Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/09015/2016**

THE IMMIGRATION ACTS

Heard in Liverpool	**Decisions & Reasons Promulgated**
On Tuesday 22 August 2017	**On Friday 1 September 2017**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

S J

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Nicholson, Counsel instructed by GMIAU
For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity order was made by the First-tier Tribunal. As this is an appeal on protection grounds, it is appropriate to continue that order. Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

Background

1. The Appellant appeals against the decision of First-tier Tribunal Judge Shergill promulgated on 5 January 2017 ("the Decision"). By the Decision the Judge dismissed the Appellant's appeal against the Respondent's decision dated 16 August 2016 refusing his protection and human rights claim. The appeal to this Tribunal relates only to the protection claim.

2. The Appellant is a national of Iran. He claims to have arrived in the UK on 26 February 2016. He claimed asylum on that day. The basis of his asylum claim is his conversion to Christianity and imputed political opinion due to a tattoo which he bears on his back stating "Death to Khameni the Terrorist". He claims that he had photographs of the tattoo on his computer which he says has been seized by the authorities during a raid on a house church meeting which he attended. It is worth noting that the Appellant does not claim to have any particular anti-regime sympathies. His friend carried out the tattoo when they were drunk.

3. The Appellant claims that he has been arrested twice. On the first occasion, in June 2014, he was arrested for walking in the street with a female. He says he was released after two days without charge. The second occurred in April 2015, when the Appellant was working as a DJ at a mixed gender party attended by some 200 people. Such parties are illegal. He claims that following this arrest he was detained and raped. He says that he was again released without charge.

4. The Judge did not find the Appellant's claim to be credible. He accepted that the first arrest may have occurred but did not believe that the Appellant was detained for a second time as he claimed. He did not therefore accept as credible that the Appellant would be of interest to the authorities as someone who would be thought to have anti-regime opinions. Neither did he accept as credible, the claimed conversion.

5. The Appellant's grounds of appeal against the Decision focus on the (imputed) political opinion claim. In short, the Appellant says that he will be at risk on return to Iran because the tattoo will come to the attention of the authorities when he is questioned at the airport. The Appellant says that, irrespective of the credibility findings, the Judge has not considered what will occur at the point of return.

6. In fact, the majority of the Appellant's grounds focus on a critique of the country guidance in SSH and HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 00308 (IAC). That is not though on the basis that this case is to be distinguished or that further background material has since come to light which undermines the decision in that case. Rather, the Appellant criticises some of the conclusions and reasoning of the Tribunal in that country guidance case. This is not though an appeal against that decision. No application was made by the parties in that case to appeal the decision. This is not an opportunity to appeal that decision by the back door. Country guidance is to be followed by First-tier Tribunal Judges absent distinguishing factors of the case in front of them or material produced since that decision tending to undermine its conclusions. There is no such distinction/additional material in this case. Accordingly, there could be no error of law committed by following that decision.

7. I do not in any event need to deal with those criticisms because the grant of permission limited the grounds of appeal on which permission is granted. Permission was granted by First-tier Tribunal Judge Hodgkinson on 18 April 2017 in the following terms so far as relevant:-

> "[3] A reading of the Judge's decision as a whole renders it [is] arguable that the Judge did not assess credibility in the round (for examples §43,45,48,50-51 & 62 of the decision). It is incorrect to indicate that the Judge did not consider risk on return on account of the

presence of the appellant's tattoo, whatever the motive for its creation might have been (§ 63 of the decision). However, it is of concern that the Judge concluded that there is a "*low risk of the appellant being detained for further inquiries immediately upon return*". It is far from clear whether the Judge was indicating that there was no real risk, or otherwise. There is no substance in the contention that the Judge erroneously sought to follow the relevant Country Guidance. Permission is granted on grounds (1)-(2) and (4), those grounds revealing arguable errors of law."

There has been no renewal of the grounds on which permission was not granted.

8. Since the grounds are not clearly headed, it is worth setting out those grounds on which I understand (and Mr Nicholson agreed) that permission was granted:-

"[4] However, the FtTJ rejected the importance of the tattoo because of a "*concern…that A has put himself in a position of harm in order to amplify the chances of him being successful in this claim*" (48) – and, it is submitted, because the FtTJ had already rejected what he himself had set up to be "*pre-cursor events*" (42)

[5] It is submitted that both of these approaches were in error. The evidence was required to be addressed in the round, rather than using any doubts about A's detention and rape against the evidently existing tattoo. Conversely, it might have been found in A's favour, that his first arrest made it more likely that his second also took place. The FtTJ doubted this because, much as R often puts it in refusal letters, he believed A would not have undertaken "risky" behaviour once again, a year later (38). It is submitted that people do not always behave logically (especially, as noted by the FtTJ himself, when drunk), and people all over the world do undertake risky behaviour, whether for reasons which are religious, political or just for sheer entertainment.

[6] [ground three: permission not granted] Moreover, A has this tattoo. It clearly poses a risk to his safety on return. It is submitted that the FtTJ was required to consider A's account at the hearing, as if he were to be returned immediately thereafter – when he would of course still have this tattoo.

[7] In addition, it is submitted that A runs the risk of ill treatment when he is questioned and, almost inevitably, detained as a result, on return to Tehran Airport."

9. I turn then to consider whether the Decision does disclose an error of law and depending on my reasons for so doing to either give directions for a resumed hearing in this Tribunal or remit to the First-tier Tribunal for re-hearing.

Decision and reasons

10. Mr Nicholson's first submission is that the Decision does not follow any coherent path and as a result the evidence has not been considered in the round. He drew my attention to [50] of the Decision where the Judge appears to reject the Appellant's motivation for having the tattoo because he did not believe the Appellant's account as to the second arrest and detention. I reject that submission. As Mr Bates pointed out, the Decision considers the claim in chronological order of events. The reference to the previous finding when considering the Appellant's motivation for the tattoo is followed in the same paragraph by an express self-direction that the conclusion is based on all the evidence.

11. The second point made is that the Judge has misunderstood some of the evidence and the findings made were not therefore open to him on that evidence. The points made in oral submissions are only tangentially raised by the grounds but I heard submissions on these points and I therefore consider them. Mr Nicholson said, first, that because the Judge had believed the Appellant as to the first arrest, he should have been inclined to believe the second arrest. He drew an analogy with the approach that past persecution may be an indicator of a risk of future persecution. That is to my mind a false analogy. That is considering the assessment of risk and not the assessment of the facts of a claim. It is often the case that part of a claim is capable of belief on the evidence but other parts are considered to be an embellishment because they do not stack up on that evidence due to inconsistencies or implausibility. That is the case here unless the Appellant is able to persuade me that the Judge erred in the consideration of the evidence.

12. The first point which Mr Nicholson makes is that the Judge has misunderstood the evidence about how the photograph of the tattoo found its way to the Appellant's computer based on what is said at [45] of the Decision. Mr Nicholson said that the finding is based on the Appellant having actively "uploaded" the picture being inconsistent with what he said later about being passive ie not directly involved in the uploading. In effect, Mr Nicholson's submission is that this is so minor as not to amount to any inconsistency and is simply a point of terminology. However, read in context, there is no error. The Judge was entitled to draw the distinction between the Appellant himself having put the photographs on his computer and others having done so. As the Judge rightly observes at the end of that paragraph, the point of greater import from the Judge's perspective is that the Appellant did nothing about it.

13. Of greater significance are the Judge's findings about the second arrest, detention and rape. Mr Nicholson was similarly critical of the Judge's reasoning for rejecting that part of the Appellant's account. I have already indicated why I reject his submission that belief in the first arrest should go some way to belief in the second. I also note that the additional points made about the findings relating to the second arrest and detention cannot be said to have been raised in the grounds even tangentially. There is no reference at all to the Judge's findings about the second arrest and detention, other than the point that the credibility finding on the first arrest should have led to a positive finding about the second and a rather speculative assertion about the Judge's finding based on patterns of behaviour as appears at [38] of the Decision. I can deal with that point shortly. Whilst the drafter of the grounds might be right that some individuals would not change behaviour to avoid risk for personal reasons, in this case that has to be read against the Appellant's evidence that, so scared was he of further arrest after the first that he changed his appearance and behaviour. No issue is taken with the Judge's interpretation of that evidence as cited at [38].

14. Mr Nicholson's submission however was rather founded on [30] to [32] of the Decision and the differences in the various accounts given by the Appellant. Mr Nicholson submitted that those were not differences but rather a greater degree of detail being given in later statements. The Judge has however, considered whether that is the reason for what he views as differences at [31] of the Decision. He goes on to explain

however at [32] to [36] of the Decision the discrepancies between the versions of events and why that gave the Judge cause not to believe this part of the Appellant's account.

15. For those reasons, I reject the submissions made about the Judge's findings. Those are not though the reason permission to appeal was given in this case. That reason is rather linked to the assessment of risk. The submission about this can be summarised thus. Even accepting that SSH is rightly decided (as Mr Nicholson accepted he must for current purposes), Mr Nicholson said that the Judge has failed properly to assess the risk factors in this case. Those are as follows:-

- Illegal entry
- Claim of asylum
- Detention for anti-regime behaviour
- Discovery of tattoo depending on what would occur as a result of the first three.

16. Mr Bates submitted that the Judge's findings on risk are adequately contained in [63] of the Decision. The Judge does not accept that the Appellant will be questioned other than administratively. The Appellant is found not to have a sufficiently significant profile for the authorities to take more interest. Accordingly the tattoo will not come to the attention of the authorities.

17. The Judge has clearly taken into account at [61] the issue whether illegal exit would cause the authorities to take particular interest in the Appellant. He rejects that, based on the country guidance because "he is likely only to come to attention of the authorities if there is some other profile". As the Judge there rightly observes "The other profile would arise if I accept the evidence about either of the previous two detentions." He goes on to recognise that there are two issues, namely whether the Appellant has been detained at all and whether any past detention would attract further enquiries. The Judge observes at [62] of the Decision that he has some misgivings about whether the first arrest and detention did occur at all based on his findings about the second but, even accepting it did, he finds that "There is seemingly nothing controversial about the first arrest." Whilst the Appellant would no doubt criticise that finding because, on Mr Nicholson's submission, the arrest was for "anti-regime behaviour", the fact remains that the Appellant was released without charge and was, as the Judge described it, "dealt with in a relatively low-key manner." Those were findings which were open to the Judge on the evidence.

18. Dealing then with the risk arising from the tattoo, the Judge dealt with it thus:-

> "[63] As a standalone issue, I am satisfied to the lower standard that if the first arrest did happen that this alone would not merit a level of inquiry upon his return that would lead to any persecution. It is difficult to second guess whether there would be a total disregard of any previous arrest. As such if there was any form of enquiry, I have considered whether this would lead to the tattoo being discovered. Presumably it depends on the nature of the questioning. If he was detained for more than a day or so he would naturally at some point end up with his shirt off when washing, changing clothes etc such that someone may see the tattoo. The likelihood is that he will only be questioned administratively. On the evidence I have before me, considering all of the aspects of the case and looking at the state of

> the case law, I have concluded that there is a low risk of the appellant being detained for further inquiries immediately upon return. If he was questioned by immigration officials there is no evidence or obvious reasons that his body would be physically examined in an ordinary interview (having rejected the accounts of the laptop and second arrest etc). The low risk only arises if he is detained beyond a day or so."

19. As Judge Hodgkinson observed when granting permission, it is not clear whether the continual reference to "low risk" is intended to mean "no real risk" or that there is some risk. Mr Bates understandably encouraged me to find that this is what the Judge meant. There is not a risk of a sufficient probability to reach the threshold of being a "real risk". The difficulty comes in reading that paragraph with what follows under the heading of "Mitigation of Risk" namely that the "low risk" could be reduced to "no risk" by the removing of the tattoo. Whilst the Judge might be entitled to note that the Appellant has no genuine political belief which would make it important to him to keep the tattoo, if the Judge intended to find that there is no real risk that the Appellant would come to the authorities' attention such that the tattoo would be discovered, there would be no need to deal with this point at all. Further, although the Judge concludes at [71] of the Decision in appropriate language that there is no real risk of ill treatment/persecution on return, that imports necessarily what comes before it, namely the Judge's consideration that the risk could be mitigated by the Appellant having the tattoo removed.

20. For those reasons, and not without some considerable reluctance based on what is otherwise a very well-reasoned Decision, I conclude that the Decision does contain an error of law when considering the risk on return but only on that issue. Mr Nicholson encouraged me to remit the appeal if I found an error of law since credibility is in issue and the setting aside of the Decision will necessarily involve consideration of the Appellant's profile in the context of what is found about his past. Mr Bates submitted that there is no need to do so in this case if I find no error in the credibility findings. Having considered those submissions, I have concluded that it is appropriate to remit the appeal. Whilst I have not found errors in the First-Tier Tribunal Judge's assessment of credibility of the Appellant, another Judge considering risk on return will undoubtedly need to determine that risk following an assessment of what he or she accepts as being the Appellant's profile. I do not for that reason preserve any findings of fact.

DECISION

I am satisfied that the Decision involves the making of a material error on a point of law. The Decision of First-tier Tribunal Judge Shergill promulgated on 5 January 2017 is set aside. The appeal is remitted to the First-tier Tribunal for re-hearing before a different Judge.

Signed

Upper Tribunal Judge Smith Dated: 1 September 2017