



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005529

First-tier Tribunal No: PA/03650/2020

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 23 December 2023**

Before

**THE HON MRS JUSTICE THORNTON DBE
UPPER TRIBUNAL JUDGE RIMINGTON**

Between

**AK
(ANONYMITY ORDER MADE)**

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr M Symes, Counsel, instructed by

Heard at Field House on 30 November 2023

DECISION AND REASONS

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, AK is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify AK. Failure to comply with this order could amount to a contempt of court.

1. The application for permission to appeal was made by the Secretary of State, nonetheless we will refer hereinafter to the parties as they were described before the First-tier Tribunal (FtT).

2. The Secretary of State seeks to appeal, with permission, against the decision of First-tier Tribunal Judge O'Malley ('the judge') who on 13th May 2022, dismissed the asylum claim but allowed the appellant's appeal on article 3 grounds.

Immigration History and criminal offending

3. The appellant, an Iranian national born in 1981, entered the United Kingdom illegally in 2004 and claimed asylum in the same year on the basis he was gay. The appellant's claim was refused in 2006 for 'non-compliance' following his absconson. In 2010 the appellant made an application under the legacy scheme but this was refused in 2011. The appellant made an application with fresh submissions in 2014 and was interviewed in 2014 but that decision was delayed as the appellant was arrested in 2015. The appellant was convicted as part of a group for the distribution of class B drugs.
4. At [13]-[16] in his decision, the judge noted the appellant's immigration history and set out the appellant's convictions of supplying a Class B drug (2nd February 2016), conspiring to supplying a Class B drug (25 February 2016), supplying Class B drug (21st March 2016) and supplying a Class B drug (15th December 2016). Charges of sexual assault, rape and inciting prostitution were not pursued against him at the appellant's trial. The appellant was sentenced on 12th January 2017 to two concurrent sentences of 9 months concurrent with a sentence of one year, and a sentence of 10 years imprisonment for the conspiracy to supply mephedrone.
5. The appellant made further submissions against a notice of deportation and proceeded to appeal the Secretary of State's decision dated 25th January 2019 to refuse the appellant's protection claim on the basis of being gay.

The FtT decision

6. The judge recorded at [4]

'The respondent accepts that if the appellant is found to be bisexual, and if section 72 NIAA does not apply, the appellant cannot be returned to Iran and is entitled to protection under the Refugee Convention'.
7. The Section 72 certificate served by the Secretary of State was upheld and thus the judge concentrated on the article 3 aspect to the appeal.
8. The judge acknowledged the importance of credibility in the appeal from [47] onwards and noted that the appellant's evidence during his time in the UK lacked clarity or specificity [49] albeit it was submitted, owing to the appellant's drug addiction. The judge noted the sentencing remarks of HHJ Lynch that despite claimed addiction the appellant was able to run a 24/7 service supplying drugs. At that point, the judge stated 'I find some of the appellant's evidence evasive and inconsistent however I do not dismiss his evidence in its entirety'. From [50] to [60] the judge assessed the various documents submitted finding most of them inconsistent but at [59] and [60] remarked upon the Google searches under the appellant's name with a large number of newspaper entries identifying the appellant as being sentenced to 10 years imprisonment and report that he claimed he was gay. The judge then assessed the expert reports from Dr Chaudhary and Dr M Kakhki. Findings in relation to Article 3 were made the from [71] onwards including in particular the following:

75. I accept the conclusion of the expert report that the appellant, in seeking a travel document for return, would be obliged to provide information to the Iranian Embassy including a completed application form with information about himself and “a letter from the Home Office explaining their status within the United Kingdom or a letter explaining the reason for their deportation”. The reasons for refusal document includes details of the appellant’s illegal exit, his assertion of homosexuality and his criminal conviction.

76. I accept the expert report which records that those found to have exited illegally can be prosecuted and face a range of punishment including lashes.

77. I accept the expert report which records that those who have been convicted of offences elsewhere may be at risk of conviction on return to Iran and that “Mr Kaveh’s sentence is likely to be considered inadequate/insufficient by the Iranian authorities, particularly if he does not serve his full sentence, and is released early. In such circumstances an additional sentence may be imposed by the Iranian judicial system, to reduce the threat he is considered to pose to Iranian society”. I note that Mr Kaveh was released on licence, in October 2020, before the end of his sentence.

78. The documents referring to the appeal against sentence and conviction reach the conclusion that “as such the learned Judge must have concluded that the quantity of drug dealt by Mr Kaveh would have been around or above the indicative rate of 20kg...”. The expert report identifies that the criminal code in Iran proposes that those convicted of dealing with drugs in such quantities will be subject to lashes, imprisonment and, in the event of recidivism, the death penalty.

79. I accept the conclusion of the expert witness, that the appellant is at risk of a range of punishments from lashes to the death penalty if convicted of homosexual activity. The CPIN reports “LGBT Iranians have also reported accounts of physical and psychological abuse during detention - including the threat and use of torture - in order to extract confessions as evidence of homosexual conduct to be adduced in Iranian criminal trials”. “As far as can be ascertained, all investigative services... are mandated to pursue homosexual activities... A number of interviews ... seem to show that the authorities use harsh measures during arrests and interrogations. Intimidation, blackmailing, incommunicado detention, rape, torture, coercion to sign (false) confessions and extrajudicial punishments such as flogging are widely practiced during detention and interrogation...”.

80. I accept that the appellant would not be required to lie about his sexuality if questioned as part of the process of obtaining travel documents. I find that such lies would be difficult to maintain in the face of the information available about him on a simple google search. I am satisfied to the lower standard that his assertions of homosexuality and his convictions will become known to the Iranian authorities.

Grounds of Appeal

9. The grounds submitted that the judge materially misdirected himself in law. Specifically at [69] he failed to address the respondent's very clear challenges to the claimant's credibility contained in the refusal letter dated 23rd (sic) January 2019.
- (i) The judge found the appellant had been consistent about his sexuality without considering the inconsistencies contained in the refusal letter. Whilst the appellant first claimed he was gay in his screening interview, completed on 6th September 2004, it was not until the asylum interview completed on 15th September 2014 that the claim was repeated, the appellant having made no claims to this effect in the further submissions of 7th July 2010, 20th April 2011 or 29th July 2012 where the appellant claimed to have been charged with engaging in homosexual relations in Iran previously but stated that he had not been so engaged. It was only in 2014 that the appellant claimed to have engaged in activity with other males in Iran and that charges were not groundless. In submissions dated 16th May 2018 the appellant then claimed to be bisexual. Given the judge found some of the appellant's evidence to be evasive and inconsistent at [49] it was submitted that the judge should have considered the appellant's failure to be consistently gay when changing his claim to be bisexual.
 - (ii) The appellant had chosen not to obtain evidence from his family members who are not associated with his criminal activity.
10. Permission to appeal was granted by UTJ Stephen Smith who identified that a central issue was whether the appellant was a gay man. The judge arguably failed to consider the inconsistencies raised in the refusal letter when identifying that the judge had been consistent. Judge S Smith found less merit in the second ground noting that the judge had addressed that issue at [70] of his decision.
11. At the hearing Mr Melvin expanded on the grounds of challenge and relied on his skeleton argument. Mr Melvin focussed on three points in particular; first the judge had not addressed the main challenges on the appellant's inconsistencies which were raised by Secretary of State in the refusal letter, second, there had been no consideration of the claims of activity whilst in Iran and prior to entering the United Kingdom and thus there was no finding on past persecution. Thirdly, the judge had not considered the appellant's change of claim that he was previously gay and now bisexual. Mr Melvin referred us to PS (Christianity - risk) Iran CG [2020] UKUT 00046 (IAC) and submitted that the Iranian authorities did not necessarily act of the mere claim for example of being a Christian.
12. Mr Symes, in response, highlighted the grounds of appeal to the FtT which included the following:
- 'The Appellant disputes that the news report published in the UK, referring to his sexuality, would not be available to the Iranian Authorities. It is well documented that the Iranian Authorities are able to monitor people in the UK as well as objective news reports. It is therefore reasonable that the Iranian Authorities, upon searching his name if he were to be returned to Iran or arrive at the airport, would come across the articles available in the public domain referencing his criminal convictions and sexuality.'

13. He submitted that the claim always included 'attributed sexuality' and the appellant had relied on media reports not just his personal history. Mr Symes submitted that at [74] and [75], the decision relied on the expert report which in turn reflected likely press coverage of corrupting lifestyle, unfair hearings in Iran, and double jeopardy in relation to drugs' charges and the view of partial sentencing for which the appellant might be re-sentenced.
14. Although the reasoning in relation to the appellant's credibility was brief, and Mr Symes acknowledged there were aspects of evidence that the judge had rejected, there had been a valid shortcut to the conclusion of risk of persecution by way of reliance on the press publication and expert report. This evidence was independent of the appellant and thus the focus on credibility was, in this particular instance, not material.

Conclusions

15. We agree with Mr Symes' submissions. Contrary to the skeleton argument submitted by Mr Melvin it is clear that the 'perception' of the Iran authorities was part of the grounds of appeal as indicated at [12] above.
16. The judge noted at [49] that he found 'some of the appellant's evidence evasive and inconsistent' and did reject some of the documentation having carefully considered it, including the summonses said to have emanated from Iran [55], and the judge found the timing of these documents inconsistent and it was open to the judge to find that he did not dismiss the appellant's evidence entirely. Nevertheless, although the judge's reasoning on the appellant's own credibility could have been more expansive, there were fundamental findings which were separate from and independent of the assessment of the appellant's credibility, and which unarguably founded the judge's conclusion that there was a real risk of article 3 ill treatment should the appellant be returned to Iran.
17. The judge's key findings in relation to the 'perception' ground of appeal to the FtT and cited above at [12] were as follows:

59. There are further documents on which the appellant relies, identified in and including the Google search of his name. There are a large number of newspaper entries identifying him as one of the co-defendants in the matters which led to his sentence. The press reports identify that he was sentenced to 10 years imprisonment for conspiracy to supply drugs and that he identified himself as gay when questioned.

60. I am satisfied that it is appropriate to put weight on this search and the documents referred to in the search. I have seen copies of some of the newspaper reports, available online which record the headline "pizza shop worker accused of raping teenage girls claimed he was gay when interviewed by police" and I find that the reports identify the appellant within the body of the article. He is identified by name and nationality in many of the reports.

18. Particular attention was given by the judge to the country expert reports from Dr Mohammad M H Kakhki dated 14th December 2020 and 31st January 2020 and extracts from that report were identified in the judge's findings and their content is self evident as follows:

'62. In relation to expert evidence I accept that this is independent evidence and not merely a recitation of the appellant's assertions.

63. I accept that Dr Kakhki is a lawyer and academic with expertise in Iran. I find that it is appropriate to put weight on his report where it identifies the objective reports on the attitude of Iran in returning criminals and homosexuals and on the process for returning in the absence of regular travel documents.

64. His conclusion is that the appellant may raise suspicion and be investigated on application for a travel document for return and that the investigations will uncover the conviction and the appellant's assertion of his homosexuality. He concludes "his past homosexual conduct combined with his subsequent conviction for drug offences in the UK would increase the likelihood that he would face arrest and persecution at the hands of the authorities should he be returned to Iran. In my opinion any investigation by the Iranian authorities would normally involve harsh and prolonged interrogation with the use of torture amounting to persecution".

65. I find his conclusions about the risk of the treatment on arrest, interrogation and imprisonment in homosexuals are consistent with, and indeed rely in part upon, the CPIN Iran "sexual orientation and gender identity or expression" (June 2019).

66. I note that Dr Khakhi identifies that he was provided with a witness statement for his 2020 report. The only witness statement available to the court was dated 2021 and it is not clear whether this is the same statement. However, my conclusion is that his report generally deals with the objective reports on the country and as such is not less weighty because I cannot assess the witness evidence given to him by the appellant.'

19. My Symes took us to the expert report which showed the judge had faithfully reflected the expert report in his findings. Dr Kakhki's evidence was not challenged by the Secretary of State and nor was the press report on which the judge relied. The judge was careful to refer to the appellant's *assertion* of homosexuality and noted the expert's view that a search of the appellant's profile by the Iranian authorities was likely and the combination of his past homosexual conduct and subsequent drug conviction would increase the likelihood that the appellant would face persecution at the hands of the authorities. That did not rely on the appellant's past history in Iran and it is the perception of the authorities on the appellant's return which is relevant.
20. Mr Melvin accepted that PS related to Christians but moreover it was accepted in PS that there was possible risk in Iran even to those who may be found to be insincere, were they to come to the attention of the authorities and the risk should be assessed. PS acknowledges that 'All returning failed asylum seekers are subject to questioning on arrival, and this will include questions about why they claimed asylum'. We considered the judge, in the light of the legal authorities and evidence, was entitled on the evidence before him, to conclude the appellant would be questioned and come to the attention of the authorities.

21. As noted by XX (PJAK - sur place activities - Facebook) Iran CG [2022] UKUT 00023 (IAC) at headnote 4 applying for an ETD even prior to arrival in Iran is likely to be the first pinch point and further:

‘It is not realistic to assume that internet searches will not be carried out until a person’s arrival in Iran. Those applicants for ETDs provide an obvious pool of people, in respect of whom basic searches (such as open internet searches) are likely to be carried out.’

This is not a question of the authorities accessing personal data of the appellant; as noted by the judge a mere Google search of the appellant’s name would flag to the Iranian authorities the claim by the appellant that he was gay.

22. Mr Symes referred us to Dr Kakhki’s report with reference to double jeopardy and for example, at [70] and [71] the expert expressed his opinion that the Iranian authorities treat offences which negatively reflect upon Iran abroad with a particularly harsh approach and would be ‘investigated to the full extent to establish whether AK is a threat to Iranian society and if he is liable for additional penalties under Iranian law’. In relation to international drug offences there remained the risk of double jeopardy and investigation and further sentencing by the revolutionary courts. .

23. As Dr Kakhki also recorded at [127]

‘127. In light of the above information regarding the systematic use of torture by the Iranian authorities, it is likely that Mr Kaveh would experience some form of ill treatment if returned to Iran and subjected to investigation for various offences, including his past homosexual conduct in Iran, his criminal conviction in the UK and general lifestyle. As mentioned, authorities’ common use of torture and various types of harassment and threats may lead to a forced confession or incriminating statements being extracted from suspects.’

24. At [29] of his report Dr Kakhki referenced the ‘persecutory stance towards those suspected of being homosexual’ and that it

‘is of note that, simply being suspected of the crime can trigger harassment intimidation and brutal treatment by official and extrajudicial authorities including the police, Basij etc..’

25. No challenge was raised in respect of the report of Dr Kakhki and in the light of this report and the ease with which the appellant’s activities can be located online we are not persuaded that the judge’s decision materially erred in law. There was no requirement of the judge to focus on past persecution bearing in mind the extant risk found that the appellant’s claims of sexuality and his criminal activities would be revealed to the Iranian authorities at the relevant ‘pinch point’ of either applying for entry or on entry to Iran, when bearing in mind the documented attitude of the authorities to those activities and the likely resultant treatment.

26. Although the reasoning in relation to credibility could, as Mr Symes accepted been more detailed, in the light of the key findings, there was no material error of law, and the decision of the First-tier Tribunal shall stand.

Judge of the Upper Tribunal Rimington
Immigration and Asylum Chamber

30th November 2023