Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01171/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 12 January 2016	**On 11 February 2016**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MR B A K
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Turner, Counsel, instructed by Duncan Lewis & Co
For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity direction was made by the First-tier Tribunal. In the circumstances of this case, it is appropriate to continue that direction.

DECISION AND REASONS

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Background

1. The Appellant appeals against a decision of First-Tier Tribunal Judge L K Gibbs promulgated on 25 March 2015 (“the Decision”) dismissing the Appellant’s appeal against the Secretary of State’s decision dated 9 June 2014 making a decision pursuant to section 3(5)(a) Immigration Act 1971 that the Appellant’s deportation is conducive to the public good by reason of a conviction in Japan on 12 December 1997 for manslaughter.

2. The background facts are as follows. The Appellant is a national of Iran. He was brought up by his parents there with his two brothers. He was educated there. He undertook military service there in 1987. At the age of fifteen years, he decided that he no longer believed in religion and he became involved in politics and philosophy. He left Iran in 1992 and studied in Japan for three years. He met and married a Japanese woman. In 1996, his wife died, the Appellant says as the result of an accident in which he killed her. He was convicted of manslaughter for her death and sentenced to three years’ imprisonment with labour. He was transferred to Iran less than a year after sentence.

3. The Appellant says that when he was returned to Iran, his luggage was lost, as a result of which the police had access to it and were able to read his writings (of which a number had been published in Newsweek). He says that the police questioned him about his beliefs. He was held in detention for one night. He escaped he says with the assistance of his brother via Turkey. He arrived in the UK on 30 March 2000 and claimed asylum on the following day.

4. The Appellant’s asylum claim was refused on 20 August 2001 and his appeal was dismissed in January 2002. He was though given discretionary leave on 18 December 2003 by reason of mental health problems. He sought further leave thereafter but that was refused and his appeal was dismissed in December 2007. He made a number of subsequent attempts to regularise his stay which were unsuccessful. He has therefore been an overstayer since December 2007.

5. The Appellant has been convicted of three offences in the UK – battery and possession of cocaine in 2005 and possession of cannabis in 2006. He was sentenced to a community order and fines for those offences. He was given notice that he was liable to be deported in February 2014 to which he responded. That led to the decision of 9 June 2014 against which he appeals.

6. The Appellant says that he cannot return to Iran because of the events which occurred when he was there last and the risk to his family as a result. He also relies on the private life which he has formed in the UK. He says that he could not cope with deportation as a result of his

mental health problems and that he would commit suicide if deported. He claims that his deportation would therefore breach Articles 3 and 8 ECHR.

7. Placing reliance on the findings of the Judges in the Appellant's previous appeals, Judge Gibbs' starting point in relation to the risk on return was that the Appellant was not credible in relation to what occurred when he was previously returned to Iran. The Appellant had also obtained a passport from the Iranian embassy in London which the Judge (and earlier Judges) found undermined his claim to fear the authorities in Iran. The previous Judges also found it not credible that the Appellant had various articles published in magazines such as Newsweek as he produced no evidence of this. In fact, before Judge Gibbs, the Appellant accepted that none had been published although he continued to assert that he had sent the articles to that publication for that purpose. The fact that the Appellant failed to disclose his conviction in Japan was further found to undermine his credibility, as was the inconsistent account which he gave of how his wife died.

8. Judge Gibbs did not accept that the Appellant left Iran illegally because he did not accept the account of events given by the Appellant. In any event, he relied on SB (risk on return – illegal exit) Iran CG [2009] UKAIT 00053 to support the proposition that the Appellant would not be at risk on that account in any event.

9. In relation to the Appellant's mental health, the Judge had before him two reports from the Appellant's GP and Dr George, a consultant psychiatrist who had met the Appellant on one occasion. Dr George indicated that he was not persuaded that the Appellant suffers from Post-Traumatic Stress Disorder. Both doctors concluded that the Appellant suffers from mild to moderate Major Depressive Disorder caused in part by the Appellant's uncertain immigration status. The Judge found based on those reports that the Appellant was not at real risk of self harm. Although the Judge noted that Dr George's report states that the Appellant would be at increased risk of suicide if he felt defeated, the Judge was not satisfied based on the totality of the evidence that this was sufficient to show a real risk. The Judge noted that the Appellant had family in Iran who could support him on return. The Appellant was receiving medication for his depression and it was noted that he had insight into his condition.

10. In relation to the Appellant's private life, the Judge noted that he had lived in the UK for fifteen years, having lived previously in Japan for seven years and Iran for twenty-three years. He had not been lawfully resident here for most of his life. The Judge considered whether he could benefit from paragraph 399 or 399A of the Immigration Rules but found that he could not. He considered whether there were very compelling circumstances which outweighed the public interest. He also had regard to section 117 Nationality, Immigration and Asylum Act 2002. Noting that the Appellant had

leave only for a limited period, he gave little weight to his private life. He accepted that the Appellant did not intend to cause the death of his wife in Japan and that he was not a risk to the public in the UK and that finding was not affected by the low level offences for which he was convicted in the UK. Relying on GS (India) and others v Secretary of State for the Home Department [2015] EWCA Civ 40, the Judge found that, since he had already held that the Appellant's mental health issues did not reach the threshold to engage Article 3 ECHR, and since there were no other factors bringing the case within "the Article 8 paradigm", the Appellant could not succeed on Article 8 grounds.

11. Permission to appeal was granted by Upper Tribunal Judge Allen on 10 July 2015 on the basis that there were arguable issues concerning the return of failed asylum seekers to Iran. He found that the remaining grounds had less force but were arguable. This matter comes before me to determine whether the Decision contains an error of law and if so to either re-make the Decision or remit the appeal to the First-Tier Tribunal to do so.

Submissions

12. Mr Turner's grounds can be summarised as follows:-

(1) That the Judge failed to properly consider what would happen to the Appellant on return as a result of his mental health and failed to properly consider the Appellant's mental health when considering his credibility. The Appellant submitted that the Appellant would be bound to be questioned on return. What he would say in response was uncertain due to his mental health so that the issue of whether the Appellant does genuinely hold anti-regime views is nothing to the point. The issue is whether the authorities would recognise that the Appellant is mentally ill when considering his answers. The Judge also held against the Appellant the inconsistent account given about his wife's death without considering whether the inconsistency might be caused by his mental condition.

(2) Coupled with that, Mr Turner relied on the judgment of UTJ Allen in R (on the application of Ali Ahmad Rashid) v The Secretary of State for the Home Department IJR [2015] UKUT 00430 IAC. Although this is a judicial review, Mr Turner relied on it to show that SB (Iran) no longer represents good law and that there is to be further country guidance on the risk on return to failed asylum seekers to Iran. He says also that the Judge failed to consider what would happen to the Appellant on return to Iran if he was of interest to the authorities.

(3) Allied to ground two, Mr Turner says that the Judge also erred in finding that the Appellant would have family to support him in Iran. The evidence is that the Appellant's mother is old and that

one of his brothers also suffers from mental illness. The only person who might be able to support the Appellant is his second brother. Mr Turner says that the evidence shows also that he too has started to go mad. In terms of accessing State support for his condition, Mr Turner pointed out that the Appellant has a subjective fear of the authorities so would be unable to access that support.

(4) In relation to Article 8 ECHR, Mr Turner accepted that the Appellant's case was weaker. He said that the Appellant's case was however exceptional based on the fact that the Appellant had been outside Iran for a long period and was not a risk in the UK. The Judge accepted that the Appellant did not intend to cause the death of his wife.

13. Mr Melvin's responded to those submissions as follows:-

(1) The Judge made sound findings of fact about how the Iranian authorities would view the Appellant's writings. Those were not published. There was little evidence that they even existed. The Judge found that the Appellant had an only mild to moderate mental health condition based on the medical evidence and that there was a limited risk of suicide. His condition was not such as to engage Article 3 ECHR on the facts.

(2) In relation to risk on return on account of being a failed asylum seeker, the Appellant was not credible in relation to the core of his account. Mr Melvin confirmed that there is a country guidance case due to examine issues in relation to Iran. Those issues relate to illegal exit, availability of documentation and being a failed asylum seeker. The Appellant has an Iranian passport obtained in London. Even if that had expired, the Appellant could obtain another one and would not be considered to have exited Iran illegally.

(3) The findings in relation to support in Iran, have to be read in the context of the medical evidence. The Appellant is on medication but is not accessing other medical support.

(4) In relation to Article 8 ECHR, the Appellant's presence in the UK has been precarious or unlawful.

14. In reply, Mr Turner indicated that the Appellant's passport has expired and that the Appellant would be unlikely to approach the Iranian authorities to renew it because of his subjective fear of those authorities. In relation to support in Iran, even though it is the case that the Appellant is receiving medication only for his condition, he would still need to access support to obtain his medication.

Decision and reasons

15. Prior to the hearing before me but after the grant of permission, the Appellant's solicitor sent a letter dated 4 January 2016 seeking to

adduce further evidence being a supplementary statement from the Appellant and an updated report from Dr George. Those were said to be produced as a result of "recent sensitive evidence disclosed by the Appellant as well as for a general update on his mental state". The further evidence disclosed by the Appellant relates to events which he appears to say may have occurred to him in the UK with which Dr George deals briefly in her updated report. The report is otherwise largely unchanged, certainly in its material respects. Mr Turner did not pursue the application to adduce this evidence and he was right to do so. Mr Melvin indicated that he had not received the letter or further evidence. It would not be appropriate for me to deal with it without the Respondent having any opportunity to consider it. The evidence such as it is was not before the Judge at the time of the Decision and relates to a wholly new claim. As such, it could not possibly form the basis for a finding of an error of law relating to that Decision. It could of course be taken into account if a further re-hearing were required following my decision. Equally, however, it could form the basis of further submissions if my decision is adverse to the Appellant. For the reasons set out below, my decision is adverse to the Appellant and if the Appellant wishes to rely on this further claim, it will therefore be for his solicitors to make further submissions. For that reason, I make no further comment on this evidence.

16. The Judge's starting point in the Decision in relation to the Appellant's credibility about events which occurred when he was returned from Japan to Iran is the findings of the previous Judges in the two earlier appeals of the Appellant. That is clearly the correct approach following <u>Devaseelan v Secretary of State for the Home Department</u> [2002] UKAIT 000702. This was however the Judge's starting point and not his end point. He considered the Appellant's evidence, noting his change of position in relation to whether his writings had been published. It was open to the Judge to find that the Appellant's claim was an exaggeration and that the inconsistencies and failures to disclose damaged his credibility.

17. The high point of the Appellant's case in relation to the failure to disclose his conviction and deal straightforwardly with his wife's death is Dr George's report which notes that this is a sensitive issue and that this may be linked to his mental health issues; also that he has no insight in relation to the conviction and events. However, at the time of the earlier appeals, the Appellant had not disclosed the conviction and was found not credible at that time for other reasons. The Judge's finding that the Appellant was not credible was not based solely on that failure but because of exaggerations in the Appellant's core claim. Even if there was an error by the Judge in failing to note that there may be a reason for the failure to disclose the conviction earlier and for the inconsistency, any such error is not material.

18. The Judge fairly summarises the evidence of the Appellant's mental health condition at [30] to [33] focussing in particular on the report of Dr George and the Appellant's GP. The Judge accepts that Dr George puts the risk of suicide higher than does the Appellant's GP at [32] but gives reasons for finding that this still does not reach the threshold of a real risk. The Judge relies in particular on the fact that the Appellant is taking medication for his condition and has insight into his condition. He relies also on the fact that the Appellant failed in his appeal as long ago as 2007 and had not attempted self-harm in the period since. That finding was open to the Judge on the evidence.

19. The issue then becomes one of whether the Appellant would be at risk on return due to an interest in him by the authorities. The Appellant has been roundly disbelieved by two Judges as to his core claim. Although there is material in the Appellant's bundle which is said to be some of his writings, none of those are dated, it is not now said that those have been published and the Appellant was not believed about those writings having come to the attention of the authorities when the Appellant was returned to Iran from Japan. The Judge was therefore entitled to find as he did at [26] that there Appellant would not be at risk from the authorities because there would be no writings to "come to light".

20. Moving on then to the more generalised assertion that the Appellant would come to the attention of the authorities because he is a failed asylum seeker who would be forcibly returned, for the reasons which the Judge gave which in turn arose from the earlier appeal findings, the Appellant is not someone who is believed to have exited Iran illegally. That he is able to return to Iran voluntarily is also underlined, as the Judge found, by the fact that he obtained a passport from the Iranian authorities in the UK. Although it appears that this passport may now have expired, it is open to the Appellant to seek to renew it. The reliance on the case of SB (Iran) is therefore secondary to the Judge's main finding that the Appellant would not be of interest in any event as he had not exited Iran illegally.

21. Insofar as Mr Turner relies on the case of Rashid, that is a judicial review of a rejection of further submissions as a fresh claim for which the test is very different. In Rashid, the Applicant was an Iranian Kurd (which this Appellant is not) and reliance was placed on a report of Dr Joffe which was not before the Judge in this case. I note in passing also that the judgment in Rashid could not have been relied upon before the Judge as it post-dates the Decision. Whilst it is my understanding that the forthcoming country guidance cases are not confined to the return of Iranian Kurdish failed asylum seekers, the fact that the correctness of SB (Iran) was successfully put at issue in the case of Rashid is not support for a finding of an error of law in this case. It was not argued before the Judge that SB (Iran) was no longer good law even if it was relevant. As I have noted, it was only of

peripheral relevance based on the finding that the Appellant had not illegally exited Iran.

22. The Judge's finding in relation to support on return to Iran is at [33]. The finding there is only that the Appellant has a family to support him and that mental health treatment is available. That is not central to the finding that his mental health condition is not such that removal would breach his Article 3 rights. It is prefaced by the fact that the Appellant is being treated only by way of medication which he takes because he has insight into his own condition. There is no suggestion in the evidence that he has support in the UK from a partner or ongoing mental health treatment. In fact, the evidence suggests that the Appellant has had only intermittent engagement with the authorities in the UK for his mental health. As the Judge notes, it was not argued before him that the necessary mental health treatment is not available in Iran.

23. The Judge deals with the Article 8 claim at [34] to [38] of the Decision. Although the Judge accepts that the Appellant did not intend to kill his wife and is not on account of that conviction or the minor convictions in the UK a risk in the UK, the fact remains that the Appellant does not have any status in the UK. He arrived as an asylum seeker and his asylum claim has failed. He had leave to remain on a discretionary basis at an earlier stage but that too, as the Judge notes, was precarious and further leave was refused. The Judge was entitled to have regard to the criminal conviction; indeed he was bound to do so under section 117C. The Judge found that the index offence was not particularly serious in spite of the nature of it. However, this is not a case where, but for that offence, the Appellant would continue to have leave to be in the UK and the Judge was right to consider the Article 8 claim against the period of precarious and unlawful presence as he has done. The Appellant is no longer in a relationship in the UK. The Judge took account of the Appellant's mental health also as part of his Article 8 claim. Mr Turner acknowledged that he was on weaker ground in relation to the Article 8 claim and he was right to do so.

24. For the foregoing reasons, I am satisfied that the Decision does not contain any material error of law.

DECISION

I am satisfied that the Decision of the First-Tier Tribunal does not contain an error of law. The Decision of First-Tier Tribunal Judge Gibbs promulgated on 25 March 2015 is hereby confirmed.

Signed Date 9 February 2016

Upper Tribunal Judge Smith