Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/04684/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination sent**
on 11 March 2014	**On 27 March 2014**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

ELHAM YAZDANI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr A Caskie, Advocate, instructed by Latta & Co, Solicitors
For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

No anonymity order requested or made

DETERMINATION AND REASONS

1) Both parties sought permission to appeal to the Upper Tribunal. Permission was granted to the SSHD, whose application was received first, while the appellant's application was overlooked. Mr Matthews agreed to the UT proceeding as if permission had been granted also to the appellant.

2) In her determination promulgated on 5 August 2013 First-tier Tribunal Judge Balloch found that the appellant's account was not reasonably likely to be true, but that the indications were that she and her husband (a dependant on the claim) left Iran illegally. The judge went on, at paragraph 97:

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> Dr Kakhki [a country expert] has indicated that [illegal departure] would be sufficient to engage the authority's attention and the appellant could be subjected to abusive interrogation. Even though I have not found that it has been established that the appellant removed sensitive materials, the respondent has accepted that the appellant and her husband were employees of TAKSA and Dr Kakhki has demonstrated that this is a company that deals with military matters.

3) The judge referred at paragraph 98 to *SB* (Iran) CG [2009] UKAIT 00053. That case held that Iranians facing enforced return did not in general face a real risk of persecution or ill-treatment even if they had exited illegally. Such exit was not a significant risk factor but if there were difficulties with the authorities for other reasons, it might add to them.

4) The judge went on to refer to deterioration in relations between the UK and Iran; to arrests of a student activist and of a member of the Kurdish minority on return; and a report that failed asylum seekers might be prosecuted for inventing accounts of persecution derived from the respondent's COIRs (country of origin information reports). At paragraph 104 the judge said that the content of COIRs in respect of failed asylum seekers raised:

> … sufficient concern that … the appellant may on return be apprehended as someone who has claimed asylum in the UK and … may suffer treatment that could engage Article 3 of the ECHR. I therefore allow the appeal to this extent.

5) The SSHD's appeal is on the grounds firstly that the judge misinterpreted the evidence, which did not demonstrate that all failed asylum seekers are at risk of breach of Article 3. The COIR evidence referred to three Iranian nationals, one with a political profile, which this appellant did not have, and the other two without clear specification of the facts. Secondly, the SSHD says that the judge acknowledged but failed to apply *SB*. The asylum claim had been found not to be credible, and there was no evidence to suggest any other factors adding to the level of difficulties she might face on return. With no profile other than that of an asylum seeker, there was no real risk.

6) The appellant appeals on the grounds that the judge failed to consider whether the appellants might be seen as opposed to the regime because they had left the country illegally, had claimed asylum in the UK, and had been employees of a company which deals with military matters. In those circumstances, political opinion would therefore be to them, a view supported by "objective evidence … and … the expert report from Dr Kakhki." The judge thus erred by dismissing the appeal under the Refugee Convention.

7) Mr Matthews said that the SSHD's two grounds are interlinked. He referred to the evidence in the respondent's COIRs (paragraphs 31.15 to 31.18 or 32.25 to 32.27; it is unclear for which years these reports are, but the information is the same in both versions, and neither party suggested that anything turns on which version of the COIR is used). There was also information in the appellant's bundle at pages 23 and 27, but these were the same instances. The somewhat obscure circumstances of three returns about three years ago did not show a pattern of treatment of failed asylum seekers which entitled the judge to conclude that there would be a breach of Article 3.

In at least one instance, there had been a background of participation in demonstrations. This appellant had no similar background. This was not a mere disagreement over the weight to be given to the evidence, but an error of departure from country guidance without adequate justification. While it was accepted that the evidence post-dated the country guidance case, it was not significantly different from the materials which had been before the Tribunal when issuing its guidance. It did not justify the conclusion that there had been a general deterioration in the treatment of failed asylum seekers. If the Secretary of State's ground were upheld, the appellant's appeal fell away. In any event, the judge had not accepted that the appellant had any access to sensitive information, and there was nothing from which to infer that the authorities would impute political opinion to the appellant.

8) Mr Caskie said that the appellant's case had not been that all those who left Iran illegally are thereby at risk on return. He accepted that the background evidence did not support that. The position was that this particular appellant would be at risk. The critical findings were at the end of paragraph 97 of the determination, quoted above. It had been found that the appellant was likely to have exited illegally, and checks were made on returnees. The judge erred by failing to tie together paragraphs 97 and 104 of her determination. The authorities did have reason to take particular interest in the appellant. Even if she had not removed sensitive materials, the employment of the appellant and her husband was linked to a company dealing with military matters. Even if there were no sound grounds against them, the authorities were likely to doubt their loyalty, which involved imputed political opinion, so that she should have been treated as a refugee. The Home Office submissions assumed that the case involved illegal exit only, but there was more. The SSHD's grounds were framed as lack of evidence to support the conclusion, but a determination should not be set aside if, read as a whole, its conclusion be justified. So read, the determination justified a further conclusion in favour of the appellant.

9) I reserved my determination.

10) There is some substance in the submissions made on both sides.

11) The Tribunal's Practice Directions, approved in case law, require the First-tier Tribunal to treat as authoritative country guidance findings so far as they relate to the issue at stake, and so far as they depend upon the same or similar evidence. Failure to follow country guidance, or to show why it does not apply to the case under consideration, is generally error of law. At paragraph 104, the judge reached a sweeping conclusion on failed asylum seekers in general. That was at best weakly justified by reference to a small number of instances, not entirely comparable, in the background evidence before her. She further justifies her conclusion by brief reference to the nature of the Iranian regime, and to poor relations between the UK and Iran, but those matters are nothing new. If there were no more to the case, the determination would, I think, need to be reversed.

12) Mr Caskie points out a saving element. The judge made a finding at paragraph 97 that the appellant and her husband would engage the attention of the authorities on return, and that she might be subjected to abusive interrogation. It was accepted that the couple were employees with a company dealing with military matters. I see no apparent reason why they might not be expected to arrange to return on their own valid Iranian passports, so as not to attract attention; but the case has been approached on both sides on the assumption that they would visibly return as failed asylum seekers. The judge overlooked that there might, in this case, be a further difficulty with the authorities, sufficient to raise the case to the level of a real risk. That added ingredient brings in the element of suspected disloyalty, or imputed political opinion, which places the case within the Refugee Convention. There is therefore just enough not only to save the determination from being set aside for error of law, but to require a further finding in the appellant's favour.

13) To the extent that the determination allowed the appellant's appeal under Article 3 of the ECHR, it shall stand. To the extent that the appeal was dismissed under the Refugee Convention, it is set aside, and a decision is substituted **allowing the appeal also on Refugee Convention grounds**.

17 March 2014
Judge of the Upper Tribunal