UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER) **APPEAL NUMBER: AA/07255/2015**

THE IMMIGRATION ACTS

Heard at: Field House	**Decision and Reasons Promulgated**
on 16 February 2016	**on 29 March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between
MASTER AB
ANONYMITY DIRECTION MADE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: **Mr K Smyth, Kesar & Co Solicitors**
For the Respondent: **Mr N Bramble, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. I continue the anonymity direction made by the First-tier Tribunal, which is to remain in place unless this Tribunal or any other appropriate court directs otherwise. As such, no report of these proceedings shall directly or indirectly identify the appellant or any member of his family. Failure to comply with this direction could amount to contempt of court.

2. The appellant is an ethnic Kurd and is a national of Iran, born there on [ ] 1997. His appeal against the decision of the respondent on 24 April 2015 to refuse his asylum application and to remove him from the UK, was dismissed by First-tier Tribunal Judge Traynor in a decision promulgated on 25 November 2015.

3. The Judge found that the appellant had not established that he has a well founded fear of persecution in Iran. In dismissing the appeal he accepted that the appellant had worked as a smuggler and had been arrested and detained on one occasion when caught smuggling. It was also accepted that on the second occasion he had been shot at and had run away to avoid being caught for smuggling and that there was a Court summons issued for him in Iran [22]. The activity that he was involved in related to the movement of diesel or alternatively petrol and gas oil, collecting it from one place and taking it to another village approximately an hour from where he lived [13].

4. About 4-5 months prior to his leaving Iran, he was with a group of between 10 and 20 people who were caught by the authorities whilst engaged in this activity. He claimed that he had been taken to an army camp where they were held for two or three nights. His family were contacted and were able to arrange for a payment of a bribe to secure his release.

5. Those who procured his release told him that he should not work for a while and that if he were caught again, he would not be released.

6. He waited about a month to replace the horse that the authorities had killed when he was first detained. He then began to smuggle again. He was told that he was permitted to smuggle between the hours of 10pm and 4am. Anyone caught smuggling outside those hours would be set on fire or alternatively shot.

7. Despite this, he decided to join others who were smuggling before 7pm. He claimed that they were intercepted by the authorities who began to fire at them and, as a result, some of the group were killed. He was able to make good his escape to Khelakn, where his family has land and where he was able to hide at a house for five days [15].

8. He claimed that his brother was told that the appellant had been smuggling out of hours, following which the home was searched and his family humiliated. He claimed that a court summons addressed to him was received at his home. In due course, arrangements were made for him to be taken from Iran in order to avoid the problems that he faced there [15].

9. The respondent did not accept that the appellant had established that he had a well founded fear of persecution in Iran. In particular it was not accepted that simply because he had received a summons he would face inhuman and degrading treatment or that he would be persecuted on account of his past activity. Whilst noting that the penalty for drug smuggling is death, there was no evidence that in the case of those smuggling other items in Iran that they would face anything other than prosecution and the likely consequence of a custodial sentence. It was not accepted that he would receive a harsher sentence or that the activities in which he

was involved for the second time meant that he was at greater risk of facing ill treatment, sufficient to amount to persecution [23].

10. The respondent considered that his fear was subjective. There was nothing in his evidence or in the background material suggesting that he would face a sentence of anything more than several months' detention or a fine for his involvement in these activities. Fundamentally, his fear was one of prosecution rather than persecution [23].

11. The Judge had regard to the Tribunal's decision in SB (Risk on Return – Illegal Exit) Iran CG [2009] UKAIT 00053 and in particular paragraph (ii) of the headnote, namely, that Iranians facing enforced return do not in general face a real risk of persecution or ill treatment, which remains the case even if they exited Iran illegally. Having exited Iran illegally is not a sufficient risk factor, although if it is the case that a person would face difficulties with the authorities for other reasons, such a history could be a factor adding to the level of difficulties he or she is likely to face.

12. The Judge also set out headnote (iii): being a person who has left Iran when facing court proceedings (other than ordinary civil proceedings) is a risk factor, although much will depend on the particular facts relating to the nature of the offence(s) involved and other circumstances. The more the offences for which a person faces trial are likely to be viewed as political, the greater the level of risk likely to arise as a result. Given the emphasis placed both by the expert report from Dr Kahki and the April 2009 Danish fact finding report's sources on the degree of risk varying according to the nature of the Court proceedings, being involved in ongoing court proceedings is not in itself something that will automatically result in ill treatment; rather it is probably to be considered as a risk factor to be taken into account along with others.

13. In headnote (iv) the Tribunal held that being a person involved in court proceedings in Iran who has engaged in conduct likely to be seen as insulting either to the judiciary or the justice system, government or Islam constitutes another risk factor indicating an increased level of risk of persecution or ill treatment on return.

14. Judge Traynor also had regard to the earlier decision of BA (Demonstrators in Britain – Risk on Return) Iran CG [2011] UKUT 36 (IAC). He referred to the background material contained within the country guidance cases. He also had regard to documents referred to in the respondent's decision letter and the Home Office country information and guidance document for Iran, regarding Kurds, issued in August 2015.

15. In his findings, Judge Traynor noted that the respondent accepted the appellant's account of events which led him to leave Iran. However, the respondent did not

accept that his subjective fear, including being killed because of his disregard for a warning that was given to him concerning smuggling activity, is objectively well founded because the background material did not support his claim in that regard.

16. The appellant had also claimed that his fear arose because the summons issued against him came from Mohabad or Ormieh, and not his local area, Sarsasht. This would mean that it was likely he would face serious consequences for his activity [42].

17. The Judge found however that he had not supported that claim by any objective evidence. He noted 'conversely' that the respondent highlighted at paragraph 27 of the refusal letter various reports which he referred to at [42].

18. The Judge stated at [43] that having carefully considered the appellant's evidence, that whilst he has given a credible account consistent with the background material, there is no evidence that he has adduced which would support his conclusion that he would face death upon return to Iran because of his activity. If, as claimed, the summons is awaiting him, then, at its worst, the authorities will refer him on to the authorities in an area where the summons was issued and he will have to attend court. If he is detained in that process then there is no evidence to suggest that he would be held incommunicado or that he would not be duly transferred.

19. The Judge referred to the background evidence which showed that the appellant had been involved in an activity upon which the authorities in Iran are clamping down. There was no evidence to show that aside from the indiscriminate shooting of those who are involved in that activity at the time they are active, that those who are subsequently detained are treated any differently to those who have not been shot. In short, the Judge found that in all reasonable likelihood he would face the potential of a short custodial sentence or, more likely, a fine for his activity. Where he has not been caught in possession of smuggled goods, but was known to have been present at a time when such goods were being smuggled, the appellant does not raise his profile in a way that would aggravate his activities 'such as to render a harsher sentence' [44].

20. Moreover the Judge found at [45] that following the guidance in SB, supra, there is no reasonable likelihood that the authorities would consider his activity in Iran to have been politically motivated or his presence in the UK to have any political association. The mere fact that he would be returning from the UK would not be interpreted by the authorities as someone who is anything other than a failed asylum seeker who has exited Iran solely to avoid prosecution and not on account of any anti-revolutionary activity [45].

21. At [46] he found that at its highest, the authorities will either sentence him to a short term of imprisonment and/or a fine. It is clear that his parents have the

resources to pay bribes of up to 4-5 million Toman and there was nothing to suggest that they could not afford to do this as they have done when paying for his past transgressions by arranging a bribe to be paid for his release [46].

22. The Judge did not accept the contention made on the appellant's behalf that merely because he was involved in illegal activity this would be perceived as "anti-revolutionary" and therefore considered as politically motivated. That was a tenuous argument to which he gave no weight. It was unlikely that he would receive an unreasonably harsh or disproportionate sentence for the activity in which he was involved. It is likely that he would be able to return to his home area and be reunited with his family once he is there and has been duly processed for his criminal activity [47].

23. On 4 January 2016, First-tier Tribunal Judge Grimmett granted the appellant permission to appeal. The appellant had asserted in his grounds that the Judge erred in concluding that it was more likely that he would face a fine for smuggling than a short custodial sentence. It was arguable that it is not clear why the Judge reached that conclusion. It also appears that the Judge erred in failing to deal with the issues of prison conditions raised in the skeleton argument. In the grounds of appeal, it was contended that the appellant's account that his summons was issued from Mohabad or Ormieh and he would thus face consequences far more serious than if it had been issued from Sarsasht.

24. Mr Smyth, who represented the appellant before the First-tier tribunal – his name was incorrectly spelled in the decision - referred to paragraphs [31] and [43] and [44] of the determination which I have set out, where the Judge found that it was reasonably likely that the appellant would face the potential of a short custodial sentence or more likely a fine for his activity. The evidence cited by the Judge at [31] is contained in paragraph 27 of the refusal letter.

25. At paragraph 27 of the reasons for refusal, the secretary of state set out the background information that was considered. This was a report by the International Campaign for Human Rights in Iran and a USSD report dated 2012. The report noted at paragraph 64 that the Special Rapporteur was informed of the systematic killings of Kulbars (back carriers). The Kulbaran who ferry cargo across the border on their backs or smuggle commodities such as tea, tobacco and fuel to earn a living are particularly affected. Iranian law regards the activities of the Kulbari as a crime that is punishable by several months' detention or a fine equal to the value of the seized commodities.

26. Mr Smyth submitted that the passage provided no evidential basis for Judge Traynor's finding at [44] that it is more likely that the appellant would face a fine rather than a short custodial sentence. Applying the correct standard of proof, the

logical conclusion is that it is reasonably likely that the appellant will face detention upon return, especially as he had been detained on a previous occasion.

27. He further submitted that the appellant's skeleton argument produced at the hearing contained the submission that detention conditions in Iran would breach Article 3. Reference was made to evidence from the US Department of State regarding poor prison conditions and mistreatment of prisoners. There was also a report from Amnesty International referred to in the skeleton as to the prevalence of torture and other ill treatment particularly during pre trial detention.

28. He submitted that although the Judge stated at [38] that full account of the skeleton argument had been taken, he failed to make any findings at all regarding the appellant's claim that conditions in detention would breach Article 3. He submitted that the conclusion by the Judge at [52] that he was satisfied that the respondent's representative was entirely correct in identifying that the appellant's human rights claim should stand or fall with his asylum claim was "entirely incorrect and that oversight meant that his decision cannot stand."

29. The Judge at [43] had stated that if he is detained in that process there is no evidence to suggest that he would be held incommunicado or that he would not be duly transferred.

30. Mr Smyth referred to the Amnesty International report of 2014-15 contained in the appellant's bundle at B75. At B77 of that report it is stated that torture and other ill treatment, particularly during pre trial detention remains common, facilitated by routine denial of access to lawyers and the virtual impunity of perpetrators. Methods reported included: solitary confinement, confinement in uncomfortably small spaces, severe beatings, threats against the detainee's family members. The authorities generally fail to investigate allegations of torture and prosecute and punish those responsible.

31. The authorities systematically deny detainees and prisoners access to adequate medical care, including for injuries resulting from torture or health problems exacerbated by harsh prison conditions.

32. A revised code of Criminal Procedure passed in April failed to address the inadequacies of national laws to afford detainees effective protection against torture and other ill treatment. It denied detainees access to lawyers for up to one week after arrest in cases concerning national security and some other offences, and provided no clear and comprehensive definition of torture conforming to international law.

33. In the circumstances, Mr Smyth submitted that the Judge erred in finding without any basis that it was more likely that the appellant would receive a fine as opposed

to detention and that the conditions would not amount to torture and other ill treatment during any pre trial detention.

34. On behalf of the respondent, Mr Bramble submitted that the decision has to be looked at in its entirety. He highlighted what the Judge stated in the lengthy paragraph at [46], namely that at its highest, the authorities will either sentence him to a short term of imprisonment and/or a fine. His parents have sufficient resources to pay that.

35. Moreover, at [47] he found that the appellant's fear of returning to Iran related to his fear of prosecution. It is unlikely that he will receive an unreasonably harsh or disproportionate sentence for the activity in which he has been involved. It is likely he will be able to return to his home area and be reunited with his family once he is there and has been duly processed for his criminal activity. That particular paragraph shows that the Judge was not predisposed to finding that he would receive a fine for his activities and not a custodial sentence. That was left open.

36. Mr Bramble accepted that Judge Traynor had not dealt at all with issues relating to potential problems faced by the appellant if detained on return.

37. Mr Bramble nevertheless posed the question as to whether that omission constituted a material error in the circumstances. He noted that the skeleton argument on behalf of the appellant contained a submission that given the appellant's history there was a real risk of the appellant finding himself detained in conditions contrary to Article 3. In that regard reference was made to the US Department of State report of 2014, B22. That contained prison and detention centre conditions in Iran. He submitted that it must be borne in mind that the appellant is from the Kurdish areas of Iran. It depended on which court the appellant would find himself in; there is no evidence as to what prison he would be sent to.

38. He referred to the "physical conditions" contained in the Department of State's report at B22. Reference is made to overcrowding, forcing many prisoners to sleep on floors, in hallways or in prison yards. There were reports that overcrowding within Evin Prison had worsened over the past year. There were reports of juvenile offenders being detained with adults. Pre-trial detainees were occasionally held with convicted prisoners. Political prisoners were often held in separate prisons or wards.

39. He referred to the reference to numerous human rights NGOs and opposition websites which reported poor prison conditions and mistreatment of prisoners. There were reports of prisoner suicides. There was a reference to a prisoner in Bandar Abbas Central Prison's Ward 1 who had been arrested on a charge of drug possession who took pills and hanged himself. There were reports of two inmates

at Ghezel Hesar Prison having committed suicide and two others who had attempted suicide during the same week.

40. It is noted at B23 that during the year, several prisoners, especially political prisoners, went on hunger strike to protest at prison conditions.

41. The report however does not suggest that it was only political prisoners who were protesting against the conditions. At B23 there is a report that on April 17, security officials raided Evin Prison's Ward 350 where political prisoners were held. They were reportedly beaten there. There is also a report in the same paragraph to an event on 15 May reported by Amnesty International that officials, some in plain clothes and wearing masks, assaulted prisoners for several hours causing injuries that included loss of hearing, fractures, cuts and bruises and led to hospitalisation of several prisoners. It is not clear from that paragraph whether the May 15 assault was carried out against the political prisoners or those perceived as being hostile to the government.

42. Mr Bramble again referred to B77 containing the Amnesty report. He submitted that it is not suggested that the appellant's activities amounted to anything like a threat to national security and the like.

43. Mr Bramble referred to SB, supra. Iranians facing enforced return do not in general face a real risk of persecution or ill treatment. He submitted that the appellant was not at any heightened risk on account of political opinion, insulting conduct or activity likely to be seen as insulting to the judicial system, the government or Islam. This is in no way a political case or a national security charge.

44. The appellant accordingly does not appear to fall within one of the categories placing him at risk of ill treatment, even if detained. He submitted therefore that it is unlikely that the Judge would have found that detention would place him at risk such that his Article 3 rights might be contravened.

45. In reply, Mr Smyth submitted that the Judge had to ask himself whether there was a real risk that if detained, he would be exposed to ill treatment contrary to Article 3. This had not been dealt with by the Judge at all, notwithstanding evidence presented to the Judge as set out in the skeleton for him. The preceding paragraphs at B22 relate to political prisoners but the later paragraphs relate to prison detainees generally.

Assessment

46. The Judge had regard to submissions at [36] that the appellant had received a summons which would of itself heighten his risk upon return. The appellant explained his fear that where the summons had been issued from a court outside

his home area, the likelihood is that he would receive a lengthy custodial sentence and it was possible he could be killed for his offending. The fact that he had been involved in smuggling activity in the past and that the Revolutionary Guards had fired on those involved in that smuggling was indicative that they would view his conduct as "anti revolutionary" as he had ignored warnings given and he would therefore be placed at risk.

47. At [34] the Judge noted that the appellant's representative, Mr Smyth, confirmed his reliance upon the skeleton argument. It had been submitted that in all reasonable likelihood, the appellant would face difficulty upon his return. The fact that he had received a summons and would not be considered to be a first time offender would raise his profile and therefore increase the risk that he is likely to face.

48. The Judge considered the respondent's acceptance of the appellant's account of events, leading him to leave Iran. At [43] the Judge found that having considered his evidence and the fact that he had given a credible account, there was no evidence adduced which would support his conclusion that he would face death upon return to Iran because of this activity. He stated that if the summons is awaiting him, then at its worst, the authorities will refer him on to the authorities in the area where the summons was issued and he will have to attend Court. If he is detained in that process then there is no evidence to suggest that he would be held incommunicado or that he would not be duly transferred [43].

49. He stated at [44] that he found that in all reasonable likelihood, the appellant would face the potential of a short custodial sentence or, more likely, a fine for his activity.

50. At [46] the Judge again concluded that at its highest the authorities will either sentence him to a short term of imprisonment and/or a fine. He did not accept that because the appellant was involved in illegal activity that this would be perceived as "anti-revolutionary" and therefore be considered as politically motivated. The Judge found that his fear of returning to Iran is of prosecution and not persecution. It is unlikely he will receive an unreasonably harsh or disproportionate sentence [47].

51. From the foregoing it is evident that the Judge has largely focused on the likely outcome of a sentence upon the appellant on his return.

52. In this respect, he found that there was no basis from any evidence presented, that the appellant would more likely receive a fine for his activity as opposed to a short custodial sentence [44].

53. However, apart from a fleeting reference to the potential detention of the appellant, he found at [43] that there was no evidence to suggest that he would be held

incommunicado. There was however no consideration given of the evidence presented to him as set out in the skeleton argument.

54. I bear in mind the submissions made by Mr Bramble that properly assessed, the reports relating to torture and ill treatment, particularly during pre-trial detention, appear to relate to persons involved in national security offences or offences that might be viewed as political or which might be seen as insulting to the government or Islam. This would not affect the appellant.

55. However, it is not clear that the Amnesty International report at B77 is focused upon those suspected of national security offences. The opening paragraph appears to be a general reference to torture and ill treatment during pre-trial detention, which remains common. There is reference to prolonged solitary confinement or confinement in uncomfortably small spaces, severe beatings, threats and the like.

56. Similarly, in the US Department of State report for 2014 at B22, there is again reference to prison conditions and detention centre conditions being often harsh and life threatening. This included reports of juvenile offenders being detained with adults.

57. There is reference to overcrowding and ill treatment, including the refusal of medical treatment for injuries that prisoners suffer. At B21, when dealing with torture and other cruel, inhuman or degrading treatment or punishments, there is reference to "white torture" being used especially on political prisoners and often in detention centres outside the control of prison authorities. There is nothing to suggest at B22 and 23 that the conditions reported as harsh and life threatening pertained only to those who were political prisoners as such. The examples of prisoners who were charged on drug possession and took their lives at one of the prisons did not appear to be an example of a political or national security offence.

58. Mr Bramble has very properly accepted that the Judge did not deal with the submissions made at paragraph 14 and onwards of the skeleton argument that had been relied on. This also contained a reference to paragraph 29 of the appellant's witness statement dated 19 November 2014 contained in the respondent's bundle where the appellant stated that while in Saradasht there is a chance of being released; if one is taken to Orumiyeh, or Mahabad, he will then not come back. Mahabad is stated to be "precisely from where the Court summons originates."

59. I cannot be sure that if the Judge had properly assessed the evidence and the reports as a whole, he would inevitably have come to the same conclusion regarding the asserted real risk of being detained in conditions contrary to Article 3.

60. In the circumstances I find that in making te decision there has been an error on a point of law. I accordingly set aside the decision. It follows that there will need to be a re-hearing.

61. Both parties accepted that should the decision be set aside, this was an appropriate case to be remitted to Taylor House for a fresh decision. There had been no findings of fact made in relation to the Article 3 issues. Taking into account the Practice Statement, I agree that this is an appropriate case to be remitted to the First-tier Tribunal. The positive findings of fact made by the First-tier Tribunal Judge will be retained. Both parties are permitted to file and serve further evidence.

62. The appeal is accordingly remitted to the First-tier Tribunal, at Taylor House, to be remade by another Judge.

Notice of Decision

The decision of the First-tier Tribunal is set aside and is remitted to the First-tier Tribunal at Taylor House to be remade, with a time estimate of two hours.

Anonymity direction is made.

Signed Date 10 March 2016

Deputy Upper Tribunal Judge Mailer