Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/09779/2016**

THE IMMIGRATION ACTS

Heard at North Shields	**Decision and Reasons Promulgated**
On 26 January 2018	**On 02 February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[F Z]
(Anonymity Direction Not Made)

Respondent

Representation:
For the Appellant: Mr M Diwnycz, Senior Home Office Presenting Officer
For the Respondent: Ms S Rogers of Immigration Advice Centre Ltd.

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Ruth, promulgated on 11/08/2017 which allowed the Appellant's appeal.

Background

3. The Appellant was born on 17/02/1985 and is a national of Iran. On 11/03/2016 the Appellant made a protection claim. On 31/08/2016 the Secretary of State refused the Appellant's protection claim.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Ruth ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 24/10/2017 Judge Pickup gave permission to appeal stating

> 1. The respondent seeks permission to appeal, (in time), against a decision of the First-tier Tribunal (Judge Ruth) who, in a decision and reasons promulgated on 11/8/2017, allowed the appellant's appeal against the Secretary of State's decision to reject his protection claim.
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> 2. It is arguable that once the Judge found at [40] to [41] that the appellant was involved in the Basij and serious crimes against humanity by suppression of dissent and including attacks on civilians, it was incumbent on the tribunal to consider whether he should be excluded from protection of the refugee convention, following JG (exclusion, risk, Maoists) Nepal [2002] UKAIT 04870.

The Hearing

5. (a) Mr Diwyncz, for the respondent moved the grounds of appeal. He told me that the circumstances of this appeal are similar to criminal proceedings in which an accused incriminates himself in the course of evidence. He told me that the Judge adjourned the appeal part heard so that consideration could be given to article 1F of the refugee convention. He told me the once article 1F had been raised the Judge was obliged to deal with it. The exclusion provisions of 1F had not been considered in this case because the Home Office did not believe what the appellant said. The decision makes it clear that the Judge believed the appellant. After finding the appellant credible, the Judge finds at [41] of the decision that the appellant was involved in attacking civilians and ensuring that civilians being executed were not rescued. He told me that those findings place a duty on the Judge to consider article 1F of the refugee convention.

(b) Mr Diwyncz asked me to find that the decision is tainted by material error of law. He asked me to set the decision aside and remit the case to the First-tier to be determined of new.

6. For the respondent, Ms Rogers relied on the rule 24 note dated 02/01/2018. She told me that the decision does not contain material errors of law and that the grounds of appeal are misconceived. She told me that the judge followed the guidance given in Gurung (Refugee exclusion clauses especially 1F (b)) Nepal CG * [2002] UKIAT 04870, because the Judge adjourned the hearing specifically so that the respondent could consider her position in relation to article 1F in the light of the evidence brought out in cross-examination. She said that the Secretary of State's position has consistently been that the appellant is not telling the truth so that there cannot be article 1F considerations. She told me that there is no evidence to support a finding that the appellant should be excluded from the benefit of the refugee convention. She urged me to dismiss the appeal and allow the decision to stand

Analysis

7. The appellant claimed to have a well-founded fear of persecution because of he is considered to be apostate. The appellant claims that he became a member of the Basij when he was a student, that he attended a protest as a member of the Basij, but did not follow orders to harm protesters. The respondent rejects the appellant's claim to have been a member of the Basij.

8. The Judge summarises the appellant's claim between [7] and [10] of the decision. Between [11] and [14] he summarises the respondent's position. At [18] and [19] the Judge explains that in cross-examination the appellant gave answers suggesting that he had been involved in activities which would require consideration of exclusion under article 1F of the refugee convention. At [20] the Judge explained that he adjourned so that the respondent could consider her position in the light of the appellant's oral evidence.

9. At [21] the Judge records that when the hearing resumed he was told that the respondent does not rely on the exclusion clauses of the refugee convention.

10. The Judge's findings of fact are between [29] and [51]. At [41] and [42] of the decision, the Judge notes that under cross-examination on the first date of hearing the appellant claims to have been actively involved in attacking civilians. At the resumed hearing the appellant distanced himself from that evidence. At [42] the Judge finds that the appellant was a member of the Basij. At [43] the Judge decides that as the respondent is not relying on exclusion clauses it is not necessary for the Judge to reach any firm conclusions about whether and to what extent the appellant was, himself, involved in attacks on civilians and the policing of civilian executions.

11. The Judge's findings of fact only amount to findings that the appellant was a volunteer member of the Basij.

12. In AA (Palestine) UKIAT 00104 the Tribunal indicated that an Adjudicator had an obligation to consider Article 1F of his own motion where the issue is obvious. Because the Judge raised article 1F after listening to the appellant's oral evidence, and because the judge records between [41] and [43] that the appellant gives inconsistent evidence about his involvement with the Basij, it is an obvious issue.

13. At paragraphs 46 to 48 of Gurung (Refugee exclusion clauses especially 1F (b)) Nepal CG * [2002] UKIAT04870 say

> 46. Although the Court of Appeal was here discussing the duty of the appellate authorities to consider points which, although not raised by the asylum-seeker, were in his favour, the same logic, submitted Mrs Grey, should apply with equal force to points which are not so favourable. Thus if an adjudicator considers that on the facts that have emerged (whether on the papers or at the hearing) there is a "strong prospect" that one of the three limbs of the exclusion clause might apply, he should raise the issue.
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> 47. We find ourselves in agreement with Mrs Grey`s submissions on this point. Because Art 1F is in mandatory terms, the answer an adjudicator must give to the overall question of whether someone is a refugee can only be made by reference to the elements of the definitions variously set out in Articles 1A – IF. So long as the Art 1F issues are "obvious" they can, indeed must, be raised.
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> 48. When raised in this way by an adjudicator (or the Tribunal), the difficult issue then arises of whether an adjournment should be granted (or, if so, for how long) so as to ensure the parties have had an opportunity to deal with the issue. We do not propose to lay down any separate guidelines on this issue here save to emphasise that adjudicators will no doubt bear in mind that after the events of September 11, the EU Commission has echoed UNHCR`s call to States to apply the Exclusion Clauses scrupulously and rigorously.

14. The Judge followed the guidance in Gurung (Refugee exclusion clauses especially 1F (b)) Nepal CG * [2002] UKIAT04870 when he granted an adjournment as soon as the appellant has given evidence which raised the question of consideration of article 1F. The respondent considered her position and decided that the appellant was not excluded from the protection of the refugee convention.

15. After correctly following the guidance in Gurung (Refugee exclusion clauses especially 1F (b)) Nepal CG * [2002] UKIAT04870, the Judge then falls into error of law because it is obvious that article 1F consideration has been raised. At [40] and [41] of the decision the Judge clearly records inconsistency in the appellant's evidence and says that he prefers the evidence that the appellant was involved in attacking civilians and

policing executions. At [43] the Judge incorrectly says that it is not necessary for him to reach a conclusion about the appellant's activities.

16. AA (Palestine) UKIAT 00104 says that it is necessary for the Judge to reach a conclusion about the appellant's activities. It was the Judge who raised consideration of article 1F of the refugee convention. It was then incumbent on the Judge to reach a decision in relation to article 1F of the refugee convention, and that is what the Judge did not do.

17. The Judge finds that the appellant is a member of the Basij; the Judge then does not go on to complete his fact-finding. What the Judge has done amounts to an inadequacy of fact finding. In effect, the appellant's case has only been partially considered. Having found that the appellant was a member of the Basij and recording that the appellant gave evidence which may amount to evidence of crimes against humanity, it was incumbent upon the Judge to deal with that evidence and reach a decision. The Judge's failure to reconcile a conflict in the appellant's evidence and reach conclusions about article 1F of the refugee convention is a material error of law. I must set the decision aside.

18. As the decision is tainted by material error of law I must set it aside. I am asked to remit this case to the First -tier. I consider whether or not I can substitute my own decision, but find that I cannot do so because of the extent of the fact-finding exercise necessary.

Remittal to First-Tier Tribunal

19. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
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> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

20. In this case I have determined that the case should be remitted because a new fact-finding exercise is required. None of the findings of fact are to stand and a complete re-hearing is necessary.

21. I remit this case to the First-tier Tribunal sitting at Bradford to be heard before any First-tier Judge other than Judge Ruth.

Decision

22. The decision of the First-tier Tribunal is tainted by material errors of law.

23. I set aside the Judge's decision promulgated on 11 August 2017. The appeal is remitted to the First-tier Tribunal to be determined of new.

Signed Paul Doyle Date 31 January 2018

Deputy Upper Tribunal Judge Doyle