Upper Tribunal
(Immigration and Asylum Chamber)

Appeal no: **DA 01243-13**

THE IMMIGRATION ACTS

At **Field House**
on **13.11.2013**

Decision signed: **13.11.2013**
sent out: **29.11.2013**

Before:

The Hon. **Lord MATTHEWS** and
Upper Tribunal Judge **John FREEMAN**

Between:

Haidar Hamakhan HAYASI

appellant

and

Secretary of State for the Home Department

respondent

Representation:
For the appellant: *Harriet Short* (counsel instructed by Wilson LLP)
For the respondent: Mr Chris Avery

DETERMINATION AND REASONS

This is an appeal, by the appellant, against the decision of the First-tier Tribunal (Judge David Page and a lay member), sitting at Newport on 16 July, to dismiss a deportation appeal by a Kurdish citizen of Iran, born 1 December 1985. The appeal turns on whether the panel were justified in refusing a request for an adjournment for a report to be commissioned from a 'country expert', and in their approach to *Devaseelan* [2002] UKIAT 00702*; so first we shall need to say something about the history of these proceedings.

2. The appellant had clandestinely arrived in this country on about 16 September 2005, claiming asylum on the 22nd: his claim was based on his having been approached by the Iranian security forces to act as a spy for them, and the likely consequences of his refusal to do so. His first appeal, against refusal of asylum, was dismissed by Judge Stephen Hall on 26 January 2006, and came finally to an end with refusal of reconsideration of that decision by a senior immigration judge on 20 February that year. The appellant did not leave this country, but stayed on till he was given indefinite leave to remain, for what reasons the grant leaves unclear, on 17 September 2010.

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3. In early November 2010 the appellant committed three offences of conversion or possession of criminal property, for which on 26 October 2011 he was sentenced to 12 months' imprisonment, concurrently on each. That led to a notice from the Home Office, inviting him to say why an order for his deportation should not automatically follow, to which he responded on 9 December 2011, repeating his previous asylum claim, without any apparent fresh material to support it. A deportation order followed on 28 May 2013, posted with a decision letter giving the reasons for it to his solicitors on 2 June, and personally served on him on the 5th. The letter referred to the appellant's reassertion of his asylum claim, and to its having been dismissed on appeal in January 2006.

4. The appellant appealed through his very experienced specialist solicitors on 17 June: the grounds referred in general terms to the appellant's rights under the Refugee Convention, but gave no further details. The solicitors' covering letter referred, apparently in their standard terms, to the need to list their firm's London appeals at Taylor House, rather than Hatton Cross. This appellant, as they knew however, had since his release on immigration bail on 2 April 2012 been living in Bristol, so that, in accordance with the usual procedure, his appeal was not listed for hearing in London, but in Newport (Gwent).

5. On 25 June 2013 the appellant and his solicitors were sent by first-class post notice of hearing at Newport on 16 July. The solicitors did not reply to that till Friday 12 July at 1506, when they faxed a letter to that centre, complaining that

   (a) they had only just received the Home Office bundle for the appeal, missing some pages, which they listed;

   (b) they had not yet received a reply from the appellant's former probation officer to questions they had asked about him; and

   (c) since the appellant had been unrepresented at his first appeal, they wanted to submit further evidence, which at this stage they did not specify;

   and asking for the appeal hearing either to be transferred to Taylor House for a pre-hearing review, or to be converted into a similar hearing at Newport, so that appropriate directions could be given. No point was taken before us on (b), and the panel in any case accepted that this appellant had been assessed as presenting low risks of re-offending, and of harm to the public, and had behaved well in prison, leading to his being given 'enhamced status' while there. That application was refused by a judge and the solicitors were told of the refusal on Monday 15 July.

6. On 16 July, the day of the hearing itself, the solicitors faxed the hearing centre again, saying their counsel would be applying to the hearing judge for an adjournment: the relevant part of this application referred to an attached e-mail of the 15th from Mrs Anna Enayat, a 'country expert' well known to this Tribunal, where she says

> I am able to write a report on the issues you have raised but owing to the complexity of some, coupled with travel plans in August, I am unable to meet a deadline until early September.
>
> The report will need to cover the background to your client's original appeal, which was not explored at the time, taking in the use of informers among the Kurdish population by the Iranian authorities, the reasons why an inhabitant of the particular village he came from would

have been of particular value to them, as well as certain cultural issues that were not taken account of in his 2006 hearing.

7. The solicitors added, though this did not appear in Mrs Enayat's e-mail, that she had

> … confirmed that she would be able to comment on the Iranian authorities' likely adverse interest in the appellant on account of his criminal conviction and the likely consequences of this in terms of interrogation, detention and any ill-treatment. This is plainly a new issue which did not arise before the Tribunal in the appellant's original appeal.

8. The application was repeated by counsel at the hearing (not Miss Short), and the one involving Mrs Enayat's evidence was dealt with by the panel at paragraph 22, after referring to r. 21 (2) of the Procedure Rules, which provides that

> The Tribunal must not adjourn a hearing of an appeal on the application of a party, unless satisfied that the appeal cannot otherwise be justly determined.

The panel went on to say this

> The issues in the asylum appeal had been fully determined and those issues were essentially credibility – not in-country questions to be determined with the assistance of expert evidence.

and to conclude that they were not satisfied as required by the rule.

9. The panel referred at paragraph 25 to Judge Hall's findings of fact at his paragraph 28, and said this

> It is unnecessary to set all of those findings out here, suffice it to say that at paragraph 29 the judge said that each and every one of his findings of fact led him to the conclusion that the appellant had been an untruthful and unreliable witness.

They went on to refer at paragraph 41 to *Devaseelan;* while they did not go into further details about this very well-known decision, the guideline they were thinking of was clearly (6):

> **If before the second Adjudicator the Appellant relies on facts that are not materially different from those put to the first Adjudicator,** and proposes to support the claim by what is in essence the same evidence as that available to the Appellant at that time, **the second Adjudicator should regard the issues as settled by the first Adjudicator's determination and *make his findings in line with that determination*** rather than allowing the matter to be re-litigated.

10. The panel reviewed the likely effect of the proposed evidence from Mrs Enayat, as a well-known 'country expert', giving expert opinion on the plausibility of the appellant's account, and concluded as follows:

> The issue was essentially credibility [always a matter for the judge, not an expert witness] and given the nature of the appellant's story an expert report was unlikely to have taken the case much further.

11. Permission to appeal was given on the basis that

(a) the appellant's solicitors might not have had a proper opportunity to take proper instructions and then consider whether expert evidence was necessary, in particular on whether the appellant's conviction would put him at risk on return; and

(b) the fact of the appellant's conviction amounted to new evidence, in terms of the panel's approach to *Devaseelan*.

12. So far as the facts behind the appellant's original claim are concerned, Judge Hall's findings were just as they had said: at paragraph 28, he reached nine separate conclusions against the appellant on his personal credibility, for reasons relating to his individual history, and not to the plausibility or otherwise of the Iranian security forces taking a particular interest in getting information out of someone from his village. While Mrs Enayat's views on this point were something they could legitimately have taken into account, if they had had them before them, the panel did not say anything to the contrary, but simply concluded that her proposed evidence on it was unlikely to have made any real difference to the result.

13. While it was to say the least regrettable that the Home Office should have served a bundle only a few days before the hearing (the Tribunal's own copy was not received till 10 July), which was even then incomplete, it would certainly have been possible, and equally certainly desirable, for a full copy of Judge Hall's decision to have been obtained and considered by the panel and both sides at the hearing, as they did for themselves later. However, the application before them was not for a short adjournment for this purpose, which could easily have been accommodated; but for one of at least two months to allow for 'country expert' evidence to be given. The question is whether the panel were entitled to take the view they did on whether, weighing the e-mail from Mrs Enayat, and what the solicitors said about it, against Judge Hall's findings of fact, the appeal could be justly determined without full evidence from her.

14. At the time of the first-tier hearing on 16 July 2013, the appellant had been aware of Judge Hall's findings against him for the last 7½ years, and his solicitors had at least been put on notice of them, and that the Home Office were relying on them for their present decision on the appellant's renewed asylum claim, by the terms of the decision letter they had received in early June. There was no application for an adjournment at all, nor any attempt to enlist Mrs Enayat's services, till their letter of 12 July, where they did not even then refer to any need for expert evidence. That was first mentioned on 16 July, the day of the hearing itself.

15. The panel did not refer to, but clearly had in mind, the provisions of r. 4 of the Procedure Rules:

> The overriding objective of these Rules is to secure that proceedings before the Tribunal are handled as fairly, quickly and efficiently as possible; and, where appropriate, that members of the Tribunal have responsibility for ensuring this, in the interests of the parties to the proceedings and in the wider public interest.

16. So far as the credibility of the appellant's original account was concerned, and bearing in mind that overriding objective and what we have said at **12 - 14**, we consider the panel were entitled to take the view that this very late application for two months' delay for a report from Mrs Enayat, not likely even then to cast any serious doubt on Judge Hall's 7½-year old findings, was not something which justice required to be granted.

17. Somewhat different considerations apply to the claim, not made by the appellant himself in his reply to the deportation notice, nor mentioned by Mrs Enayat in her e-mail of 15 July, which was the one before the panel, to the effect that he might be at risk on return to Iran, simply by the fact of his conviction in this country. This claim was only before the panel, if at all, by way of the assertion by the solicitors themselves in their letter of 16 July, set out at **7**; nor was it repeated by counsel at the hearing, so far as we can see from the panel's careful account of his submissions at paragraphs 22 and 35 – 38, or the appellant's oral evidence, and this may have been why they did not see the need to deal with it. If it had been a live point, on the other hand, then it would of course have been a new one, not covered by the panel's view on the effect of *Devaseelan*.

18. Our primary view on this point is that it was not something which the panel were required to consider in the first place in dealing with the application for an adjournment; nor one on which they were required to reconsider the need for 'country expert' evidence in the light of what was said when they decided to go ahead with the hearing. No doubt Mrs Enayat had said something to the solicitors about it; but the factual basis for such a claim had not been laid by the end of the hearing, apart from the appellant's conviction itself.

19. However we thought it right, in the interests of fairness to the appellant, to check our view on that point against what Mrs Enayat did later say herself, in an e-mail of 8 August, not of course before the panel, but put before us by Miss Short. Here Mrs Enayat makes further reference to the point already dealt with, and goes on

> The other issue that I could comment on in this case is the likely consequences on return of [the appellant's] recent conviction for money laundering in the UK. This is a complex issue as, in recent years, there has been a significant amount of legislation regarding money-laundering in Iran, prompted in part by pressure from the international community and the United Nations. In my report, I would be able to explain this context and comment on how, if this came to light when [the appellant] was screened on return, it could lead to his being imprisoned, prosecuted and punished, particularly if his activities are perceived to be political and/or linked to transactions between Kurds in the diaspora.

20. This does not provide any factual basis for suggesting that the circumstances of the appellant's conviction *were* reasonably likely to become known to the Iranian authorities, or seen as political or otherwise suspect if they did become known. It confirms our view that this 'double jeopardy' claim, only before the panel by way of an assertion in the solicitors' letter, was not something they needed to deal with at all.

Appeal dismissed

(a judge of the Upper Tribunal)