



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

Appeal Number: AA/09005/2014

THE IMMIGRATION ACTS

**Heard at Manchester Piccadilly
On 6 May 2015**

**Decision and Reasons Promulgated
On 18 May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

**SOHAIL BANAEI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Brown, counsel instructed by GMIAU

For the Respondent: Ms C Johnstone, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.
2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge

Herwald promulgated on 23 January 2015 which allowed the Appellant's appeal against a refusal of asylum.

Background

3. The Appellant was born on 19 March 1969 and is a national of Iran.
4. On 16 February 2014 the Appellant applied for asylum having been encountered at Gatwick Airport travelling on a stolen GBR passport. The Appellant's claim was based on his assertion that he was at risk on return as he had converted from Islam to the Yaresan religion and he would be at risk from having left Iran illegally and returning as a failed asylum seeker.
5. On 20 October 2014 the Secretary of State refused the Appellant's application. The refusal letter gave a number of reasons:
 - (a) The Appellant's nationality was accepted.
 - (b) The Appellant's conversion to the Yarsan religion was not accepted.
 - (c) The Appellant's failure to claim asylum in Italy was said to undermine his credibility.
 - (d) There was no reference to or assessment of the Appellant's claim that he had left Iran illegally.

The Judge's Decision

6. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Herwald ("the Judge") allowed the appeal against the Respondent's decision.
7. The Judge found :
 - (a) He took into account all of the documentary evidence before him and heard oral evidence from the Appellant.
 - (b) He did not find that the Appellant's claim that he was a convert to Yarsan was credible.
 - (c) Given that he had previously recorded that the Respondent did not deny that the Appellant had left Iran illegally the expert report from Dr Kahkhi suggested that the circumstances in Iran underpinning the conclusions of the court in SB (risk on return-illegal exit) Iran CG [2009] UKAIT 00053 for which he provided a report had changed to such an extent that having left Iran illegally and returning as a failed asylum seeker would put the Appellant at risk on return.
8. Grounds of appeal were lodged arguing that:
 - (a) The Judge had made adverse credibility findings in respect of his religious conversion he had failed to give adequate reasons for accepting tht the Appellant had left Iran illegally.

- (b) The Respondent had implicitly not accepted that the Appellant left Iran illegally because what it did and did not accept was set out in the refusal letter at paragraphs 37-39.
 - (c) The Judge failed to give adequate reasons for going behind the CG case of SB.
9. On 12 February 2015 First-tier Tribunal Judge Kelly gave permission to appeal stating that all grounds were arguable.
10. At the hearing I heard submissions from Ms Johnstone on behalf of the Respondent that :
- (a) The Judge made a number of adverse credibility findings against the Appellant but without a positive concession the Judge took into account the experts report based on the Appellant's assertion that he left Iran illegally.
 - (b) The expert report did not support the assertion that returning without a passport and travel documents would lead to detention.
 - (c) The Judge did not give adequate reasons for departing from country guidance failing to take into account the Practice Direction.
11. On behalf of the Respondent Mr Brown submitted that :
- (a) The Respondent did not totally reject the Appellant's credibility in that he accepted that the Appellant left Iran via Italy.
 - (b) The Appellant had given an account of his illegal exit in his Screening Interview and had asserted that he had never had a passport.
 - (c) The finding at paragraph 13 (3) was therefore sustainable.
 - (d) The Respondent was represented at the hearing. The consequences of illegal departure were a major part of the Appellant's case. The Respondent did not address the report, did not apply for an adjournment and did not suggest in submissions that the Appellant had not left illegally..
 - (e) What is written in paragraph 13(c) reflects the attitude of the res's representative and the fact that the refusal letter was silent on this issue.
 - (f) The Judge then had to consider whether there was sufficient evidence to justify departing from SB. The authority of SG (Iraq) v SSHD; OR (Iraq) v SSHD [2012] EWCA Civ 940 allowed the court to depart from the case if very strong grounds supported by cogent evidence were adduced justifying that course. The Judge looked at the report and gave reasons for his decision.
 - (g) Had the submissions made today in relation to the Appellant's credibility and his illegal exit been made before Judge Herwald he could be criticized but they were not.

Finding on Material Error

12. Having heard those submissions I reached the conclusion that the Tribunal made no material errors of law.
13. This was an application for asylum based on the Appellant's claim to have converted from Islam to the Yarsan religion. The Judge took into account the Appellant's claim as set out in his screening interview, asylum interview, chronology and rebuttal statement all of which included an unequivocal assertion that he had left Iran illegally without a passport and travelled via Turkey and Italy and arrived in the United Kingdom using a stolen British passport.
14. Aspects of his claim, his identity, nationality, the fact that he travelled via Italy and travelled on a stolen passport were accepted by the Respondent. The fact that the Appellant was encountered with a stolen British passport was acknowledged in the refusal letter at paragraph 15. The fact that he travelled via Italy was also acknowledged in paragraph 35 by way of an adverse inference for failing to claim asylum there. The refusal letter however neither explicitly nor implicitly referred to his mode of departure from Iran and I do not accept that the Judge was obliged to read into it that the Respondent did not accept that he left illegally.
15. The Judge had before him the documents that explicitly made his illegal exit part of his case. Indeed the Judge makes no reference to the CMR dated 14 November 2014 but the fact that this was central to his case was identified as the CMR document records that an expert would be relied on in relation to 'illegal exit from Iran.' The full hearing was originally scheduled for 5 December 2014 and there is on the file an adjournment request on the basis that the expert report was not yet available from Dr Kakhi who would comment on *'the risk faced by the Appellant on return based on his religious beliefs and his illegal exit.'*
16. The Judge recorded the Appellant's oral evidence at paragraphs 10 (a)-(m) and that he left Iran illegally. The Judge summarised the Respondent's case at paragraph 11 which he said had been 'amplified by the Respondent's representative' although I note that this did not include any challenge to the Appellant's assertion that he had left Iran illegally recorded in the decision or indeed in the record of proceedings that I have read.
17. The Respondent's representative Mr Cliff in final submissions relied on the reasons for refusal letter and said nothing about the expert report or illegal exit and this was noted by the Judge at paragraph 13(b). Ms Khan who represented the Appellant addressed the Judge at length about his conversion and his illegal exit.
18. It is against this factual background of the unchallenged evidence of the Appellant that he had left Iran illegally that the Judge at paragraph 13(c) records what I am satisfied was an entirely reasonable conclusion that was open to him in relation what he understood to be the view of the Respondent's view as reflected by Mr Cliff:

" ..the very fact that he appears illegally to have exited Iran (and this was not denied by the Respondent) would mean he must be granted asylum.'
19. I do not accept that simply because the Judge made adverse findings against the Appellant in respect of his religious conversion it immediately followed that he had to

reject the claimed illegal exit both because while it was always central to his case it was never challenged but also because the Respondent had accepted limited aspects of his case including that fact that he travelled via Italy and arrived in the United Kingdom using a stolen United Kingdom passport.

20. Having accepted that the Appellant had left Iran illegally the Judge was bound to consider whether he was at risk on return and had before him a report from Dr Kakhki who had also been the expert in SB. I am satisfied on the basis of SG (Iraq) v SSHD: OR (Iraq) v SSHD [2012] EWCA Civ 940 that the Judge was entitled to depart from the country guidance in the appropriate circumstances: the Court of Appeal said that the CG procedure was aimed at arriving at a reliable and accurate determination and it was for those reasons, as well as the desirability of consistency, that decision-makers and tribunal judges were required to take country guidance determinations into account, and to follow them unless very strong grounds supported by cogent evidence, were adduced justifying their not doing so (paras 43 – 50).
21. The report in this case was compelling given that it was written by the same expert as that in SB so it seems there is no one better placed than Dr Kakhki to identify the change in the material on which the assessment of risk is based. The Judge identified the report as so vital that he appended pages 21-36 of the report to his decision. The Judge quoted from the expert's report where he had stated that he had not been asked in SB to address whether the risk on return was enhanced by being a failed asylum seeker and that the issue of risk on return was not the focal point of his report in SB.
22. It is clear however that the Judge was not being asked to come to a different conclusion based on the same material as was before the court in SB but rather Dr Kakhki was identifying changes that changed the assessment of risk. The Judge summarises the new information at paragraph 13(c) that was not before the court in SB that leads him to the conclusion that the Appellant was at risk on return: firstly he specifically identifies an amendment to the passport law that occurred in 2010 that requires Iranians to return either with a valid passport or a travel document issued by the Iranian embassy called a Barge Obour which the Appellant could not obtain as the Iranian Embassy has limited functionality since the breakdown of diplomatic relations with the UK which post dates SB; the second change which the Judge summarises by reference to page numbers in the experts report in essence relates to more recent evidence of the changed attitude of the Iranian authorities to failed asylum seekers since SB and the pages referred to by the Judge cite a number of returned failed asylum seekers who were the subject of persecutory treatment and the experts conclusion that the Appellant would be at risk of similar treatment.
23. I am therefore satisfied that the Judge had clearly demonstrated that there were very strong grounds supported by cogent evidence that allowed him to depart from the general guidance given in SB that simply being a failed returning asylum seekers was not a risk factor
24. I was therefore satisfied that the Judge's determination when read as a whole set out findings that were sustainable and sufficiently detailed and based on cogent reasoning.

CONCLUSION

25. I therefore found that no errors of law have been established and that the Judge's determination should stand.

DECISION

26. The appeal is dismissed.

Signed

Date 12.5.2015

Deputy Upper Tribunal Judge Birrell