Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/01724/2012

THE IMMIGRATION ACTS

Heard at Birmingham	**Determination Promulgated**
on 10th June 2013	

Before

UPPER TRIBUNAL JUDGE HANSON

Between

H E (Iran)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Woodhouse of Sultan Lloyd Solicitors.
For the Respondent: Mr Smart Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Archer promulgated on 24th April 2012 in which he dismissed the appellant's appeal against the removal direction to Iran that accompanied the refusal of his claim for asylum or any other form of international protection.

2. The appellant was born on 1st August 1978 and is an Iranian national. He claims that if returned to Iran he will be killed by the Etelaat. He

refers to periods of previous alleged detentions and ill-treatment at the hands of the authorities.

3. Having considered the evidence Judge Archer set out his findings at paragraphs 47 to 58 of the determination which can be summarised as follows:

i. It was found remarkable that the appellant failed to mention that he had received a message from his brother-in-law, via his wife, that the authorities were still looking for him. This alleged call occurred prior to his 21st March 2012 witness statement yet there was no mention of what was said to be such an important issue in an otherwise comprehensive statement [47].

ii. That is reasonably likely the appellant has Kurdish ethnicity [48].

iii. The appellant's confirmation in his oral evidence that no letters or paperwork were given to him upon his release by the judge, or anyone else, in Iran was found to be wholly irrational and not reasonably likely to be true, especially as there would at least have been some indication of when he was expected to surrender for further investigation or court proceedings. It was found not to be reasonably likely the appellant would simply have been released on the named third party's undertaking with nothing else to follow [52].

iv. The core of the appellants claim is that the PJAK left items at his house, in a bag, which including three grenades which was seized by the authorities in August 2011. This account was found to be not reasonably likely to be true on the basis of the appellants own evidence [54].

v. There was no explanation for why, in all the circumstances, the bag was left at all [55].

vi. It was found the appellant himself, realising that his account was not plausible during his asylum interview, alleged in question 124 that he was confused himself, and was searching for an excuse. The appellant's suggestion in his witness statement at paragraph 23 that the answer was wrongly translated was rejected as no alternative answer was suggested and the appellant did not rely upon incorrect translation in his oral evidence.

vii. In question 124 the appellant was seeking to explain the otherwise irrational actions of PJAK by suggesting they were somehow acting in collusion with the authorities although he later resiled from that account because it is clearly inconsistent with the object of

evidence and indeed his own account of members of this group being shot on sight by the authorities [57].

viii. The core of the appellants claim is not credible. Credibility issues raised by the Secretary of State recorded in paragraph 21 to 31 of the determination have weight and have not been rebutted by the appellant. The appellant's account of being granted bail is not reasonably likely to be true. The appellant is of no interest to the authorities in Iran or to the PJAK. As such he is not at risk if returned to Iran.

4. Permission to appeal was sought on the basis that as the appellant left Iran illegally he will be subject to a fine and questioning on return; yet no proper consideration had been given to this element in the determination. It is said there are several aspects of the appellant's case which could lead to further detention and that if he is detained for questioning he is likely to be subject to inhumane and degrading treatment which would breach Article 3 ECHR. The grounds allege there was no consideration of these features of risk which were drawn to the Judge's attention in submissions made by the appellant's representative.

5. The application was opposed by the respondent on the basis that, bar the fact he is an Iranian Kurd, the appellant's account was rejected for sustainable reasons and no adequate basis has been advanced to show how the appellant can demonstrate a real risk on return on this basis.

6. I accept that paragraph 12 of the skeleton argument, prepared for the purposes of the hearing before the First-tier Tribunal, did contain a contention that the appellant's illegal exit made him vulnerable to being detained for questioning on arrival and that his ethnicity and past experiences create a heightened risk of adverse attention leading to his further detention and persecution.

7. Before the Upper Tribunal Mr Woodhouse submitted that there had been changes in Iran since the country guidance case of SB was decided, implying that reliance on this case was an error.

Discussion

8. The appellant has been found to be no more than a failed Iranian asylum seeker of Kurdish ethnicity who lacks credibility. There are a number of cases relevant to assessing risk on return to Iran.

9. In FM (Risk-Homosexual-Illegal departure) Iran CG [2002] UKIAT 05660 (Collins J) the Tribunal concluded that "there is no evidence of any general persecution or ill treatment of failed asylum seekers merely because they are failed asylum seekers." The general view seems to

be that returning asylum seekers will only be at risk on arrival back in Iran where there were other factors which make them stand out, such as a political profile.

10. In GN (Iran) v SSHD [2008] EWCA Civ 112 the Court of Appeal agreed with the Tribunal that the objective material demonstrated that neither illegal departure nor asylum failure would of themselves give rise to mistreatment on return contrary to Article 3 of the ECHR.

11. In SB (risk on return-illegal exit) Iran CG [2009] UKAIT 00053 the Tribunal held at headnote (ii) that Iranians facing enforced return do not in general face a real risk of persecution or ill-treatment. That remains the case even if they exited Iran illegally. Having exited Iran illegally is not a significant risk factor, although if it is the case that a person would face difficulties with the authorities for other reasons, such a history could be a factor adding to the level of difficulties he or she is likely to face.

12. I accept that events in Iran indicate a clampdown by the authorities since 2009 but this was considered by the Tribunal in BA (Demonstrators in Britain – risk on return) Iran CG [2011] UKUT 00036 (IAC) in which the Tribunal held that Iranians returning to Iran are screened on arrival. A returnee who meets the profile of an activist may be detained while searches of documentation are made. However, there is not a real risk of persecution for those who have just exited Iran illegally or are merely returning from Britain. The conclusions of the Tribunal in the country guidance case of SB (risk on return -illegal exit) Iran CG [2009] UKAIT 00053 are followed and endorsed. It was also found in this case that If, however, information is known about their activities abroad, they might well be picked up for questioning and/or transferred to a special court near the airport in Tehran after they have returned home. It is important to consider the level of political involvement before considering the likelihood of the individual coming to the attention of the authorities and the priority that the Iranian regime would give to tracing him. It is only after considering those factors that the issue of whether or not there is a real risk of his facing persecution on return can be assessed.

13. Assessing the degree of risk is therefore a fact sensitive exercise as demonstrated in two further and more recent cases of the European Court of Human Rights. In S.F. and Others v. Sweden (application no. 52077/10) reported on 15th May 2012, when considering the human rights situation in Iran, the Court observed that information available on Iran from a number of international sources showed that the Iranian authorities frequently detained and ill-treated people who peacefully participated in opposition or human rights activities. Those people included not only leaders of political organisations or other high-profile individuals who were detained, but anyone who opposed the current regime. However, taken on its own, the situation in Iran

could not justify the finding by the Court of a violation if the applicants were expelled to Iran.

Notwithstanding the above, the Court examined the applicants' personal situation and noted that their story was credible overall. It found that the applicants' activities in Iran were not, on their own, sufficient to conclude that a real and immediate risk existed of them being ill-treated if returned to Iran. On the other hand, the Court found that their activities in Sweden had intensified and grown in importance since 2008. Furthermore, the information available on Iran showed that the Iranian authorities effectively monitored internet communications as well as those critical of the regime, even outside Iran. In addition, given the applicants' activities and incidents in Iran before moving to Sweden, the Court concluded that the Iranian authorities would easily identify them. That conclusion was also supported by the fact that the applicants did not have valid identity documents and had allegedly left Iran illegally.

With regard to all the above, the Court held that a real risk existed of the applicants being ill-treated if returned to Iran. There would, therefore, be a violation of Article 3 if Sweden deported them to Iran.

14. In RC v Sweden [2010] ECHR 307, at paragraph 49, the ECtHR state:

> 49. Whilst being aware of the reports of serious human rights violations in Iran, as set out above, the Court does not find them to be of such a nature as to show, on their own, that there would be a violation of the Convention if the applicant were to be returned to that country. The Court has to establish whether the applicant's personal situation is such that his return to Iran would contravene Article 3 of the Convention.

15. In relation to the specific facts of the appellant in RC the Court found in paragraph 57:

> 57. Having regard to all of the above, the Court concludes that there are substantial grounds for believing that the applicant would be exposed to a real risk of being detained and subject to treatment contrary to Article 3 of the Convention if deported to Iran in the current circumstances. Accordingly, the Court finds that the implementation of the deportation order against the applicant would give rise to a violation of Article 3 of the Convention.

16. It is material to the European Court's decision that the applicant in RC was found to have substantiated his claim that he was detained and tortured by the Iranian authorities following the demonstration in July 2001. Having regard to this finding it was found that the applicant had

discharged the burden of proof that he had already been tortured and so the Court considered that the onus rested on the State to dispel any doubts about the risk of him being subjected again to treatment contrary to Article 3 on return.

17. The Court found that when assessing such risk the current situation in Iran and the tense situation where respect for basic human rights has deteriorated considerably following the elections in June 2009, had to be considered. The Court found that regard must also be had to the specific risk facing Iranians returning to their home country in circumstances where they cannot produce evidence of their having left the country legally. The Court considered that such Iranians are likely to be scrutinised for verification as to the legality of their departure from Iran and, in relation to the applicant in RC, the Court found it probable that being without a valid exit document he would come to the attention of the Iranian authorities and that his past is likely to be revealed. It was found that it was the cumulative effect of the above factors that added a further risk to that appellant.

18. The court in RC did not find that failed asylum seekers per se are at risk on return which is in accordance with the findings of the Tribunal recorded in SB (Iran). In this appeal H E was found by Judge Archer not to have come to the attention of the authorities and his claim to the contrary was found not to be credible. He will be returned, therefore, as no more than a failed asylum seeker and the finding in RC and the other cases does not support the contention that he will be at risk sufficient to engage the United Kingdom's obligations under any Convention on this basis.

19. Judge Archer was required to follow the existing country guidance case law. The Court of Appeal have said that the Tribunal “must treat as binding any country guidance authority relevant to the issues in dispute unless there is good reason for not doing so, such as fresh evidence which casts doubt upon its conclusions, and a failure to follow the country guidance without good reason is likely to involve an error of law.

20. What distinguishes this appellants case from the two Swedish cases referred to above is that in those cases there was clear evidence of credible activities which would have come to the attention of the authorities so as to place the individual appellants’ at risk upon return. This is the key element missing from the case considered by Judge Archer. The appellant was found to be no more than a failed asylum seeker who is found to have concocted a story with an attempt to deceive the authorities in United Kingdom to recognise him as a refugee or a person entitled to any other form of international protection. It is accepted he is an Iranian national of Kurdish ethnicity but the case law and country material does not show that this group are at risk per se upon return. The case law clearly states that failed

asylum seekers are not at risk of persecution even if being returned on an Emergency Travel Document and who are found to have left Iran illegally.

21. It was submitted before me that exiting illegally may constitute a breach of provisions of the Iranian penal code but it has not been shown that it is reasonably likely that any consequences the appellant will face, such as a sentence or involvement in criminal proceedings, will amount to an unfair trial or a sentence that would satisfy the definition of persecution rather than prosecution. It has also not been proved that prison conditions in Iran, in the event that a prison sentence is imposed, are such that there will be a breach of his Article 3 rights. Mr Woodhouse submitted that any sentence the appellant will receive will be at the upper end of the scale as a result of his profile but I find this to be mere speculation and not supported by any country material.

22. It was accepted that the burden is upon the appellant to prove that he will face a real risk on return sufficient to engage any of the relevant conventions in light of his unchallenged profile as no more than a failed asylum seeker who left the country illegally. I find there is no evidence the Iranian authorities will be aware that the appellant claimed asylum abroad. Mr Woodhouse accepted that he had no evidence to show that if a person was returned on an ETD the fact he was a failed asylum seeker will be disclosed.

23. Even if questioned and it was discovered he had left Iran illegally, the fact the Iranian penal code enables the judiciary to bring charges, does not necessarily establish that those powers will be used. The country material does not establish that all failed asylum seekers are at risk on return and would face such charges. Mr Woodhouse, in his response to Mr Smart’s submissions, accepted that he had no examples to draw to the Tribunal's attention proving that the penal code was enforced or used in the way he submitted such as to create a real risk to the appellant on return.

24. I find that insufficient evidence was made available to Judge Archer and the Upper Tribunal to warrant departing from the country guidance case law. Mr Woodhouse's submission that those who make claims abroad are viewed in the same way as those who have helped opposition groups, as making such a claim may be perceived as creating an adverse view/perception in the eyes of others of the Iranian regime such as to create a real risk, is noted but not substantiated. This claim is not supported by any evidence and the country guidance case law makes it clear that being a failed asylum seeker does not create a risk.

25. Although Judge Archer’s findings in relation to the risk on return do not contain an extensive examination of the case law relating to this

aspect or appear on the face of it to engage with the submission in paragraph 12 of the skeleton argument, it is clear from reading the determination that all relevant aspects of the evidence were considered in detail by the Judge. I find that the overall conclusion that the appellant has not discharged the burden of proof upon him to the required standard to show that he is entitled to a grant of international protection has not been shown to be infected by any legal error sufficient to amount to a material error of law. The appellant has no adverse profile. He is a failed asylum seeker returning from the United Kingdom of Kurdish ethnicity and no more. The finding that he will be able to return to Iran without a breach of his Article 3 of or other related rights is a finding he will be able to pass through the airport safely and return to his home area without experiencing difficulty, even if initially questioned on arrival. I find this to be legally sustainable finding and one within the range of findings the Judge was entitled to make the evidence.

Decision

26. **There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

27. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed…….
Upper Tribunal Judge Hanson

Dated the 5th July 2013