Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/00052/2015**

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 8th March 2016	**On 30th March 2016**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

P
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Schwenk, instructed by Parker Rhodes Hickmotts, Solicitors
For the Respondent: Mrs C Johnstone, Senior Presenting Officer

DECISION AND REASONS

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

1. The parties before the Tribunal both agreed that an anonymity direction should be made as detailed above.

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2. The Appellant seeks permission to appeal against the decision of the First-tier Tribunal (Judge Heynes) who, in a determination promulgated on 2nd September 2015 dismissed his appeal against the decision of the Respondent to make a deportation order.

3. The immigration history of the Appellant can be set out briefly. The Appellant is a citizen of Iran who claims to have arrived in the UK unlawfully. An application for asylum was made which was refused by the Secretary of State and came before an Immigration Judge on 2nd September 2010. In the determination promulgated on 15th September 2010 the Appellant's appeal against the decision to refuse to grant asylum was dismissed. The judge set out the findings of fact made concerning the two significant incidents relied upon. In respect of the first at [28] the judge accepted that he had been arrested in 2005, had been detained and tortured but at [29] rejected his claim that he was subsequently required to report to the authorities and found that he had remained there between 2006 and 2009 with no interest being shown in him. He also rejected the second strand of his claim that he had been arrested in 2009 following the demonstrations. He concluded on the information in 2010 and applying the relevant country guidance case of **SB (risk on return – illegal exit) Iran CG [2009] 0053** he would not be at risk on return.

4. The Appellant has a number of criminal convictions. They were set out at paragraphs [10] to [12] of the determination of the First-tier Tribunal. The most recent conviction gave rise to the present proceedings. They are correctly summarised at paragraphs [11] to [12] and it is not necessary for me for the purposes of this determination to set out those details.

5. On 26th January 2015 the Respondent made a deportation order by virtue of Section 32(5) of the UK Borders Act 2007. The Appellant lodged an appeal against that decision and as recorded in the determination at [5] there was no Article 8 appeal but his claim was based on Article 3 grounds.

6. At the hearing before the First-tier Tribunal, the Appellant relied upon an expert report which was summarised at paragraphs [13] to [21] and the report dealt with a number of issues namely the risk to the Appellant based on the nature of the crimes he had committed, and whether he would be at risk of further prosecution as a result of those crimes ("double jeopardy"), and the consequences of any adverse interest in him by reason of those offences and his illegal exit from Iran when seen in the context of this particular Appellant's circumstances.

7. The judge's findings of fact were set out at paragraphs [24] to [35] in which he reached the conclusion that it was not reasonably likely that the nature of those convictions would become known [28] to [29]; furthermore, that the information provided by the Home Office which would accompany a temporary travel document (referred to as a "barge obour") would not provide any basis for disclosure of the nature of the offences [31] and that the report did not determine what level of interest the Iranian authorities would show on the basis of information in the barge obour. At [33] the judge considered the issue of those who exit Iran

illegally and any risk on return but reached the conclusion that the expert report was "not sufficiently comprehensive" to depart from the country guidance. Thus he dismissed the appeal.

8. The Appellant sought permission to appeal that decision and permission was granted on 9th November 2015 by Upper Tribunal Judge McWilliam. Permission was granted on all grounds.

9. The appeal came before the Upper Tribunal. Mr Schwenk who appeared on behalf of the Appellant and who had drafted the grounds relied upon those written grounds set out in the papers before me. He supplemented those submission by reference to the expert report before the First-tier Tribunal and highlighted the areas in which it was said the determination did not engage with the issues raised in that expert report, namely how the Iranian authorities would become aware of the conviction and in what circumstances and also the evidence relating to the procedures at the airport. Thus he highlighted a number of questions that were relevant to any analysis by the First-tier Tribunal which were the likelihood of the Iranian authorities knowing of the UK conviction and its circumstances, (relying on the matters set out in the report), what the Iranian authorities would be able to find out as set out in the expert report and also in the light of the nature of the interrogation process.

10. As to second issue, he relied on the written grounds in which it was asserted that the judge's consideration of this issue at paragraphs [33] to [34] was inadequate in the light of the matters set out not only in the expert report but the skeleton argument which made reference to the more up-to-date country material relating to this issue which demonstrated that there had been changes since the country guidance case referred to in the determination. This required an analysis of that material and that the short paragraph at [33] was inadequate to demonstrate such analysis.

11. Mrs Johnstone on behalf of the Secretary of State relied upon the Rule 24 response in which it is submitted that the judge considered the risk on return due to the Appellant's criminal activities in the UK and that the findings at paragraph [29] to [32] that he would not be at risk were sufficiently open to him. She also submitted that the refusal letter did challenge his credibility and that there were no concessions made by the Secretary of State. However she accepted that at paragraph [6], there was no cross-examination of the Appellant's account at the hearing and thus no findings of fact were made.

12. She made reference to the previous judge's findings of fact and that whilst the judge accepted he had been arrested, detained and tortured in 2005 there was no evidence such a conviction would put him at risk on return now. She further submitted it was not clear if the expert report dealt with that issue but the risk form his earlier detention had not been accepted by Judge Levin. She further submitted that there was no direct evidence of any infiltration or "spies" in the UK and the evidence relating to Interpol was not detailed sufficiently in the expert report thus the judge was

correct in his assessment of the expert evidence. She further submitted that the offences themselves even if they were disclosed would not necessarily refer to the nature of them and in this respect the judge's finding that it would be so at [31] as speculative was a finding that it was open to him to reach. She also submitted that whilst the conclusions reached to issue of illegal exit, whilst brief, were open to him.

13. I reserved my determination.

14. The First-tier Tribunal set out the two factors that were said to give rise to Article 3 mistreatment or risk on return which related to the nature of the crimes committed and his illegal exit. It could also be stated from the way the case was advanced that his past circumstances relating to the findings of fact made by the previous Immigration Judge were also relevant in this regard. The Appellant relied upon an expert report dealing with those specific issues.

15. The judge set out his findings of fact on those issues identified at paragraphs [24] to [35] of the determination. As summarised earlier, he accepted the earlier findings of the First-tier Tribunal that the Appellant was arrested, detained and tortured by the Iranian authorities in 2005 but that there was no interest thereafter. As to the modus operandi of the offence he concluded that little evidence of this would be known to the Iranian authorities upon return and at [29] made reference to an internet search undertaken by the expert which did not disclose any relevant information. The judge made reference to the contents of the expert report and the methods upon which such a person would be returned making reference to a document known as a "barge obour", a temporary document. In this regard, he did not find that the report explained why travel documents obtained by the Home Office in order to affect his deportation or removal would not overcome the need for such a temporary document and at [31] that even if a barge obour was required, there was no evidence to suggest that information accompanying it would identify the nature of the convictions. He found that it would require no dishonesty on the part of the Appellant and that the report did not assist in determining the level of interest the authorities would show in him on that basis. At [33] as to the risk upon return for those who exited Iran illegally, he recorded that he was being asked to depart from the country guidance but that "the report is not sufficiently comprehensive to take this step not least because, as noted above, the few examples that he has given have not been placed in the context of the number of such failed asylum seekers returning to Iran." At [34] the judge also stated that the report did not explain why his "claimed detention" would arouse an interest upon return when it did not when he was in Iran.

16. As set out earlier, Mr Schwenk on behalf of the Appellant submitted that the findings do not adequately deal with a number of issues supported by objective information and evidence that was contained in the expert report and referred to in the skeleton argument. By way of reply Mrs Johnstone submits that sufficient reasons were given by reference to the expert report and were open to the judge to make.

17. I have considered those submissions and have reached the following conclusions. The expert report sets out a number of issues dealing with risk on return and whether the conviction would be investigated upon return to Iran and that despite having been convicted and sentenced in the UK whether he would be at risk of further punishment on account of that crime and therefore "double jeopardy" applied and if so, the extent and liability of punishment under Iranian law. The expert judge cited a number of articles of the Islamic Criminal Code and this was an issue also raised in the refusal letter. The background of the Appellant in particular in the light of his previous accepted detention was also of relevance. Secondly the report dealt with the likelihood of the convictions being discovered and the particular nature of the circumstances of the crimes committed. In this context, the expert report referred to a number of ways in which it could be disclosed or discovered by the Iranian authorities. They are described as follows namely, the return process itself and the use of a barge obour and the information that would accompany such a document. Secondly, the Iranian Government's relationship with international agencies such as Interpol and the cooperation in this regard and the objective material cited in support and thirdly the Iranian Government's abilities in "intelligence gathering" not only including the internet but also the use of Iranian infiltrators and those in the Iranian community. This being a case where was expressly asserted on behalf of the Appellant that the particular nature of the crime had been made known to the Iranian community and also that it had been become known to neighbours in Iran.

18. The findings of fact set out at paragraphs [24] to [35] do make some assessment of the issues of discovery of his conviction and the return process. However I am satisfied having heard the submissions of both parties that the analysis does not deal with all the relevant issues set out above and in the light of the matters set out in the expert's report. Whilst it was open to the judge to consider the method of return via a barge obour and the contents of the letter and to reach the conclusion that the information would reveal no more than dishonesty, there was no further analysis of whether the details of that conviction and the nature of the crimes would be reasonably likely to be known by the other methods outlined by the expert, including the cooperation between the Iranian authorities and the international organisation such as Interpol. In the report the expert set out a number of examples of that cooperation and in particular that the Iranian Government had access to Canadians' criminal history records.

19. Furthermore the second route of discovery related to the Iranian Government's efforts of intelligence gathering. This did not only relate to the internet searches which were considered by the judge at [29] but also the information that would be likely to be available from other methods. In this respect it is of note that the expert report specifically considered the issue of infiltration on the basis of express evidence from the Appellant set out in his witness statement at paragraphs [14] to [15]. Mrs Johnstone made it plain on behalf of the Secretary of State that there were no concessions made on credibility and referred to the refusal letter in this regard. Whilst the evidence and the witness statement was not known to

the Secretary of State until the after the refusal letter was drafted, the issues contained in it were issues of fact that required determining. The judge was not assisted in this regard as it is recorded at [6] that whilst the Appellant had adopted his witness statement as his evidence-in-chief, he was asked no questions in cross-examination and this included the issues raised at paragraphs [14] to [15] concerning the knowledge of the Iranian community and the knowledge of those in Iran. The factual basis of this was plainly an issue that required determining. If it was concluded that there was no factual basis for the assertions made by the Appellant that it would have been open to the judge to reach the conclusion that the factual basis had not been demonstrated and thus would affect the expert's conclusions on this issue. However as set out above no factual findings were made either way and thus it remains an issue that has not been determined.

20. Dealing with the issue of risk and illegal exit, the findings on this issue were set out at paragraphs [33] and [34] and are given in brief terms on the basis that the report was not "sufficiently comprehensive" to depart from the country guidance decision of **SB** (as cited) on the basis that there were few examples given had not been placed in the context of the number of failed asylum seekers returned to Iran. However as Mr Schwenk submitted, the report went into significant details (as did the skeleton argument) as to the more recent evidence on this issue and had to be considered in the light of the Appellant's history as a whole.

21. Further contrary to the finding that there is no evidence to signify either that there were significant numbers of asylum seekers that had been returned, the decision of **AB and Others (internet activity – state of evidence) Iran [2015] UKUT 0257** at paragraph [466] makes it difficult to establish any kind of clear picture as very few people seem to be returned unwillingly and it makes it difficult to predict with any degree of confidence what fate if any, awaits them. Thus the issue of numbers themselves was not a sole criterion upon which to dismiss the report. There was objective material cited from other sources including that from the Secretary of State and it would have been open to the judge to reject that objective material with reasons however such an analysis was not undertaken.

22. As for the finding at [34] it failed to take into account what the decision in **AB** (refers to as the "pinch point" on return) whereby a person is brought into direct contact with the authorities in Iran who have the time and inclination to interrogate them (see decision of **AB** at [467], [470[and [471]).

23. I am therefore satisfied that the grounds are made out and that the determination should be set aside. Both advocates agreed that in the event of an error of law being found and on the basis that a country guidance case is pending to be heard on 18th March that the correct course would be for the appeal to be reheard before the First-tier Tribunal as it will require further oral evidence and analysis of the relevant issues in the light of the country guidance decision.

Decision:

24. Therefore the decision of the First-tier Tribunal is set aside; none of the findings shall stand and the case is to be remitted to the First-tier Tribunal at Manchester for hearing in accordance with Section 12(2)(b) of the Tribunals, Courts and Enforcement Act and paragraph 7.2 of the Practice Statement of 10th February 2010 (as amended). The case should not be listed until promulgation of the relevant country guidance decision. The parties will be expected to file any additional evidence they wish to rely upon fourteen days before the hearing before the First-tier Tribunal.

Signed

Date 11/3/2016

Upper Tribunal Judge Reeds