Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/06130/2012

THE IMMIGRATION ACTS

Heard at Newport **Determination Sent**
On 1 July 2013

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

HS

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr O Manley instructed by Gloucester Law Centre
For the Respondent: Mr K Hibbs, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal is subject to an anonymity order made by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind the order and I continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

2. The appellant is a citizen of Iran who was born on 29 January 1980. He left Iran in August 2009 and travelled to Turkey. He then went to Greece

where he stayed for six months before travelling to Italy where he stayed for two years. In May 2012, he came to the UK entering illegally in a lorry. He was arrested on 16 May 2012. He claimed asylum on arrest.

3. The appellant claimed to be a Ghashgaei Turk. He claimed that his father had been arrested in 1983 and executed in 1995. The appellant, however, did not claim to have participated in any activities for the Ghasgayee himself. He was a member of the Green Movement. He claimed that shortly before the presidential election in 2009 he had put up posters for the presidential candidate, Moussavi and he had been arrested and kept in police custody for two nights during which time he was tortured and beaten up. He was then released without charge. He claimed that on 13 June 2009 he was involved in a demonstration in Kovar. He was not arrested but the police were taking photographs and the Etellaat raided his home at 3.00 am the next morning looking for him. The appellant fears the Iranian authorities because of his involvement in the demonstration on 13 June 2009.

4. On 13 June 2012, the Secretary of State refused the appellant's application for asylum and made a decision to remove him as an illegal entrant by way of directions under Schedule 2 to the Immigration Act 1971. The appellant appealed to the First-tier Tribunal. Following a hearing, in a determination dated 4 August 2012 Judge C J Woolley dismissed the appellant's appeal. The Judge made an adverse credibility finding and did not accept that appellant's account. The Judge did not accept that the appellant would be at risk as a failed asylum seeker or that his removal would breach Articles 2, 3 and 8 of the ECHR.

5. Although the appellant's grounds did not engage with Judge Woolley's reasoning, the First-tier Tribunal (Judge Gibb) granted the appellant permission to appeal on two bases (1) that the Judge had failed to have regard to the fact that the appellant was unrepresented and had mental health problems when assessing his evidence and making an adverse credibility finding, in particular in counting against the appellant his failure to mention before the hearing that he had been detained and tortured before the demonstration in June 2009; and (2) that it was arguably contrary to the background evidence that it was implausible that the Iranian authorities would release him without charge and that he would have been photographed and identified by the police at the demonstration.

6. The appeal had previously been listed before me but adjourned because it was understood that the appellant had, in fact, been granted asylum in Italy. That matter having been explored, I was informed at the hearing that the appellant had indeed been granted asylum in Italy. Mr Manley informed me that, nevertheless, he had no instructions to withdraw the appeal (as had been anticipated) and he invited me to determine the error of law issue. Thereafter, he indicated that the appellant's representative would take further instructions about the continuance of this appeal. Mr Hibbs also invited me to determine the error of law issue.

7. On behalf of the appellant, Mr Manley submitted that the Judge's adverse credibility finding was flawed and could not stand for three reasons.

8. First, Mr Manley submitted that the Judge had erred in law in applying s.8 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 in taking into account, as damaging of the appellant's credibility, his failure to claim asylum in a safe third country, namely Italy and that he had lied in his screening interview when he said that he had been granted asylum in Italy (and also Turkey). Mr Manley submitted that it was now clear that in fact the appellant was telling the truth. Mr Manley acknowledged that this was his main point upon which he now relied.

9. Secondly, however, Mr Manley continued to rely upon his skeleton argument at para 4(a)-(g) that the Judge had failed to take into account the appellant's mental health. There it is argued that the hearing should have been adjourned in order that the appellant could be represented and further medical evidence obtained and also that the appellant's mental health was wrongly not taken into account in assessing the appellant's evidence, in particular his failure to mention that he was detained and tortured before the demonstration prior to the hearing before the First-tier Tribunal.

10. Thirdly, in his reply, Mr Manley also submitted that the Judge had been wrong to conclude that aspects of the appellant's evidence were implausible in the absence of background evidence.

11. Turning to each of these submissions in turn, I deal first with what maybe termed the "mistake of fact" submission.

12. At para 42 of his determination, Judge Woolley noted the appellant's evidence in relation to whether he had previously claimed (and been granted) asylum in Turkey and Italy as follows:

> "42. ….The appellant in his screening interview states that he had been granted asylum in both Turkey and Italy, and that in fact he had been given a 5 year residence visa in Italy. This claim was not repeated in his substantive interview and at the hearing he said that he had not been granted asylum in either country, and that his motive in saying so was that he would not be sent back to Iran. It is stated in the decision letter that the absence of fingerprints suggests that he did not claim asylum in either country, but I am satisfied after hearing from Miss Goodfellow that this conclusion cannot be reached for this reason, since fingerprints are deleted from the system in any event after a period of time. Having heard from the appellant at the hearing I am satisfied that he was not granted asylum in either country. The fact remains however that he made a false statement to the immigration authorities in his screening interview with the aim of manipulating the process to his own advantage, and I do find that this is behaviour which comes under Section 8 of the 2004 Act as behaviour which was designed to mislead."

13. Then at para 43 the Judge dealt with that issue in the context of the appellant's failure to claim asylum in a safe third country which, if

established, is also conduct falling within s.8 of the 2004 Act. The Judge said this:

> "43. The appellant by his own account did not claim asylum in any country through which he passed on his journey to the United Kingdom. No criticism can be levied against him for not claiming asylum in Greece which, it has been accepted, does not apply international standards properly. In respect of Italy, France and Belgium however all are accepted as safe countries which do apply international law. In Italy it is noteworthy that the appellant had come to the attention of the proper authorities (the "Network Italiano Richiedenti Asilo Sopravvissuti a Torture" – the Italian network for those requesting asylum and survivors of torture) as he had been given medication following an examination by a psychiatrist at Bari on 7th August 2010. Given the assistance which had been given to him by Italy it is hard to see any reason why the appellant would not have claimed asylum other than personal choice. Indeed he did say that in Italy even those who have been granted asylum still have to live on the streets. In France and Belgium similar conclusions follow and I find he could have claimed asylum in either of these countries. Both are safe countries where the appellant would have been free to claim asylum. I do not accept his account that he had no idea where he was going and would have preferred to go to Norway and Sweden. If this was the case his route would have been northwards across Europe rather than northwest and there would have been no need for him to ever be in Belgium. I find that his destination was the United Kingdom and that his failure to claim asylum while in a safe country is a further reason to apply Section 8 of the 2004 Act and to conclude that by reason of the engagement of that Act his credibility is undermined."

14. It was not suggested before me that if the appellant had, in fact, not claimed asylum or been granted asylum in Turkey and Italy that the Judge's reasoning in relation to s.8 of the 2004 Act was in any way flawed. Clearly, the appellant's failure to claim asylum in Italy and to lie to the UK authorities that he had been granted asylum in Italy (and Turkey) would fall within s.8 and would be behaviour potentially "damaging" of his credibility. Further, there is no doubt that the Judge was entitled to find, on the evidence before him, including the appellant's own conflicting evidence but his unambiguous oral evidence at the hearing, that he had not claimed asylum prior to coming to the UK. Consequently, Mr Manley's submission relies entirely upon the proposition that the "mistake of fact" by the Judge amounted to an error of law. The leading authority is E v SSHD: R v SSHD [2004] EWCA Civ 49 which I drew to the representatives' attention at the hearing. In that case, the Court of Appeal accepted that a mistake of fact giving rise to unfairness could amount to an error of law. Having set out at some length the previous authorities, Carnwath LJ (delivering the judgment of the Court) stated at [66] that:

> "66. In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in cooperating to achieve the correct result. Asylum law is undoubtedly such an area."

15. Thus far, E & R provides some support to Mr Manley's principal submission. At [66], Carnwath LJ went on to set out the requirements to establish this new head of challenge as follows:

> "66. ….First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been 'established', in the sense that it was un-contentious and objectively verifiable. Thirdly, the appellant (or his advisors) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning".

16. The first two requirements are met. There is not doubt that in this appeal there has been a "mistake as to an existing fact" and that that fact is "uncontentious and objectively verifiable". The crucial issue, in my judgement, relates to the third requirement, namely whether it can be said that the appellant (or his advisers) was not responsible for that mistake. In my judgement, that requirement is not made out in this appeal. Although the appellant initially (at his screening interview) said that he had claimed (and had been granted) asylum in Italy and Turkey, he expressly recanted that evidence at the hearing in his oral evidence. The mistake (if that is what it can properly be called in the light of the variance in the evidence from the appellant) was, therefore, of the appellant's own making. Subject to Mr Manley's submission in relation to the Judge's assessment of the evidence which I deal with below, the Judge was entitled to take the appellant's oral evidence on this matter as being the truth rather than what he said in his screening interview. Although the appellant was not represented at the hearing, he was previously represented. At no time did the appellant or his representatives provide any supporting evidence concerning what we now know to be the case, namely that he had been granted asylum in Italy and Turkey. As I have said, the Judge was entitled to rely on the appellant's unequivocal oral evidence at the hearing and reach the finding that he did. In my judgement, this was not a case where, applying the requirements set out in [66] E & R, that a mistake of fact was made by the Judge which amounts to an error of law. Consequently, the Judge was correct to apply s.8 of the 2004 Act.

17. Secondly, Mr Manley (in his skeleton argument and oral submissions) argued that the Judge had erred in law by not adjourning the appeal given the appellant's mental health issues and also, having continued the hearing, in assessing the appellant's evidence. The point arises out of the Judge's reasoning in para 38 of his determination. There, the Judge said this:

> "38. The appellant's account of being detained and tortured before the demonstration was made for the first time at the hearing. It is noteworthy that he did have the assistance of a solicitor in reviewing the interview (Messrs Crowley & Co) who did write in with a series of amendments to the interview. If this detention did take place I do not find it credible that the appellant would only mention it for the first time at the hearing, especially when a

> competent immigration solicitor would have ensured that the whole picture would have been presented before the decision. The appellant in his screening interview stated that he had never been in detention and I do not accept his explanation at the hearing for this discrepancy – namely that he thought this question just related to his time in Europe. The question is not so defined…. "

18. Mr Manley pointed out that the appellant was on medication for depression and his own evidence, set out by the Judge at para 19 of the determination, was that he was "under the supervision of a psychiatrist and forgetful of dates".

19. In my judgement this ground is not made out. Self-evidently, the Judge had in mind that the appellant was on medication for depression. Although the appellant stated that he was under the supervision of a psychiatrist and forgetful, there was no supporting medical evidence to that effect. The documents at pages D8-D20 appear to be documents concerned with the appellant's treatment whilst in Italy. They are not translated into English. There is reference to a number of drugs which seem, and it was not suggested to the contrary before me, to relate to treatment for depression. There was, however, apart from the appellant's own evidence nothing to indicate that the appellant first, could not properly represent himself; and secondly, to explain why at his screening interview he omitted to mention altogether that he had been detained and tortured by the police for two days prior to the demonstration in June. As the Judge made clear in para 38, the appellant was at that time represented by a firm of solicitors who wrote to UKBA on 7 June 2012 making a number of points of clarification arising out of the appellant's substantive interview on 30 May 2012. No mention is made of the omission of the appellant to refer to his detention and torture which he subsequently referred to for the first time at the hearing before the Judge. The appellant's own evidence, at its highest, was that his mental condition meant that he "forgets dates". That was not the inconsistency or omission which the Judge relied on in para 38. The appellant's evidence provides no explanation for the complete omission to mention a two day period of detention (the only one that he claims to have happened) during which time he was tortured.

20. Nothing in the evidence before the Judge warranted his adjourning the appeal because of the appellant's mental health issues in order to obtain legal representation or further medical evidence in relation to the appellant's mental health. Nothing in the determination suggests that the appellant was not able to represent himself or suggests that the Judge failed to conduct the hearing fairly and give the appellant a proper opportunity to present his case. Likewise, the Judge was entitled to rely on the appellant's omission to mention his detention and torture during his interview and to raise it for the first time at the hearing in reaching his finding that he did not accept that the appellant had been detained and tortured as he now claimed.

21. For these reasons, I reject Mr Manley's second submission.

22. Thirdly, in his reply Mr Manley relied upon the point made in the grant of permission to appeal that the Judge's view that aspects of the appellant's account were implausible appears to be contrary to the background evidence on the persecutory response of the Iranian authorities to low level demonstrators/Moussavi supporters. That is a reference to a passage in Judge Woolley's determination at paragraph 38 where the Judge said this:

> "38. ...The appellant says that he was detained for putting up posters but from the country evidence Moussavi had hundreds of thousands of supporters and election posters of Moussavi must have been commonplace throughout Iran. The Country evidence suggests that there were nightly TV debates between candidates and that there was a "mass distribution of computerised propaganda" and also that there were some 110 million text messages sent out from the political parties every day. Against this background it is not credible that the appellant would have been singled out by the authorities just for putting up posters. The appellant had not come to the attention of the authorities before and has not suggested that there was any link in the authorities' minds between him and his father who had been executed by the regime when the appellant was a child. Even if he was detained for two days as he claims it is not consistent with the country evidence that the authorities would have released him without charge or without any conditions to ensure his behaviour, especially in such a sensitive time before the elections. And yet the appellant said clearly in answer to questions at the hearing that he was released without any conditions. He describes that he was kicked to the face and body with boots but has not produced any evidence of any injuries he was caused. He was under the medical care of the Italian authorities and has produced a certificate issued at Bari on 7th August 2010. There is however no mention in this certificate of any detention by the authorities, just as there was no mention in either of his interviews. I do not find that the appellant's account is credible and do not accept that he was ever in detention in Iran. I find that it is a later invention designed to strengthen his claim."

23. There are two difficulties with Mr Manley's submission. First, neither the Judge in granting permission to appeal nor Mr Manley identified the specific background information concerning Iran which, it is postulated, contradicts the Judge's conclusion that it was "not credible that the appellant would be singled out by the authorities just for putting up posters". To the extent that it is also said that the Judge's view that it is not consistent with the country evidence that the authorities would release the appellant without charge, again the contradictory country evidence is not identified in the grant of permission or by Mr Manley in his skeleton argument or oral submissions. Secondly, this reason formed only one of many given by the Judge for doubting the appellant's credibility. Most particularly, in para 38 this passage (now challenged) follows the passage I set out earlier in which the Judge stated that he did not "find it credible" that the appellant was detained given that he had not mentioned it at his two interviews and only for the first time referred to it at the hearing.

24. The other issue raised under the rubric of "plausibility" concerns paragraph 39 of the Judge's determination. There, the Judge said this:

> "39. The appellant in interview suggested that he was identified at the demonstration and singled out later by the Etellaat. I have noted the country information to the effect that Kovar itself is not mentioned as one of the cities in which a demonstration took place. I have however to accept that the absence of Kovar's name from the list is not a convincing reason to deny that any demonstration took place there at all. There was an upsurge in political activity at this time in Iran and a demonstration could have taken place in Kovar without being recorded. Even accepting that a demonstration did take place there, however, I do not accept that the appellant's mere presence at that demonstration is a credible explanation of why the Etellaat were interested in him. There wee on his own account a thousand demonstrators and the numbers of police were small. They would have been preoccupied certainly in the first few hours with controlling the demonstration to actively engage in intelligence gathering about the participants. The appellant says that there were photographs being taken but does not say that he did anything out of the ordinary at the demonstration or that he was singled out by the police in any way. Even if his photograph had been taken it would have been one face in a thousand and I do not find it credible that the police would have been able to identify him so quickly as to attempt a raid on his house at 3.00 am the next morning. He says that in Kovar everyone knows everyone else but in the case of a man who had not come to the attention of the authorities before (I have not found his account of detention to be credible) it is not credible that a man of good character would have been singled out at such an early stage as opposed to the organisers of the demonstration or of any student activities who may have been present. I do not find that the appellant is credible in his account of the demonstration and its aftermath. He was not singled out in the demonstration and was not arrested at it. I do not find that he was identified at the demonstration by the authorities or that Etellaat raided his house."

25. In his skeleton argument, Mr Manley submitted that the Judge's view was not supported by reference to specific objective evidence. Further, it is said that it is inconsistent with the respondent's view expressed at para 44 of the refusal letter that the Iranian government had a "long standing suspicion" for the Ghashghaye of which ethnic group the appellant is a member. In my judgment, this is no more than a disagreement with the Judge's assessment of the evidence. It was open to the Judge to find that it was not likely that the appellant was identified by photographs or otherwise (as one out of a thousand people) by the Etellaat so that his house was raided at 3.00 am the next morning. Having rejected the appellant's account that he had previously been involved in a demonstration, it was not perverse or irrational of the Judge to conclude that the appellant's account of being tracked down at his home, simply because he was involved in such a large demonstration, was not credible.

26. For these reasons, the Judge did note err in law in reaching his adverse credibility finding and rejecting the appellant's account and consequently to find that he had failed to establish that he would be at risk on return to Iran.

Decision

27. Thus the decision of the First-tier Tribunal to dismiss the appellant's appeal on asylum grounds did not involve the making of an error of law and its decision stands.

28. The First-tier Tribunal's decisions to dismiss the appeal on humanitarian protection grounds and under Articles 2, 3 and 8 were not challenged and stand.

29. The appeal is dismissed.

Signed

A Grubb
Judge of the Upper Tribunal

Date: