IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/02776/2020**

THE IMMIGRATION ACTS

Heard at Field House via Teams	**Decision & Reasons Promulgated**
On the 28th January 2022	**On the 22nd March 2022**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

M M
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr K Gayle, Elder Rahimi Solicitors (London)
For the Respondent: Mr A McVeety, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, who claims he is Iranian and is recorded on the Secretary of State's documentation as being Iranian born on 26th May 1990, arrived in the UK in 2008 and claimed asylum. That claim was refused and the Secretary of State disputed his nationality. The appellant's appeal was dismissed on 12th February 2009 by Judge Haynes.

2. Following the submissions of a fresh claim on 18th January 2020, the appellant's claim for asylum, humanitarian protection and protection under the European Convention was refused on 12th March 2020. That decision recorded that the appellant claimed to be from the Islamic

Republic of Iran and the focus of the refusal letter was that the appellant feared persecution on return to Iran and consideration was given to his return to Iran with reference to the relevant country information and case law relating to Iran. The appellant's claim was refused, and his appeal came before the First-tier Tribunal, Judge Athwal, who dismissed the appeal on 7th April 2021.

3. The grounds of appeal explain that the appellant feared persecution in Iran because of his sur place anti-regime activities and the grounds were as follows:

Ground 1: The judge materially erred because of his rejection of the appellant's Iranian nationality

4. It was asserted that the Home Office Presenting Officer had predicated all of his submissions on the supposition that the appellant was a national of Iran and the judge had failed to note that. Neither the Home Office Presenting Officer nor the judge asked the appellant any questions about his nationality. The judge asserted the appellant had failed to provide evidence of his Iranian nationality but it was unclear what she expected. The appellant was not in touch with his relatives and had consistently stated so because of fear of putting them at risk.

Ground 2: There was a failure to consider the appellant's explanation for delay in sur place political activity

5. The judge based her adverse credibility findings in part on the absence of any reasonable explanation for the delay in explaining the delay in his sur place political activity but in his 9th January 2020 fresh claim the appellant explained that he had been seriously ill. The judge had failed to take account of this despite the appellant having provided medical advice to corroborate his account.

Ground 3: Failure to apply the correct standard of proof

6. At [49] the judge stated: "The appellant has been found to fabricate accounts in the past to bolster his asylum claim and I have not been provided with sufficient evidence to *convince* me that this is not the case now." That was a clear error because the standard of proof for both past and future aspects of well-founded fear is that of "a reasonable degree of likelihood". In relation to disputed nationality, the standard is "balance of probabilities". Both standards of proof are lower than that adopted by the judge. The appellant had provided compelling evidence of his participation in demonstrations against the Iranian regime outside their London Embassy and further to **Devaseelan v SSHD** [2002] UKIAT 00702, "*facts happening since the first Adjudicator's determination can always be taken into account by the second Adjudicator*". As per **TK (Consideration of Prior Determination/Directions) Georgia [2004] UKIAT 00149**, if an Adjudicator should examine later events on their own

merits and not disbelieve the evidence merely because he disbelieved the earlier account.

7. Permission to appeal was granted on the basis that (i) it was arguable that the judge had erred in concluding the appellant was not an Iranian national, (ii) that it was arguable that the appellant's explicit explanation in his witness statement for the delay in undertaking sur place political activity was not considered and (iii) there was an indication that the judge had applied an incorrect standard of proof.

8. At the hearing before me, Mr Gayle queried the previous and underlying decision of Judge Haynes on the basis that it was clear the appellant was not represented at that hearing. The criticisms of his responses in his asylum interview, which were said to have undermined his claim to be Iranian were not sustainable. The appellant, who was just 18 years old at the time of his interview, had agreed to the use of the Iranian calendar, the Sardasht event (of which the appellant was said to lack knowledge) had occurred before he was even born, and toman, the currency to which he had referred, was indeed a currency of Iran. Finally, the appellant had known and had drawn the Iranian flag during his interview.

9. Mr McVeety accepted that there was an error of law in the approach of the judge's consideration to the nationality of the appellant. He was not, however, persuaded that the decision of Judge Haynes could be challenged in the way that Mr Gayle submitted but he did acknowledge that Judge Haynes specifically made no findings on nationality and at the hearing before Judge Athwal, the Home Office Presenting Officer did not refer to the question of nationality and the appellant was not given the opportunity to deal with the point.

Analysis

10. I am persuaded that there is indeed an error of law, not least because the Home Office Presenting Officer before the First-tier Tribunal predicated his submissions on the supposition that the appellant was a national of Iran and the judge found otherwise on a flawed basis and apparently without have raised further questions on this. There were also conflicting findings at [50] and [51] on whether Judge Athwal found the appellant an Iranian or whether she made no findings on his nationality.

11. In relation to nationality, Judge Haynes, the previous judge, made no clear findings on nationality. Judge Athwal summarised at [43] the findings of the previous decision maker as if relating to the judge's conclusions on nationality when they in fact related more to the overall claim rather than supporting a conclusion on nationality.

12. I realise that Judge Athwal's decision at [46] stated Judge Haynes "*was not satisfied that the appellant was Iranian*" but Judge Haynes actually concluded in full at [39] "*I am not satisfied as to the truth of this appellant so far as his nationality is concerned. The fact that the appellant was*

assisted by a Kurdish (Sorani) interpreter suggests that he comes from the Kurdish Iranian/Iraqi border area but I make no finding so far as his nationality is concerned." [My underlining].

13. To proceed, on this basis without more, to a finding on nationality particularly when the Secretary of State appeared to submit on the basis that the appellant was Iranian, was fundamental and a material error of law.

14. Secondly, the judge made no reference to the appellant's medical condition, which was evidenced, and which was said by the appellant to explain the delay in his involvement in sur place activity.

15. There was additionally clear reference to the judge requiring to be "*convinced* of an aspect of the appellant's claim" at paragraph 49 in respect of the appellant's evidence regarding his political activity. I can see that the judge in the next paragraph at [50] referred to the lower evidential standard of proof but it is not clear that the judge has applied this throughout the determination and did apply it to a significant element of the claim which is a material error of law.

16. Therefore, for the reasons given, I set aside the decision of Judge Athwal in its entirety because of the fundamental importance of the issue on nationality and remit the matter to the First-tier Tribunal for a hearing de novo.

Directions

(1) The appellant's representatives should file and serve any further evidence at least fourteen days prior to the substantive hearing.

(2) The appellant's representatives should file and serve a skeleton argument at least seven days prior to the substantive hearing.

Notice of Decision

The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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 both to the appellant

and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Helen Rimington

Date 16th February 2022
Upper Tribunal Judge Rimington