



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/11083/2016

THE IMMIGRATION ACTS

Heard at Glasgow
on 6 September 2018

Decision & Reasons Promulgated
On 11 September 2018

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

KALIL [M]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr S Winter, Advocate, instructed by Latta & Co, Solicitors
For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This decision is to be read with:
 - (i) The respondent's decision, dated 23 September 2016, refusing the appellant's claim.
 - (ii) The appellant's grounds of appeal to the First-tier Tribunal.

- (iii) The decision of FtT Judge S Gillespie, promulgated on 6 November 2017, dismissing the appeal.
 - (iv) The appellant’s application for permission to appeal, filed on 6 February 2018: Ground 1, “errors of law when assessing risk on return”, set out at paragraphs numbered 2 (i) – (vi), and ground 2, “Mibanga point”, set out at paragraph 3.
 - (v) The decision of UT Judge Perkins, dated 27 March 2018, granting permission on the view that the FtT arguably “did not get to grips with the subtleties of returning someone to Iran”.
2. In course of submissions it became clear that there was error on two points.
 3. The appellant said that he left Iran illegally and that he had no passport. The FtT, like the respondent, found him generally not credible but made no express finding on those matters. Mr Winter submitted that a favourable finding was implicit in paragraph 58, whereas Mr Govan submitted that an adverse finding was implicit in the whole decision.
 4. An answer cannot be inferred either way. The omission is a material error, because the manner of the appellant’s exit, and whether he is able to obtain a passport, are matters relevant to the mode of his return and any liability to questioning by the authorities.
 5. Refusal to return voluntarily, where that course is available, does not contribute to a claim for protection (see e.g. *Macdonald’s Immigration Law and Practice*, 9th ed., ¶12.24 and ¶12.28). There is no presumption of enforced return, and as in other branches of the case it was for the appellant to show that the only course available to him was return on a travel document marking him out as a failed asylum seeker; but findings on those issues were needed.
 6. While the judge was correct in finding that neither illegal exit nor return from Britain by themselves led to risk, those matters were also part of the appellant’s wider case.
 7. The appellant advanced at the hearing in the FtT a *sur place* case which had not previously been put to the respondent. The FtT resolved that at paragraph 54 onwards, accepting the appellant’s participation in demonstrations but finding that his return to the airport would not “excite any adverse attention”, because he would not be sought for his activities abroad.
 8. The second error is the absence of a finding on whether those *sur place* activities were carried on in good faith or in bad. Again, a finding cannot safely be inferred.
 9. The FtT perhaps thought this unimportant because good or bad faith is generally irrelevant in a *sur place* claim. It may be material in this case, however, because one link in the chain of the appellant’s case is that if questioned by the authorities he cannot be expected to lie. Even if no risk can be shown from a claim set up in bad faith, risk may arise if an appellant shows that he would be questioned; that questioning is liable

to go to his *sur place* activities; and that it must be deemed he would answer truthfully, if those were genuine.

10. Parties agreed that the adverse credibility findings of the judge were not affected by error of law and that they stand, subject to *Devaseelan* principles, in remaking the decision. With that qualification, the decision is set aside, and the case is remitted to the FtT.
11. The member(s) of the FtT chosen to hear the case further are not to include Judge Gillespie.
12. No anonymity direction has been requested or made.

A handwritten signature in black ink, reading "Hugh Macleman". The signature is written in a cursive style with a large, stylized initial "H" that loops around the first letter of the name.

6 September 2018
Upper Tribunal Judge Macleman