Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/10059/2014

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision and Reasons Promulgated**
On 6 April 2016	**On 25 April 2016**

Before

Deputy Upper Tribunal Judge Pickup
Between

SG
[Anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Mr A Reza, instructed by Sultan Lloyd Solicitors
For the respondent: Ms C Johnstone, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, an Iranian national, appeals against the decision of First-tier Tribunal Judge Gurung-Thapa promulgated 19.3.15, dismissing on all grounds his appeal against the decision of the Secretary of State, dated 4.11.14, to refuse his asylum, humanitarian protection and human rights claims and to remove him from the UK. The Judge heard the appeal on 26.2.15.

2. First-tier Tribunal Judge Saffer refused permission to appeal on 17.4.15. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Perkins granted permission to appeal on 24.6.15.

3. Thus the matter came before me on 6.4.16 as an appeal in the Upper Tribunal.

Error of Law

4. I found no material error of law in the making of the decision of the First-tier Tribunal such as to require the decision of Judge Gurung-Thapa to be set aside. Having announced my decision at the hearing, I now give my reasons.

5. The relevant background to the appeal can be summarised briefly as follows.

6. As explained in the decision of the First-tier Tribunal, this appellant was refused asylum in 2011 but granted discretionary leave until September 2012. Before expiry of that leave he submitted an application for further leave to remain, refused more than two years later on 4.11.14, with a removal direction.

7. The appellant claims to have been engaged with his older brother in smuggling alcohol but the home they shared with their mother was raided on 25.3.11, alcohol found, and his brother arrested. The following day the authorities returned for the appellant, but he hid and was not discovered. That evening his brother returned home with a bruised face having been interrogated and tortured and said he was only released after telling the authorities that the alcohol belonged to the appellant, explaining why they had come for him. Arrangements were made for the appellant to flee Iran, with the assistance of an agent. The appellant fears that if returned to Iran he will face imprisonment for alcohol smuggling and will face inhuman and degrading treatment in prison.

8. The asylum claim was refused, his claim not engaging the Refugee Convention. Whilst it was accepted that he had assisted his brother in alcohol smuggling the remainder of his factual account was disbelieved as inconsistent and not credible. Paragraph 339L was considered in relation to the unsubstantiated claim that his brother had been detained, but he was not given the benefit of the doubt because he did not meet condition (iii) as aspects of his account of problems in Iran were not coherent or consistent. It was accepted that the appellant exited Iran illegally, but relying on SB (risk on return –illegal exit) Iran CG [2009] UKAIT 00053, the appellant did not meet any of the risk factors and faced no risk on return on account of his illegal exit.

9. The application for further leave to remain was not treated as a fresh asylum claim and there was no further evidence that he was of adverse interest to the Iranian authoritites. However, he had by then reached the age of 19 and would no longer be returning as an unaccompanied minor, which was why he was granted discretionary leave in 2011. Attempts to trace his family were unsuccessful. He did not meet the requirements of Appendix FM or paragraph 276ADE, and there were no exceptional

circumstances insufficiently recognised in the Rules to justify granting leave to remain outside the Rules on the basis of article 8 ECHR.

10. The appellant has lodged a Judicial Review application in relation to the refusal of being granted a right of appeal against the asylum decision of 2011.

11. At §45 of the decision the First-tier Tribunal Judge found the appellant's evidence not remotely credible. His factual account was largely disbelieved and the judge did not accept that either he or his brother had come to the attention of the authorities at all.

12. In considering the risk on return, reliance was placed on SB and BA (Demonstrators in Britain – risk on return) Iran CG [2011] UKUT 36 (IAC), to the effect that Iranians who left illegally and returned, whether by compulsion or voluntarily, are not in general exposed to a real risk of persecution. The judge concluded that the appellant would not be at risk on return.

13. In this regard the appellant now relies on background information to the contrary in the extracts from the COIR and OGN citing an Amnesty International account and that of an unnamed judge which have now become familiar to the tribunal. Mr Reza submitted that the Secretary of State and the judge failed to have regard to this background material in assessing the risk on return.

14. In relation to the risk on return as a failed asylum seeker or having made an illegal exit, and the appellant's reliance on background information of potential risks, in DSG & Ors (Afghan Sikhs: Departure from CG) Afghanistan [2013], and SG (Iran) [2012] EWCA Civ 940, it was held that unless it has been expressly superseded or replace by any later CG determination, or is inconsistent with other authority that is binding on the Tribunal, such a country guidance case is authority in any subsequent appeal, and that decision makers and Tribunal judges are required to take country guidance determinations into account, and to follow them, "unless very strong grounds supported by cogent evidence, are adduced, justifying their not doing so. To do otherwise would amount to an error of law."

15. I find that the evidence now relied on by the appellants is insufficient to displace the current country guidance relied on by the judge as to risk on return. There are obvious shortcomings in the relied on passages. One is distinctly lacking in detail, with no examples cited, and the other refers to existing laws cited by an unnamed judge. These two extracts post-date the CG, but on the test for departing from CG, set out above, the judge considered the objective evidence available and was entitled to follow the country guidance cases cited at §27. The background material cannot be described as cogent or amounting to strong grounds to depart from the country guidance so as to render reliance on the country guidance an error of law.

16. The grounds also rely on other background information to suggest that children can expect violent treatment for consuming alcohol and a fortiori can expect the same or worse for smuggling alcohol. Reliance is place on PJ (Sri Lanka) v SSHD [2014] EWCA Civ 1011 to suggest that there was an obligation on the Secretary of State to draw this background material to the attention of the Tribunal. Mr Reza was unable

to confirm that this background information had been put before the judge or the judge's attention drawn to it at any stage. It certainly does not feature in the appellant's appeal bundle. However, the Secretary of State did not accept that the appellant's brother had been caught, detained, or tortured in relation to their alcohol smuggling and neither did the judge. Thus there can be no material error of law in failure to have regard to it, either by the Secretary of State or the First-tier Tribunal Judge.

17. Mr Reza relied on KS (benefit of the doubt) [2014] UKUT 0052 and submitted that the appellant's general credibility had been accepted by both the Secretary of State and the judge and that all five conditions under paragraph 339L were met, so that the judge should have given the appellant the benefit of the doubt in relation to the claim that his brother had been detained, tortured and gave the appellant's name to the authorities. However, the judge specifically found the story of the brother's arrest to have been fabricated in order to bolster his asylum claim. At §38 the judge accepted that the appellant had given a consistent and credible account of assisting his brother in smuggling and was able to give detailed answers about this issue, including about the supply chain and smuggling routes, all of which was consistent with objective information. However, it is regard to the same issue as to the detention, interrogation, torture and reason for release of his brother, that both the Secretary of State and the First-tier Tribunal Judge found his account implausible, inconsistent, and not credible. The Rule 24 response submits that the judge's findings are fully compliant with paragraph 339L, (iii) of which requires that "the person's statements are found to be coherent and plausible." The judge in fact, for cogent reasons given, did not find the appellant's evidence on this issue to be remotely credible.

18. In the circumstances, I am not satisfied that the appellant met all of the criteria under 339L, for the same reason as cited in the refusal decision and the decision of the First-tier Tribunal, namely, that aspects of the appellant's account regarding his problems in Iran were neither coherent nor consistent and this failure was not due to his age or lack of education, as he had been able to provide a detailed account consistent in other areas. In the circumstances this ground discloses no error of law.

19. Mr Reza also relied on the principle of corrective leave, suggesting that the appellant was unlawfully denied an effective remedy (appeal) against the refusal of his asylum claim and the failure to trace his family or have regard to his best interests.

20. In relation to the tracing claim, at §51 the judge noted the appellant's claim that he has had no contact with his family and has given the Home Office all the personal details about his family to enable tracing. The Secretary of State in the first refusal decision explained that the appellant had been provided with information about Red Cross tracing services and a pro-forma requesting further details about his family, explaining that it was not possible to trace his family until further detailed information was provided, but the form had not been returned by the date of the first decision in September 2011 and was not returned until October 2011, after the refusal decision had been made. The appellant did not supply the authority to trace until June 2014. The refusal decision which is the subject of this appeal details attempts to

trace in 2011 and 2014. In the circumstances, at §54 the judge did not accept that there had been any failure to discharge the tracing duty.

21. At §53 onwards the judge noted the Secretary of State's response and took into account the case authority of KA (Afghanistan) v SSHD [2012] EWCA Civ 1014. However, contrary to the submissions in the grounds at §9, the judge did not accept the appellant's account that either he had come to the adverse attention of the authorities or that he had lost touch with his immediate family members. At §56 the judge found no evidence that the Secretary of State was in breach of a duty to endeavour to trace the appellant's family. The judge did not accept that the appellant had discharged the obligation to establish a proper foundation for the grant of leave on this ground. I find no error of law in respect of this ground. The judge has fully justified the findings and conclusion on this issue.

22. The grounds of appeal relating to article 8 argue that the judge erred in failing to take into account the alleged tracing failure, which the judge did not accept there had been, and failure to have regard to the appellant's best interests as a child, which are claimed to be relevant to the private life assessment under paragraph 276ADE. It is also alleged that there was an unreasonable two-year delay in dealing with his HPDL application and that this should reduce the weight to be attached to the public interest in immigration control. Mr Raza also submitted that in the proportionality assessment the judge erred by failing to take into account the failure to grant a right of appeal in the first refusal decision, and argued that the balancing exercise should have fallen in the appellant's favour.

23. In response to the issue of delay, Ms Johnstone pointed to the delay being "only" 26 months and that that there has to be some period of consideration of a claim before it can be decided upon; it cannot be that any delay gives rise to corrective leave. During that 26-month period the Secretary of State sought to trace the appellant's family and during the same period he was also pursing the right of appeal by Judicial Review. The Secretary of State did not accept that there had been any delay in making the decision, but that any further time spent in the UK after expiry of his discretionary leave has been with the full benefit and conditions of those enjoyed under his discretionary leave, and thus there had been no prejudice to him. There is nothing in fact to suggest that the appellant has been prejudiced by the alleged delay.

24. Ms Johnstone also pointed out that the judge was not entitled to consider the failure to grant a right of appeal in the first refusal, as that refusal was not the subject of the appeal before the Tribunal. In the circumstances, the issue cannot be regarded as impacting on the appellant's private life, as argued by Mr Reza in relation to his article 8 submissions. I thus find no error of law on this ground of appeal.

25. The judge, including from §72 onwards, considered these issues carefully. After considering all the relevant article 8 private life considerations, the judge concluded, for the reasons cogently set out, that the decision to remove was proportionate. I find no error of law on this or any of the other grounds of appeal.

Conclusions:

26. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed on all grounds.

Signed

Deputy Upper Tribunal Judge Pickup

Dated

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did make an order. Given the circumstances, I continue the anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: No fee is payable in this case and thus there can be no fee award.

Signed

Deputy Upper Tribunal Judge Pickup

Dated