appellant was frightened and tried to release himself from F's father and run away. As he did so, F's father fell down the stairs leading from the shop below. F's father was not moving. F was in hysterics and the appellant panicked. He ran away because he thought that if someone had seen him, or F's father had woken up they would blame the appellant for trying to murder F's father. He went on his motorbike to his paternal uncle's house some five minutes away. There, he told his paternal uncle what had happened. His paternal uncle took him to the house of one of his friends and said that he would find out what had happened. His uncle left and tried to investigate what had happened.

17. The next day, his uncle called the friend and told him that F's father had fallen down the stairs and had died. He said that the appellant's father had been arrested; they were asking about the appellant and blaming his father for hiding the appellant. His uncle's friend relayed this to the appellant. His uncle also told the friend that it was not safe for the appellant to stay in Iran. In the evening, someone came to the house of his uncle's friend and helped him escape. He was told by his uncle's friend that his uncle had said that the appellant should not make any contact with members of

the family as this would put them in danger. They walked a long distance through some mountains to a village where, the appellant says, the people were talking in Turkish. The appellant stayed there for one week after which he was put in a lorry, and having changed lorries on three occasions, arrived in the UK.

18. The appellant says that he has not been in contact with his family in Iran because he fears they would be in danger. He fears return to Iran because he will be prosecuted for the murder of F's father and also for the illicit relationship that he had with F.

Issues

19. The issues identified by the representatives in their oral submissions and by Ms Fisher in her skeleton argument are as follows:

(1) Is the appellant credible and is his account of events in Iran accepted?

(2) If it is accepted, is the appellant at risk of prosecution for the murder of F's father and for the "illegal relationship" with F?

(3) If yes, would any punishment or treatment that the appellant might face in prison amount to persecution or serious ill-treatment contrary to Art 3 of the ECHR?

(4) Would any such ill-treatment be for a reason falling within the Refugee Convention? And finally,

(5) Is the appellant at risk of persecution or serious ill-treatment on return to Iran on the basis that he illegally exited the country?

Law

20. The burden of proof is upon the appellant to establish that there is a real risk that on return to Iran he would be subject to persecution for a Convention reason, namely because of race, religion, nationality or membership of a particular social group, or serious ill-treatment or death contrary to Arts 3 and 2 of the ECHR or Art 15 of the Qualification Directive (Council Directive 2004/83/EC).

Discussion and Findings

1. Submissions

21. It is now accepted that the appellant was a minor when he came to the UK. He was 16 years of age. In his submissions, Mr Deller acknowledged that the appellant's evidence should be seen in the light of the fact that he was a minor. He submitted that the proper approach for a claim involving a child was not to concentrate on credibility issues but rather to consider his account against the background material and he urged caution in doing so. He reminded me that the appellant's relationship

with F was not, as the appellant made clear in his oral evidence, an intimate one, and that in the light of that actual relationship the appellant was not at real risk of prosecution on the basis of that "illicit" relationship. He reminded me that there was no subsequent evidence to support the appellant's claim that he was wanted by the authorities. The only evidence was what he said his uncle had told the friend and which had been passed on to the appellant, namely that the appellant's father had been arrested whilst the authorities were looking for the appellant. The appellant had not made subsequent contact with his family and, Mr Deller submitted, I should assess the appellant's explanation that he had not done so because it would be dangerous to his family.

22. As regards the expert evidence, again Mr Deller invited me to approach it with a certain degree of caution. He acknowledged that that evidence demonstrated that no particular mercy was shown to juvenile offenders.

23. Ms Fisher submitted that I should find the appellant to be credible. She submitted that the core of his claim had been consistent throughout. There were minor discrepancies in the appellant's evidence, for example whether F's father had died from a "head injury" or a "stroke" but, she submitted, the appellant's account of being confronted by F's father was not implausible and was supported by Dr Kakhki in his report at page 23 of the appellant's additional bundle. Equally, it was not implausible that the appellant would be prosecuted for murder or for the illicit relationship. She submitted that Dr Kakhki's report supported the risk of prosecution and, in relation to the illicit relationship, that risk existed even if the relationship was not an intimate one.

24. Mr Deller acknowledged that if the appellant's evidence was accepted, it would be difficult on the basis of the background evidence (including the expert evidence) to demonstrate that he was not at risk. However, Mr Deller submitted that the appellant was not at risk by virtue of any Convention reason, whether religious, imputed political opinion or part of a particular social group (PSG). The appellant could only succeed in establishing that he was entitled to humanitarian protection or that his removal would breach Art 3 of the ECHR.

25. Ms Fisher submitted that, if the appellant was at risk, then in relation to any prosecution for the illicit relationship he was part of a PSG namely those "transgressing social mores" in Iran. She accepted that his prosecution for murder and any consequences flowing from conviction would not engage the Refugee Convention.

2. <u>Credibility</u>

26. In reaching my factual findings, I have done so in the context of the background situation in Iran set out in the material to which I was referred, in particular the expert report of Roya Kashefi dated 12 April 2011 (at pages 19-25 of the appellant's bundle) and that of Dr Kakhki dated 5 April 2012 (at pages 11-46 of the appellant's

additional bundle). I was not specifically referred to any other background material by either Mr Deller or Ms Fisher.

27. Additionally, in reaching my finding, I bear in mind that the appellant was a minor, aged 16 on arrival and also a minor when he was interviewed. I assess his evidence in the light of that. I also take into account the appellant's evidence in his witness statement dated 9 July 2012 at paras 4 and 5 in which he relates a violent attack on him that occurred in November 2010 and which resulted in a head injury which, the appellant says, caused him to suffer from memory loss as well as anxiety and fear and headaches.

28. As I have indicated, Mr Deller did not subject the appellant's evidence to detailed forensic scrutiny so as to highlight any significant discrepancies in the appellant's evidence. There are some discrepancies. For example the appellant said in his first statement that he had been told that F's father had died from a "stroke". Subsequently, and in his oral evidence, he said that F's father had died from "head injuries". The appellant in his oral evidence said that he had never said that F's father had died from a stroke; in other words that was a mistaken record of his evidence. In her decision letter dated 1 July 2009, the Secretary of State offered few reasons for doubting the appellant's account. At para 30 the Secretary of State stated that: "If you were suspected by the Iranian authorities of having a relationship outside marriage, they would commence prosecution procedures." Then, at para 31 the Secretary of State did not accept that F's father knew about the secret meeting of the appellant and F on her birthday: "You have provided no reasonable explanation for your girlfriend's father knowing about the secret location and the time you planned to meet your girlfriend there."

29. In his report, Dr Kakhki (at page 23 of the appellant's additional bundle) states this:

> "At this juncture, I would like to discuss the reasonableness of [the appellant's] girlfriend's father discovering/suspecting her of entering into an illicit relationship. Within the Iranian patriarchal societies, wherein the honour of the family is enshrined and revered both within the culture and through the Islamic doctrine, it is unsurprising that the father, who is responsible for leading the family and protecting its/his own integrity, would come to know what is happening in his own household. This is especially the case within smaller, more tribal-based cities in Iran, where a family's reputation is intrinsically linked to their perceived honour and where many families know each other socially. In such circumstances and in view of [the appellant's] girlfriend's father's professional role as a police/government officer, in my opinion, it is culturally the norm for him to monitor the moral wellbeing of his daughter and it would be relatively easy for him to discover what she is partaking in and where, either using his police resources or general common sense. It is normal practice within most Iranian families to specifically monitor the behaviour of their children, especially the daughters, who would be perceived to be vulnerable and defenceless if they are not protected by the male family members. This is motivated either by religious belief of the family, or the culturally ingrained concept of honour."

30. Both Dr Kakhki and Roya Kashefi in her report, provide ample evidence of the background situation in Iran concerning the impropriety of a relationship outside marriage between a man and a woman, including the potential legal consequences of

such a relationship. At page 22 of the appellant's additional bundle, Dr Kakhki states that:

> "Applying these Articles to [the appellant's] case, if it is proven that he has entered into any form of relationship with an unrelated women, he would be punished under the above Articles. If it is proven that the relationship expanded to sexual intercourse, the punishment would be 100 lashes as highlighted in the provision below."

31. The reference to the "Articles" above is to Article 637 and 638 of the Islamic Penal Code which are in the following terms.

> "When there is evidence of an extra-marital relationship existing without sufficient evidence to prove that sexual intercourse occurred, the parties would be punished according to following legal Articles.
>
> According to Article 637 of the Islamic Penal Code, whenever a man and a woman, who are not married to each other, commit any illegal relationship or a crime against decency (except sexual intercourse) they would be sentenced to 99 lashes if the act was not committed under duress. In cases of duress, only the agitator would be punished.
>
> Article 638 states that anyone who commits an offence against 'public morality' in any place where people are assembled together (streets, meetings, private parties etc) will, at the discretion of the judge (and as long as the judge does not decide that an offence has been committed against the Shari'a law of Islam), receive a prison sentence of ten days to two months and up to 74 lashes of the whip."

32. Dr Kakhki continues:

> "The standard of proof in such cases include the confession of the perpetrators, witness testimony, circumstantial evidence and the knowledge of the judge, discussed above. In my opinion, it would not be difficult in [the appellant's] case to establish the existence of his illegal relationship, regardless of any investigation based on the homicide aspect of his case. Such evidence could be gathered from telephone records, testimony of witnesses who may have seen the couple together, the birthday present he purchased for his girlfriend etc. All these may form circumstantial evidence that may be used to trigger the 'Judge's Knowledge' method of proof and render him liable for these crimes."

33. Those views are supported by Roya Kashefi in her report. At paras 2.9 and 2.10 she states:

> "2.9 It is this honour code and staying out of public's eye that takes them to the second floor landing of a building on her birthday. The Reasons for Refusal Letter of July 2009 questions how her father knew where they were. Based on my knowledge of Iran and small traditional towns it would have been enough for one person to have seen them together to fetch her father. It did not matter that sex was not part of their relationship. To ruin a young girl's reputation and family honour it is enough to see her with a stranger, everything else is implied. Therefore, in the same way that [the appellant] was protecting her reputation by putting a piece of paper on the floor, her father was doing the same by beating her boyfriend.
>
> 2.10 Up to this point of [the appellant's] claim is completely in keeping with my knowledge of Iran and plausible in my view."

34. In my view, both experts support the appellant's claim concerning the circumstances of his relationship with F and the consequences to him if that relationship was discovered by F's father.

35. Turning to the appellant's evidence that he pushed F's father down the stairs and, as a result he died, and the appellant now faces the prospect of prosecution for murder, both experts deal with this in their reports. Both recognise that the appellant, if convicted of murder, would be at risk of execution. At paras 2.11-2.12 Roya Kashefi says this:

> "2.11 [The appellant] states that fearful for his life, he pushed his girlfriend's father away to get away from the beatings and he fell down the stairs. If this is what happened, according to article 205 and 206(B) of Book Three *(Qesas)* the Islamic Penal Code, 'cases where the murderer intentionally makes an action that is inherently lethal, even if he does not intend to kill the victim', [the appellant] could be sentenced to death by order of Qesas. It is highly likely that he would also be sentenced to receive up to 99 lashes for his relationship with his girlfriend based on article 637.
>
> 2.12 Under increasing international pressure the Islamic Republic has stated that it will not execute children. What has happened is that the child offenders have either remained in detention until they reach 18 years of age and are then sentenced to death or that they are sentenced to death and the sentence is held off until they reach the age of 18. Both scenarios have been commented upon and condemned in many international human rights reports. I would like to draw your attention to a paragraph from one such report prepared by Amnesty International and published in June 2007 the report is entitled, Iran: the last executioner of children:
>
> 2.12.1 'On 10 January 2005, the Speaker of the Judiciary reportedly dismissed reports that Iran executed child offenders as 'foreign propaganda ... aimed at distorting the image of the Islamic Republic'. The same month the Committee on the Rights of the Child noted that the Iranian delegation appearing before it had stated that Iran had suspended executions of people for crimes committed before they were 18. However, on 19 January 2005, the same day that the Committee examined Iran's report, 17-year-old Iman Farokhi was executed in Iran. The Committee deplored the fact that 'such executions have continued since the consideration of the State party's initial report, including one such execution on the day the second report was being considered.'"

36. At para 3.1, Roya Kashefi states that if the appellant: "Is wanted for murder this would become known to the security and intelligence agents present at the airport."

37. At para 4.1 and 4.3 Roya Kashefi concludes as follows:

> "4.1 The bias of the courts and poor standards under which trials are held in Iran violate Islamic Republic's own limited safeguards for due process and fair and impartial hearing as well as its international obligations and undertakings. These have been the subject much criticism in numerous international human rights reports. Every judge has his own personal understanding and interpretation of the Islamic laws and the same case can have as many different outcomes as there are judges. This arbitrary application of justice makes it very difficult to comment on the fairness and impartiality of the entire judicial system. However, the use of torture to extract information and summary trials are not exclusive to political cases and since in the last two years many journalists, lawyers and human rights defenders have ended up in unclassified cells in jails we are hearing more and more about how torture,

> coercion and ill treatment have been used to extract information and/or confessions in non political cases.
>
> ....
>
> 4.3 If it is accepted that [the appellant] pushed his girlfriend's father down some stairs and consequently he died, according to article 205 and 206(B) of Book Three *(Qesas)* the Islamic Penal Code, 'cases where the murderer intentionally makes an action that is inherently lethal, even if he does not intend to kill the victim', [the appellant] could be sentenced to death by order of Qesas. It is highly likely that he would also be sentenced to receive up to 99 lashes for his relationship with his girlfriend based on article 637 because it was this relationship that brought everyone together on the day of the incident."

38. Dr Kakhki deals at length with the law relating to homicide in Iran (see pages 12 *et seq* of the appellant's additional bundle). Dr Kakhki concludes that the appellant is at risk of prosecution for murder and, in relation to proof, states (at page 15 of the bundle) that:

> "If [the appellant] is viewed to have fled the crime scene after the commission of the offence this, in conjunction with any testimony or information extracted from his girlfriend, may constitute to satisfy the knowledge of the judge criteria."

39. At page 16 Dr Kakhki continues that:

> "Due to the alleged identity of the victim as a police officer and his subsequent escape, the authorities would extensively investigate the circumstances of the killing, with the likely use of torture."

40. And further at page 16 continues:

> "As is evident from the above account, the fact of innocence of the individual concerned does not prevent the authorities from pursuing the matter in the judiciary and securing a conviction, even if by means of forced confession .... This may have relevance to [the appellant's] account, particularly if there is indeed a bias against him in the investigation due to the victim's role as a police officer in a local district where the case would be proceeding."

41. At page 16 Dr Kakhki states that:

> "With regards to the implication of [the appellant's] purported age at the time of the offence, I would like to highlight that there are numerous instances of the Iranian authorities arresting and executing individuals for murder, even if they were younger than 15 at the time of commission."

42. At page 19, he states that:

> "In the light of [the appellant's] account, namely that the murder was committed against someone who was a police officer and his father was arrested for possibly assisting his endeavours to hide from the authorities, it is apparent that they would seek the strictest possible penalty open to them. As such, in my opinion, [the appellant's] age at the time of the alleged murder would not be of significant importance if he returned to Iran as (if found guilty) he may be executed after the age of 18, if not reached so far."

43. As I have already indicated, in my view, these expert reports materially support the appellant's account and his fear of prosecution both for murder and for his illicit relationship with F. I accept the evidence contained in the two experts' reports. The appellant's account has been largely consistent throughout and, as I indicated above, Mr Deller did not seek to subject the appellant's evidence both prior to the hearing and given orally at the hearing to any intense forensic scrutiny. The appellant's account of how he conducted his relationship with F in secret is entirely consistent with the background evidence concerning the near impossibility of conducting such a relationship in public in Iran. Likewise, given the position of F's father, it is not implausible that he would have the means and wherewithal both to monitor and, as the appellant claims, discover the whereabouts of his daughter when she was meeting the appellant on her birthday above the shop. The appellant's reaction, following what he claims happened to F's father, by running away is entirely plausible given the risks he then ran if F's father died and because of the discovery of his relationship with F.

44. I accept the appellant's explanation why he has not contacted his family since coming to the UK. If indeed he is wanted in Iran for murder or because of his relationship with F, then contact with his family would potentially put them at risk if only of interrogation and enquiry by the Iranian authorities.

45. For these reasons, I find the appellant to be credible. I accept his evidence. I find that he was in a platonic relationship with F. I accept that their relationship was discovered by F's father who was a police officer. I accept that in a confrontation F's father was pushed away by the appellant, fell down some stairs and, as a result, died. On the basis of the background evidence, I accept that the appellant is at risk of prosecution for murder and also for his illicit relationship with F.

46. As regards the former, I find that the appellant is at risk of execution and, if not, imprisonment in circumstances in which (and I did not understand Mr Deller to challenge this) give rise to a risk of torture or inhumane or degrading treatment. Likewise, as regards the latter, the appellant is at risk of prosecution and punishment of up to 99 lashes. Mr Deller's position is amply supported by the report of Dr Kakhki dealing with the use of torture, and the conditions, in Iranian prisons (see pages 16-26 under the heading "The Use of Torture in the Iranian Legal System"). Those consequences, in my judgment, amounts to serious ill-treatment and inhumane or degrading treatment contrary to Art 3 of the ECHR.

47. Consequently, I am satisfied on the evidence that on return to Iran there is a real risk the appellant will be subject to persecution (for the purposes of the Refugee Convention) and serious ill-treatment (or death) for the purposes of humanitarian protection and Art 3 of the ECHR (or Art 2 of the ECHR).

3. PSG

48. There remains the issue of whether, in relation to the risk arising from the prosecution and punishment for his illicit relationship that would be for a

Convention reason such as to engage the Refugee Convention and entitle the appellant to asylum. It is not suggested that the risk arising from his prosecution and punishment for murder engages the Refugee Convention. I now turn to that issue.

49. I begin with Art 10.1(d) of Council Directive 2004/83/EC (the "Qualification Directive") (transposed in reg 6(1)(d) of the Refugee or Person in Need of International Protection Regulations 2006 (SI 2006/2525) (the "2006 Regulations")). It provides a definition of a PSG as follows:

> "(d) a group shall be considered to form a particular social group where in particular:
>
> - members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
>
> - that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;
>
> depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States: Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article."

50. Ms Akinbolu submitted that the consequences faced by the appellant as a result of prosecution for the illicit relationship with F fell within the Refugee Convention. She submitted that the appellant was part of a PSG which she defined as:

> 'people who have breached or are perceived to have breached the moral code in Iran.'

51. Ms Akinbolu relied upon the definition of PSG in Art 10.1(d) of the Qualification Directive (see also reg 6(1)(d) of the 2006 Regulations). Ms Akinbolu relied upon the expert reports of Dr Kakhki at page 12 and also section 2 of Roya Kashefi's report headed "Honour and Shame" which, she submitted, identified the appellant as being part of a group in Iran which "shared an innate characteristic" or has a "common background" that could not be changed and which gave rise to a "distinct identity" in Iran. She also relied on the House of Lords' decision in Islam v SSHD; R v IAT ex parte Shah [1999] 2 AC 629 (hereafter "Shah and Islam"). In particular, she relied upon the speeches of Lords Steyn and Hutton who concluded that women in Pakistan suspected of adultery and who lacked the protection of the state were a PSG. By analogy, Ms Akinbolu submitted that the evidence established the appellant was part of a PSG based upon his breach, or perceived breach, of the moral code in Iran.

52. Mr Saunders (in his brief submissions) adopted the same stance as had Mr Deller at the earlier hearing. He did not accept that the appellant was part of a PSG. He did

not accept that there the appellant (as part of a wider group) had an "innate characteristic" or of a group that had a "common background" or that the claimed group was a "distinct entity" in Iran.

53. I have already set out at some length passages from both Dr Kakhki's and Roya Kashefi's reports above. I do not repeat those here. The background to Iranian society and attitudes to sexual mores and, what Roya Kashefi refers to as, 'codes of honour and shame' are set out in her report at paras 2.1-2.4 as follows:

> "2. **Honour and Shame**
>
> 2.1 While in theory codes of honour and shame refer to the behaviour of both men and women, in Iran, honour is seen more as men's responsibility and shame as women's. This division of honour and shame is related to the fact that honour is seen as actively achieved while shame is seen as passively defended, resulting in different expectations of behaviour from men and women.
>
> 2.2 The woman's chastity belongs to the family and is a measure of the family's honour. Maintaining this chastity honour, therefore, becomes a tool of control – consciously by the men and subconsciously by the woman herself who constantly has to check her appearance, actions and choices against the accepted and expected honour codes.
>
> 2.3 Virginity at the time of marriage is the most crucial aspect of this expected honour code. Traditionally, the men who are responsible for safeguarding this chastity and family honour are responsible for the women in the family; before marriage the woman belongs to her father and brother even if he is younger and after marriage her public and private interaction is controlled by her husband.
>
> 2.4 The essence, sex out of marriage is not only a sin but a codified offence according to the Islamic Penal Code. However, sex out of marriage is the ultimate dishonour which is why it carries the ultimate punishment of death by stoning. This stress on sex within the confines of marriage is evident in the punishment of Zena (adultery). A married man who can have "legal' sex with his wife as and when he chooses will be stoned to death but an unmarried man (or woman) will be punished by a hundred lashes."

54. Both her report and that of Dr Kakhi emphasis the importance of moral observance and strict sexual mores in Iran. At para 2.7 Roya Kashefi states:

> "The importance of a young woman's chastity and maintaining honour are part of children's upbringing in traditional homes. Maintaining this honour and good name in small towns where people tend to know each other is much more crucial than in big cities like Tehran. In small towns the circle of honour is much wider than family and friends."

55. The behaviour of the appellant – whose evidence I have accepted – is entirely consistent with the need to preserve a façade of respectability and even deniability of any relationship with a young woman in Iran. His approach to F was clandestine,

leaving a note for her to pick up. Their meeting was clandestine and the reaction of F's father wholly consistent with the strict 'honour and shame' codes the experts refer to in their reports. Society's disapproval of conduct breaching its moral codes is directed (although not identically) both against women and men (see Roya Kashefi's report at para 2.1) and the offence reflecting the moral code is applicable to both. Further, the criminal offences identified in both reports for engaging in "illicit relationships" reflect the prevailing social mores (see Roya Kashefi's report at para 2.6 and Dr Kakhki's report at para 1.2).

56. On the basis of this evidence, I accept that the appellant forms part of a PSG as propounded by Ms Akinbolu in her submissions. I am persuaded that he shares "an innate characteristic" with others in his position or together with others who have, or are perceived to have, transgressed Iranian social mores; he shares "a common background which cannot be changed". The appellant (and any other person in his position) cannot change the fact that they have offended the moral code even if they are subsequently prosecuted and convicted for their behaviour. The persecution through the criminal justice system does not define the group – which would be fatal to it being a PSG (see Shah and Islam and K v SSHD; Fornah v SSHD [2006] UKHL 46) - it merely reflects the potential response of the state to some who are in that group. It is the individual's behaviour and its disapprobation by reference to the moral codes of Iranian society which defines the group.

57. The evidence in this appeal echoes and provides an analogy with the PSG accepted in Shah and Islam by Lord Steyn (at page 645 and with whom Lord Hutton agreed at pp.658-9) of women who had offended the social mores of Pakistan. Having accepted the 'wider' PSG of "women in Pakistan" recognised by Lords Hope and Hoffman, Lord Steyn said this in acknowledging that there was also a 'narrower' PSG established on the evidence (at page 654):

> "If I had not accepted that women in Pakistan are a "particular social group," I would have held that the appellants are members of a more narrowly circumscribed group as defined by counsel for the appellants. I will explain the basis of this reasoning briefly. It depends on the coincidence of three factors: the gender of the appellants, the suspicion of adultery, and their unprotected position in Pakistan. The Court of Appeal held (and counsel for the Secretary of State argued) that this argument falls foul of the principle that the group must exist independently of the persecution. In my view this reasoning is not valid. The unifying characteristics of gender, suspicion of adultery, and lack of protection, do not involve an assertion of persecution. The cases under consideration can be compared with a more narrowly defined group of homosexuals, namely practising homosexuals who are unprotected by a state. Conceptually such a group does not in a relevant sense depend for its existence on persecution. The principle that the group must exist independently of the persecution has an important role to play. But counsel for the Secretary of State is giving it a reach which neither logic nor good sense demands. In *A. v. Minister for Immigration and Ethnic Affairs* 142 A.L.R. 331, 359 McHugh J. explained the limits of the principle. He said:
>
> > "Nevertheless, while persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed

> men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognisable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group."
>
> The same view is articulated by *Goodwin-Gill, The Refugee in International Law,* 2nd ed., (1996) at p. 362. I am in respectful agreement with this qualification of the general principle. I would hold that the general principle does not defeat the argument of counsel for the appellants.
>
> My Lords, it is unchallenged that the women in Pakistan are unprotected by state and public authorities if a suspicion of adultery falls on them. The reasoning in *Acosta*, which has been followed in Canada and Australia, is applicable. There are unifying characteristics which justify the conclusion that women such as the appellants are members of a relevant social group. On this additional ground I would hold that the women fall within the scope of the words "particular social group."

58. Here too the group shares a unifying characteristic and lack of protection from the State. Indeed, thorough the criminal justice system there is actual persecution by the State.

59. On its face, Art 10.1(d) indent 2 would also appear to require that the group have "a distinct identity" in Iran "because it is perceived as being different by the surrounding society". To the extent this might be thought to impose an additional definitional requirement to that in indent 1, it has been doubted by Lord Bingham in K and Fornah at [16] as it would propound "a test more stringent than is warranted by international authority". Likewise, Lord Brown in K and Fornah considered that the definition in Art 10.1(d) would have to be interpreted "consistently" with the definition of PSG in the UNHCR *Guidelines on International Protection* (7 May 2002) which defines a PSG either by reference to a shared, common (often innate) characteristic or a group that is "cognizable" in the society despite its members not sharing such a characteristic (set out at [15] of Lord Bingham's speech in K and Fornah). Had I been pressed to do so, I would have interpreted the Qualification Directive (and the 2006 Regulations) consistently with the doubts expressed in the House of Lords as those provisions were, undoubtedly, intended to give effect to the law as it was understood and adopted in a number of jurisdictions in the world applying the Refugee Convention. However, it is not necessary for me to do so. In this appeal, in any event, I am satisfied that the group to which the appellant belongs is one which, on the evidence, Iranian society recognises as "setting them apart" and "different" by others in society.

60. For these reasons, I am satisfied that the appellant meets the requirements of Art 10.1(d) and is part of a PSG. Further, the persecution that he fears, namely prosecution, conviction and punishment for his illicit relationship with F, is "for reasons of" his membership of that PSG.

4. Conclusion

61. Consequently, I am satisfied that the appellant's removal to Iran would breach the Refugee Convention and Arts 3 and 2 of the ECHR.

5. Illegal Exit

62. Ms Fisher also relied upon the risk to the appellant on return as someone who had illegally exited Iran. I have accepted the appellant's evidence, I also accept that when he travelled to the UK he left Iran illegally, crossing its border to, in all probability, Turkey.

63. Following my acceptance of the appellant's account and that he therefore succeeds in establishing his claim under the Refugee Convention and Arts 2 and 3 of the ECHR, it is not strictly necessary to consider what risk, if any, he would hypothetically be exposed to simply on the basis that he had left Iran illegally.

64. I will, however, deal with this matter in brief. It was common ground between the representatives that the appellant could not succeed if the situation was governed by the country guidance case of SB (Risk on return – illegal exit) Iran CG [2009] UKAIT 0053. Ms Fisher invited me to depart from SB on the basis that there were "cogent reasons" for doing so in the light of the expert report of Dr Kakhki. In essence, she relied on Dr Kakhki's report in two respects. First, at page 37 of the appellant's additional bundle, he noted that Article 34 of the Passport Law had been amended with effect from 21 February 2010. The effect of this amendment was to increase the potential fine to between 500,000 and 3,000,000 Tomans. Previously, the fine, as the Tribunal had noted (again) on the basis of the evidence of Dr Kakhki at [21] of the determination, was between 100,000 and 500,000 Rials. I was informed that 1 Toman was the equivalent of 10 Rials. Consequently, the minimum fine had arisen from 100,000 Rials to 5,000,000 Rials and the maximum fine had risen from 500,000 Rials to 30,000,000 Rials. Ms Fisher submitted that there was no evidence that the appellant's family could meet any fine imposed and therefore that increased the likelihood of the appellant being detained with possible consequences to him of that. Secondly, she submitted that the Tribunal in SB at [51] had identified few incidents in the evidence of returnees suffering any difficulty. Dr Kakhki's report highlighted a number of other incidents which, therefore, demonstrated an increased risk to the appellant.

65. Mr Deller submitted that the evidence did not justify a departure from SB. He reminded me that the term of imprisonment had not changed and it was difficult, in his submission, to see how a larger fine could in itself amount to serious ill-treatment.

66. As I have indicated, it is not strictly necessary for me to determine whether the evidence justifies a departure from SB. Had it been necessary, I would have concluded that the evidence was not sufficiently cogent to justify departing from the Tribunal findings in SB. First, Dr Kakhki's own conclusion that the appellant was at risk of prosecution if he returned to Iran appears, at least in part, to be premised on

the fact that the appellant faces charges of homicide and immoral relationships which "constitute additional risk factors" (see page 39 of the appellant's additional bundle). Secondly, I am not satisfied that the increase in the minimum and maximum fine for the offence creates a risk of serious ill-treatment falling within Art 3 of the ECHR. There is simply no evidence concerning the wealth or resources of the appellant's family to meet any such fine if one were imposed. The appellant has presented no evidence on that issue which is an entirely discrete matter from whether or not the appellant has been able or willing to contact his family since being in the UK. Thirdly, whilst Dr Kakhki's report identifies some instances of returnees facing prosecution on the basis of their illegal exit, the examples largely relate to individuals who have some political or human rights background (see, in particular, page 41 of the appellant's additional bundle). In assessing the risk to the appellant simply on the basis of his illegal exit, the appellant would have no such background. Fourthly, Dr Kakhki's view is not supported by Roya Kashefi in her expert report. In para 3.1 of her report (at page 24 of the appellant's bundle), Roya Kashefi identifies the risk to the appellant on return if he is wanted for murder and concludes that he would be at risk of being identified at the airport. However, at para 3.2 she considers the situation if the appellant is not wanted by the authorities as follows:

> "If [the appellant] is not wanted by the authorities then he would have no problem in returning to his home town where he could benefit from familial support to settle back into life in Iran."

67. In other words, Roya Kashefi does not identify any risk to the appellant on return simply on the basis that he has illegally exited Iran.

68. For these reasons, the expert evidence relied upon before me would not justify a departure from the country guidance case of SB that (at [52]): "Illegal exit is not a factor which in itself is a significant risk factor."

Decision

69. Ms Fisher also relied upon Art 8 of the ECHR and the appellant's private life in the UK formed since 2009, in particular through his time as a student in the UK with leave granted as an unaccompanied minor. In the light of my finding that the appellant succeeds under the Refugee Convention and Arts 2 and 3 of the ECHR it is not necessary to consider the hypothetical question of whether (if none of those were established) he could succeed under Art 8 alone.

70. The appeal is allowed on asylum grounds and under Arts 2 and 3 of the ECHR.

Signed

A Grubb
Judge of the Upper Tribunal