Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/15364/2014

THE IMMIGRATION ACTS

Heard at Glasgow **Determination issued**
On 28 October 2014 **On 30 October 2014**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

BORHAN HOSSAINI
(No anonymity order made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr S Winter, instructed by McGill & Co, Solicitors
For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Iran. He appeals against a determination by First-tier Tribunal Judge Balloch, dismissing his appeal against refusal of an application made under cover of a letter from his solicitors dated 7 February 2014, seeking "… leave to remain under Article 8 of the ECHR outside the Immigration Rules, with particular reference to private life and length of residence in the UK".

2. Ground 1 of the appeal to the Upper Tribunal is based on the impracticality of returns to Iran. This point does not appear to have been part of the case put to the First-tier Tribunal. Mr Winter correctly recognised that it is unstateable anyway, and did not pursue it. Ground 3 is that the judge "failed to give appropriate weight to the quality of the appellant's friendships in the UK". This is only an expression of disagreement, not a proposition of legal error, and was also taken no further.

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3. Ground 2 is that the credibility of the appellant's assertion that he is an atheist went unchallenged; his ability to live as an apostate and an atheist goes to the core of his moral and psychological integrity, and private life; Iran is a theocracy which requires its citizens to abide by Islamic law; the judge failed to consider the gravity of the interference; the consideration of private life under the rules was limited to whether he had ties to his country of origin, and did not encompass assessment of whether his moral and psychological integrity would be interfered with; this was a ground for consideration outwith the rules, and an error of law.

4. On 11 July 2014 First-tier Tribunal Judge Landes granted permission, although observing that the argument did not appear a strong one – the appellant had not succeeded in his asylum claim, and it would seem odd if he could succeed on Article 8 on the basis of lack of belief when he was not able to succeed on asylum or Article 3.

5. Mr Winter said that despite the lukewarm terms of the grant, the argument was a strong one. While this matter might have been put under the Refugee Convention and Article 3, it was also capable of being part of a proportionality assessment. The previous failed asylum case had been on an entirely different basis. The appellant's evidence that he is an atheist had been overlooked. In the Iranian context it was an obviously weighty matter. The judge had noted that no background information was produced (paragraph 38) but the nature of the Iranian regime was well known to judges in this jurisdiction. Mr Winter pointed out that the appellant spoke of danger to atheists and apostates at paragraphs 5 and 12 of his witness statement in the First-tier Tribunal. He submitted that the judge should have appreciated that there might have been inherent danger for example from being noticed not to attend the mosque, or not to engage in prayer.

6. The appellant's solicitors have now tendered evidence under cover of a letter of 17 October 2014. Mr Winter did not say that it was relevant to whether there had been error of law, but that it should be considered through a remit to the First-tier Tribunal. A finding that the appellant is an atheist should be preserved. Even in the absence of background evidence a weighty factor had been overlooked, which undermined the determination.

7. Mrs O'Brien submitted that the case as now argued, which amounted to a further Refugee Convention claim, had not been put in any meaningful way to the First-tier Tribunal. This was an attempt to put a case which could and should have been made there. It was up to the appellant to put in evidence, not for the judge to go looking for evidence for him, or to speculate on how he might behave, or on any adverse consequences which might follow. Having expressly renounced a case under the Refugee Convention or Article 3, the outcome was the only one which could have been expected. The case had been run on the basis of private life enjoyed in the UK, with at best a hint at the issue of atheism. He had put his case and had a proper answer to it.

8. I reserved my determination.

9. Risk to the appellant as an atheist was not invoked in any of the appellant's previous proceedings, which would have been the appropriate stage. It was not part of the application to the respondent leading to this appeal (see paragraph 1 above). It was not part of the grounds of appeal to the First-tier Tribunal, which were entirely vague and general, and no application was made to amend those grounds.

10. The judge said at paragraphs 37 -38:

> With regard to whether or not the appellant may consider himself to be at risk on return … there has been no real evidence … and no relevant objective evidence has been lodged. Mr Vassilou [the appellant's solicitor] stated that the appellant is not relying on an asylum claim but his lack of religious belief would interfere with private life … there has not been any reliance on ... real risk … and no evidence has been led from the appellant, objective reports lodged, or a submission made … in this respect.

11. I do not think the judge had to say any more. The substantive case was on the loss of the appellant's private life in the UK (on which he led 15 witnesses) not on the adverse consequences in Iran of lack of belief. The appellant said he had no Refugee Convention or Article 3 case for her to decide. The judge was entitled to accept that, particularly when she knew he had already run an asylum appeal.

12. The issue as now formulated is an afterthought. It seeks to expand an aside into the centrepiece. It is illogical, because if the consequences are as now alleged, the case should have been put in terms of the Refugee Convention not proportionality under Article 8.

13. A Judge may sometimes be under a duty to recognise an obvious Refugee Convention point even if not put, but in the foregoing context and in absence of any relevant background evidence, the issue needed no further treatment.

14. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law, and that decision shall stand.

15. No anonymity direction has been requested or made.

29 October 2014
Upper Tribunal Judge Macleman