Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00112/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8th November 2018	**On 20th November 2018**

Before

UPPER TRIBUNAL JUDGE KING TD

Between

A E-A

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr K Behbahani, Solicitor of Behbahani & Co, Solicitors
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Iran said to have been born on [~] 1985. He came to the United Kingdom in November 1997 when aged 12 years and

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has lived in the United Kingdom since. He has family in the United Kingdom and a form of disability due to a progressive spinal issue and polio. His father was granted asylum in 1996 and he, the appellant, was granted indefinite leave to remain in line with his father in 2000.

2. On 21st September 2007 he was convicted at the Harrow Crown Court of false imprisonment and causing grievous bodily harm and sentenced overall to some ten years' imprisonment. Seemingly he was released from custody in 2012.

3. On 13th May 2011 the Home Office issued a notice of decision as to the intention to deport and a deportation order was in fact made on 25th August 2017. A decision was also made to refuse a protection and human rights claim and cease refugee status.

4. On 6th July 2017 in the North London Magistrates' Court the appellant was convicted of stalking, causing thereby alarm and distress and sentenced to sixteen weeks' imprisonment and given a restraining order.

5. The appellant sought to appeal against the decisions, which appeal came before First-tier Tribunal Judge Freer on 23rd August 2018.

6. The Judge properly considered Section 72(2) of the Nationality, Immigration and Asylum Act 2002 and upheld that certification. Thus the appellant was unable to seek protection under the Refugee Convention but was entitled to raise matters which placed his life in danger were he to return to Iran, within the terms of Article 3 ECHR.

7. Those matters are said to have been his involvement with the MEK in the United Kingdom which would create a profile with the Iranian authorities, such that he would be at risk were he to return. The Judge robustly considered that aspect of the claim and found that the appellant was in effect using his perceived support for the MEK, potentially to create for himself a profile to prevent return. The Judge concluded having regard to **BA Iran CG [2011] UKUT 36 (IAC)** that the appellant would face no risk upon return, thus the claim was dismissed in all respects.

8. Challenge has been made to the fairness of that decision and leave to appeal to the Upper Tribunal was granted on a number of grounds.

9. Thus the matter comes before me to determine the issue.

10. The grounds are lengthy but can perhaps be fairly summarised as a perceived bias by the Judge against the appellant such as to raise the issue as to whether there had been a fair hearing. Also that the Judge had failed to apply country guidance to the issues and had failed to consider the evidence of a witness on a crucial issue.

11. In terms of the certificate under Section 72, it is fairly conceded by Mr Behbahani on behalf of the appellant, that he is placed in great difficulty in practical terms in resisting that certification, particularly having regard to the serious nature of his offending and the repetition of offending. In one sense therefore that was a matter that could have been disposed of fairly quickly by the Judge. However, the Judge at paragraphs 101 to 109 makes much of the stalking offence, speaking as to the appellant being prone to impulsive behaviour bordering on the obsessive and poor impulse control. Such comments seemingly are made without any reference to psychological or probation reports. The Judge speaks of the victim of his attention as being an Iranian woman, probably in exile, and what it must feel like to have such approaches made to her. It is said that the woman was not Iranian and that the remarks went far outside that which was necessary to dispose of the issue of Section 72. It was suggested that the remarks made are somewhat emotive and seem to reflect more of the thinking of the Judge than perhaps was necessary to dispose of that particular issue. Paragraphs 129 and 154 are relied upon as again perhaps suggesting that the appellant has chosen the MEK simply in order to make his asylum claim.

12. Although the passages themselves do not necessarily denote bias of the Judge in a negative or improper sense, it is clear that from a very early stage the Judge has indicated that little weight is to given to what the applicant has to say, and indeed almost all of what is said is rejected. It is understandable how a perception might arise in the mind of the appellant that the Judge is predetermined to give little weight to what he has to say.

13. Notwithstanding that point, Mr Duffy submits that in terms of the central feature of the appeal, namely whether the appellant is either a low-level activist with no profile in Iran, or alternatively is seeking by his attendance at the various meetings to create for himself a bogus profile, that the Judge has properly applied the considerations to those issues and on that basis the decision should be upheld.

14. Although generally I recognise the merit in that submission, there is one matter which seems to me to be one of distinct concern and that relates to the findings or comments of the Judge, particularly at paragraph 118 in these terms:-

> "There is no proof that the Appellant was supporting MEK before his 2007 conviction. Indeed he was involved in a gang, which is time he cannot have spent in the MEK. He went to prison until 2012. He cannot have attended any protests between 2007 and 2012. There is no proof of attending protests in 2013, 2014, 2015. The witness took the activity back only to about three years ago. I utterly reject the argument he has been a consistent MEK supporter. He was unable to recall the name of a distinguished supporter of it; the name meant nothing when put to him. He has many other interests and it is only a recent one. If the Iranians know about him, they will also know this

and are well aware that some claims are bogus. This may very well be bogus political activity, if one looks through the lens of accurate chronology."

15. The reference to activity dating back three years came from the statement of a Mr Saeed Nasseri who was referred to in detail in the decision. He speaks about having seen the appellant over the last three years in a statement dated 15th September 2018.

16. There was however a statement of a Miss Fatemeh Shams dated 15th August 2018. She features at paragraph 62 of the decision as being identified by Saeed Nasseri wearing a red headscarf in one of the photographs that was presented in support of the appellant's presence at various activities. The significance of her statement is that she seems to speak of the earlier encounters with the appellant who spent many hours in demonstrations prior to his imprisonment. She speaks of the fact that thereafter all were happy to see him participating once again on a regular basis in those demonstrations.

17. The defect in the statement is that it lacks a precise chronology, but on the face of the document it seems to indicate that the appellant has been a longstanding supporter of MEK in the United Kingdom and a very committed one. Although paragraph 62 of the determination spoke of her as being another witness in the appeal, the decision does not in any sense deal with her evidence or put it into any context. It was not clear whether she actually had attended the hearing or not.

18. The potential significance of her evidence is of course to undermine the conclusion which the Judge has come to in the paragraph to which I have referred. If indeed it be right that the appellant was a longstanding supporter of MEK, particularly in the years before his conviction and/or a significant period after, then that is relevant both to the degree of his involvement and to whether or not that involvement was genuine or not. That in turn may have some relevance to whether or not he has created any significant profile in the eyes of the regime.

19. That issue may or may not tie in with what is said to be a further potential error of law, namely the approach taken by the Judge in paragraphs 127 to 128 in relation to **HJ Iran and HT Cameroon v SSHD [2010] UKSC 31** to the lack of reference to **RT (Zimbabwe) & Ors v SSHD [2012] UKSC 38**. The fact that the appellant may be physically able to take part in demonstrations in Iran may not necessarily dispose of the issue of being forced to forego genuine political desires.

19. The Judge indicates that the regime would readily know if someone was not a genuine supporter, but equally if the appellant were in fact a genuine supporter such would eventually create difficulties for him on a proper reading of the two cases.

20. How far the statement of Ms Shams will take matters is largely unanswered, given that there had been no consideration of it. In a sense the lack of chronology may give it little weight, alternatively the fact that she clearly is someone who was involved with the organisation, might be given considerable weight which affects the issue of whether the appellant's membership is a bogus one or a genuine one and what consequences would flow from that finding.

21. As with so many of these matters, particularly those affecting the regime in Iran there is often the requirement for a nuanced and careful consideration as to the risk on return.

22. It seems to me therefore on that fairly narrow point, being mindful that the fairness of procedures as in this case, require the appellant to have confidence that his case had been fairly and impartially considered, I find there to be a material error of law in the decision such as the matter should be set aside and to be remade.

23. As I indicated to the parties it may well be that the issue on Section 72 can be more concisely considered than before and that the parties could concentrate upon the central issue. However, it is to be recognised that that may in its turn require an assessment as to credibility overall.

24. In those circumstances, in accordance with the Senior President's Practice Direction, I remit the matter to the First-tier Tribunal for a de novo hearing on all matters.

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 or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed  Date 14 November 2018

Upper Tribunal Judge King TD