Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/01227/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 4 January 2016	**On 12 January 2016**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR A R N
[ANONYMITY DIRECTION MADE]

Respondent

Representation:
For the Appellant: Mr Duffy, Senior Home Office Presenting Officer
For the Respondent: Mr K Smith, Legal Representative

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity direction was made by the First-tier Tribunal. As a protection claim, it is appropriate to continue that direction.

DECISION AND REASONS

Background

1. This is an appeal by the Secretary of State for the Home Department. For ease of reference, I refer below to the parties as they were in the First-Tier

Tribunal albeit that the Secretary of State is technically the Appellant in this particular appeal.

2. The Appellant is a national of Iran. He arrived in the UK on 14 November 1978 with leave as a visitor which was subsequently extended as a student. He was then granted leave to remain as a spouse but following the breakdown of his marriage he was refused indefinite leave to remain. He originally claimed asylum in 1984 but that was refused and his appeal rejected. Following convictions for drug offences, he was made the subject of a notice of liability to deport but the Respondent did not pursue that action at the time since, as a result of the drug convictions, the Appellant might face disproportionate punishment on his return to Iran. The deportation order was therefore revoked. The Appellant was granted indefinite leave to remain in 1993. He continued to commit drugs offences and was the subject of further convictions in 1992 and 2003. He was convicted in 2012 of having an offensive weapon and wounding with intent to commit grievous bodily harm. In all, the Appellant has committed 23 offences for which he has received 12 convictions. As a result of this latest offence, he was made the subject of automatic deportation action. The signed deportation order and a decision that section 32(5) of the UK Borders Act 2007 applies to him were served in June 2014. It is that decision which is the subject of this appeal.

3. The Appellant's appeal was originally allowed on Article 8 grounds but dismissed on protection grounds in a decision promulgated on 17 November 2014. There was an appeal by the Respondent against that decision and a cross-appeal by the Appellant in relation to his protection claim. In a decision dated 5 March 2015, the President of the Upper Tribunal found that there was no error of law in the previous decision allowing the appeal on Article 8 grounds with the consequence for my decision that the Appellant has already succeeded on those grounds and will presumably need to be granted some form of leave on that basis. Removal is not therefore in prospect. However, the President found that there was an error of law in the decision dismissing the Appellant's appeal on protection grounds. The Appellant pursues his appeal in relation to the protection claim to determine whether he is entitled to status as a refugee. The President remitted the protection claim to the First-Tier Tribunal. That culminated in the decision under challenge which is that of First-Tier Tribunal Judge Britton promulgated on 20 May 2015 ("the Decision").

4. The Respondent sought permission to appeal the Decision on the basis that the Judge misdirected himself in law in finding that the Appellant would be at risk on return to Iran. The Respondent asserts that the Judge erred by failing to apply the relevant case law correctly, failing to provide adequate reasons for the Decision including failure to engage with or provide reasons for departing from the findings of the earlier Tribunal which dismissed the asylum claim in 1987, and failing to properly consider the evidence.
5. Permission to appeal was granted by Upper Tribunal Judge Clive Lane in a decision dated 4 August 2015 on the basis that the Judge's reasons for accepting the Appellant's account as true and accurate and his consequent assessment of risk on return were arguably inadequate. The matter comes

before the Upper Tribunal to determine whether the First-tier Tribunal Decision involved the making of an error of law.

Submissions

6. Mr Duffy relied on the grounds. He directed my attention to [31] to [36] of the Decision. He submitted in particular that the case law did not show that the Appellant would be at risk on return to Iran as a result of his convictions. Those were not convictions in Iran to which the case of SB (Risk on Return: Illegal Exit) Iran CG [2009] UKAIT 00053 might be relevant. That case talks of criminal convictions as the basis of risk but that relates to convictions in Iran not in the UK. The Respondent would not identify the Appellant as a convicted criminal. In response to a question from me concerning the impact of HJ (Iran) v Secretary of State for the Home Department [2011] 1 AC 596 and RT (Zimbabwe) v Secretary of State for the Home Department [2012] UKSC 38, Mr Duffy submitted that even if the Appellant were identified as a convicted criminal, that did not mean that he would be at risk on that account.

7. Mr Smith relied on his Rule 24 response. He submitted that there was no error of law in the Decision. The Judge made a clear finding that the Appellant's criminal convictions some of which related to drugs and were associated with alcohol abuse and his other conduct including sexual relations outside marriage would be seen by the regime as amounting to anti-Islamic conduct. The Respondent's grounds did not engage with what would happen to the Appellant on return. He would be returned on an emergency travel document because he had no exit stamp in his passport as he had lost his passport on which he travelled. The headnote at (3) and (4)(iii) of BA (Demonstrators in Britain: Risk on Return) Iran CG [2011] UKUT 36 (IAC) makes clear that the authorities would therefore take an interest in how the Appellant left Iran and on what visa. The Appellant left Iran when the Shah was still in power. The fact that he has no passport issued after the Revolution would also attract attention. As a result, he would be questioned. Following the decision in RT (Zimbabwe) he could not reasonably be expected to lie about his convictions or his views of the current regime. The authorities would thereby be aware of his convictions, the circumstances of those convictions and his views of the regime. Those factors would place him at risk.

8. In reply, Mr Duffy accepted that there were factors in this case which might lead the authorities to interview the Appellant on return to Iran but he continued to submit that even if the convictions were disclosed those would not lead to a risk. Even if the convictions and the circumstances of those convictions were seen as anti-Islamic conduct, there would not be a risk on that account.

9. I reserved my decision in relation to whether there is an error of law in the Decision and indicated that I would give my decision and reasons in writing which I now go on to do. Both parties agreed that if I were to find an error

of law, I could go on to re-make the Decision on the evidence before me without a further hearing as the facts were accepted and provided I did not consider that further oral evidence was required.

Decision and reasons

10. In his decision dated 5 March 2015, the President set out the basis on which he found an error of law in the previous First-Tier Tribunal decision as follows:-

> "[3] The first ground relates to the sustainability of the Judge's assessment that the Appellant's asylum claim was lacking in credibility by virtue of its timing. The burden of the Appellant's case is that there is no tenable basis for this assessment and, further, that it disregards the case made by him in response to the Form ICD/0350/AD questionnaire accompanying the "minded to deport/one stop warning" letter sent on behalf of the Secretary of State, together with the Appellant's letter which accompanied his response and certain other evidence generated at an earlier stage. The exercise for this Tribunal is to juxtapose all of these sources with the determination of the FtT. Having performed this exercise, I conclude that this ground of appeal is established. There is, in my judgment, a failure on the part of the FtT to acknowledge these various strands of evidence and to assess them accordingly. Had the FtT performed this exercise, I cannot be confident that its adverse credibility assessment of the Appellant would nonetheless have been made. Thus this error of law is material.
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> [4] The second error of law which I have found, based on the second of the permitted grounds of appeal, relates to the manner in which the FtT considered the various risk factors on which the Appellant's case was advanced. There were several such factors: his own historic conduct; the asserted anti-government conduct of members of his family and events relating to them, including their alleged execution; the Appellant's drugs offences convictions in the United Kingdom; his illegal departure from Iran; his enforced return from the United Kingdom; his non-possession of a passport; and his status of Iranian Arab. The first two of these factors were conflated by the FtT: see [55] of the determination. The Judge failed to recognise that these were separate considerations. The Judge then considered in extenso the drugs offences factor. No consideration was given to the factors of non-possession of a passport, enforced return from the United Kingdom to Iran and the Appellant's Iranian Arab status. The Judge did consider the illegal departure factor. The relevant passages in the determination are [56] – [58].
>
> [5] In addition to the conflation and omissions noted above, I consider it clear that the risk factors which the Judge did identify were considered by him disjunctively. This I consider to amount to a further, free standing error of law since, having regard to the Country Guidance decisions in this sphere, it was incumbent on the Judge to consider these factors cumulatively, in the round. See SB (Risk on Return: Illegal Exit) Iran CG [2009] UKAIT 00053, BA (Demonstrators in Britain: Risk on Return) Iran CG [2011] UKUT 36 (IAC) and SA (Iranian Arabs – No General Risk) Iran CG [2011] UKUT 41 (IAC)"

11. Although the previous First-Tier decision is no longer relevant as it is set aside so far as the protection claim is concerned, the President's observations concerning the error of law are important as a backdrop to the way in which the Judge approached the re-determination of the protection claim in the Decision.

12. I start by dealing with the written grounds which were not elaborated upon at the hearing as I consider that those can be dealt with shortly. The Respondent says that the Judge failed to engage with the findings of the previous Tribunal in relation to the earlier asylum claim in 1987. Quite apart from the fact that the Appellant was not present and not represented at the earlier hearing, the basis of that claim was very different to the one now made. It concerned a claim that the Appellant would be forcibly conscripted into the army and that he would be executed as a deserter. In any event, the findings are set out at [16] of the Decision and the Judge notes at [33] that as the Appellant's failure to complete his military service was a long time ago, that factor may not now be significant. Although the reasoning is short in relation to the alleged imprisonment and activities of the Appellant's cousins and other family, the fact that the Appellant is an Iranian Arab and the assertion that the authorities may be suspicious of the Appellant as a spy due to his length of absence, those factors are not the central crux of the Judge's reasoning. Any deficiency in reasoning is not material. Further, in any event, the Judge's findings on those aspects of the claim follow a lengthy recitation of the Appellant's evidence at [17] to [19] of the Decision which evidence does not appear to have been seriously challenged (see note of the Respondent's submissions at [20] of the Decision).

13. The Judge's findings on the protection claim are set out at [31] to [36] of the Decision. Since that section is quite short, I set it out in full:-

> "[30].....I have to consider the appellant's claim for asylum and whether he would be at risk on return to Iran.
> [31] The appellant has been in this country since 1978. He came as a visitor. He was granted leave to remain as a student until 30 September 1979. He had further leave to remain on the basis of marriage as set out above. The appellant states that he has not seen his family over 37 years. His father is still alive and he last spoke to him in 2010 and 2011. His family have been members of the Mujahedeen. His brother died of a heart attack 6 or 7 years ago following the revolution. Some of his cousins have been in prison. The appellant received funds from the Shah's government to study in this country. These funds were stopped when the Shah was overthrown. He never completed his military service.
> [32] I find that on return to Iran the appellant would arrive without a valid passport. He has been away from Iran for some 37 years. The authorities would want to know why he has been away for so long. They would be suspicious that he may be a spy. He would be interrogated and they would find out that he has been convicted of serious drug offences. <u>The question is whether the appellant is at risk because of his convictions, especially his drug offences on return to Iran. I am satisfied he would be at risk because it is not just one offence and he would be considered as a risk of reoffending. Also the last offence is an extremely serious violent crime.</u>
> [33] The appellant has not completed his military service. That was a long time ago and may not be a significant factor.
> [34] <u>What is more significant is the report that has been produced by the appellant in his bundle (p71-118), the executions in Iran in relation to drug offences, even though the appellant's last conviction was over 12 years ago, I find that would still put him at risk in relation to the regime. He has been convicted "of the most serious crimes" in the United Kingdom. He has been convicted of a number of drug offences. The appellant would be accused of anti-</u>

> Islamic conduct which would constitute a significant risk factor because of his drug offences (SB (Risk on Return – Illegal Exit) Iran CG [2009] UKAIT 00053).
> [35] The appellant has not got a passport to show that he left Iran legally, and therefore that would be another problem he would have to face to convince the authorities that he did not leave illegally.
> [36] Other factors that would cumulatively put him at risk include his family supporting the Mujahedeen and he being an Iranian Arab"
> [my emphasis]

14. The core of the Judge's findings therefore relates to the grounds on which I was addressed at the hearing. I agree with Mr Duffy that if the Judge's findings amounted to a reliance on the case of SB on the basis that the Appellant's convictions would put him at risk on return on that account alone, this would amount to an error of law. However, that is not the basis of the Decision. It is said in the Respondent's original grounds that the majority of the Judge's findings are to be found at [32]. I disagree. That sets out the basis on which the Judge has allowed the case namely that the Appellant's convictions for drugs offences are the principal basis for the risk on return but that paragraph does not contain the reasoning for why they put him at risk. The reasoning is at [34]. The Judge finds that the background evidence relating to drugs offences shows that the convictions would put the Appellant at risk even if his last conviction on that account was 12 years ago. The evidence shows that Iranian authorities deal with such offences particularly harshly and that the death penalty is often imposed and enforced in such cases, often following unfair trials or no trials. It is clear that the reference to the case of SB is in the context of the Appellant's drugs offences constituting anti-Islamic conduct and not on the basis that the convictions would themselves create the risk.

15. Neither SB nor BA address the circumstances of this case. BA concerns sur place claims and SB concerns the impact of previous Court proceedings in Iran. However, what both cases do serve to show is when and in what circumstances an individual would come to the attention of the Iranian authorities. As noted at (3) of the headnote in BA, it is important to consider the likelihood of the individual coming to the attention of the authorities. As that case also shows, a person's immigration history is important as a trigger factor. That is the issue which the Judge was considering at [32].

16. The case of SB also raises the issue of anti-Islamic conduct as a significant risk factor. The headnote relates to [45] of the decision in that case which says the following:-

> "It is plain from the background evidence before us that being accused of anti-Islamic conduct amounts to a significant risk factor in respect of likely treatment a person will face on return. Both Dr Kakhi's evidence and that from established sources such as Amnesty International, Human Rights Watch and the US State Department reports concur on this."

17. What that passage does not say is what amounts to anti-Islamic conduct. The circumstances of that case were very different to this Appellant's case. However, based on the background evidence to which the Judge referred (see [14] above), the content of those reports coupled with the evidence of

the other risk factors in this case which, as I have noted, was not seriously challenged by the Respondent and the fact that the Respondent does not challenge the finding that the Appellant would come to the attention of the authorities, I am unable to find that there is any material error of law in the Decision or the Judge's reasoning. I am therefore satisfied that the Decision did not involve the making of an error of law.

DECISION

The First-tier Tribunal Decision did not involve the making of an error on a point of law.

I do not set aside the Decision

Signed Date 8 January 2016
Upper Tribunal Judge Smith