Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01227/2014

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Decision and Reasons Promulgated**
On 05 March 2015	**On 10 March 2015**

Before

The President, The Hon. Mr Justice McCloskey

Between

ARN

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellant:	Mr Bandegani (of Counsel), instructed by Kesar and Company Solicitors (Dover)
Respondent:	Mr I Richards, Senior Home Office Presenting Officer

ANONYMITY

I maintain the anonymity order made instance and have adjusted the description of the Appellant in the title above accordingly.

DECISION

Introduction

1. This appeal has its origins in a decision made on behalf of the Secretary of State for the Home Department (the "*Secretary of State*"), the

Respondent herein, dated 19 June 2014, to make a so-called "automatic" deportation order. The outcome of the Appellant's appeal to the First-tier Tribunal (the "*FtT*") was thus:

(a) The asylum limb of the appeal was dismissed.

(b) The appeal succeeded, however, under Article 8 ECHR.

This is the Upper Tribunal's determination of the Appellant's appeal on the asylum issue and the Secretary of State's cross appeal on the Article 8 issue. At the conclusion of the hearing I gave an *ex tempore* judgment allowing the Appellant's appeal and dismissing the Secretary of State's cross appeal. I summarise below my reasons for thus deciding.

The Asylum Appeal

2. I have decided that this appeal succeeds on the two grounds which, in essence, form the grant of permission to appeal.

3. The first ground relates to the sustainability of the Judge's assessment that the Appellant's asylum claim was lacking in credibility by virtue of its timing. The burden of the Appellant's case is that there is no tenable basis for this assessment and, further, that it disregards the case made by him in response to the Form ICD/0350/AD questionnaire accompanying the "minded to deport/one stop warning" letter sent on behalf of the Secretary of State, together with the Appellant's letter which accompanied his response and certain other evidence generated at an earlier stage. The exercise for this Tribunal is to juxtapose all of these sources with the determination of the FtT. Having performed this exercise, I conclude that this ground of appeal is established. There is, in my judgment, a failure on the part of the FtT to acknowledge these various strands of evidence and to assess them accordingly. Had the FtT performed this exercise, I cannot be confident that its adverse credibility assessment of the Appellant would nonetheless have been made. Thus this error of law is material.

4. The second error of law which I have found, based on the second of the permitted grounds of appeal, relates to the manner in which the FtT considered the various risk factors on which the Appellant's case was advanced. There were several such factors: his own historic conduct; the asserted anti - government conduct of members of his family and events relating to them, including their alleged execution; the Appellant's drugs offences convictions in the United Kingdom; his illegal departure from Iran; his enforced return from the United Kingdom; his non-possession of a passport; and his status of Iranian Arab. The first two of these factors were conflated by the FtT: see [55] of the determination. The Judge failed to recognise that these were separate considerations. The Judge then considered *in extenso* the drugs offences factor. No consideration was given to the factors of non-possession of a passport, enforced return from the United Kingdom to Iran and the Appellant's Iranian Arab status. The

Judge did consider the illegal departure factor. The relevant passages in the determination are [56] – [58].

5. In addition to the conflation and omissions noted above, I consider it clear that the risk factors which the Judge did identify were considered by him disjunctively. This I consider to amount to a further, free standing error of law since, having regard to the Country Guidance decisions in this sphere, it was incumbent on the Judge to consider these factors cumulatively, in the round. See SB (Risk on Return: Illegal Exit) Iran CG [2009] UKAIT 00053, BA (Demonstrators in Britain: Risk on Return) Iran CG [2011] UKUT 36 (IAC) and SA (Iranian Arabs – No General Risk) Iran CG [2011] UKUT 41 (IAC).

The Article 8 ECHR Cross - Appeal

6. Permission to appeal was granted to the Secretary of State on three grounds. The first of these grounds complains, correctly, that the FtT erred in law in its assessment that whereas the new provisions of Part 5A of the Nationality, Immigration and Asylum Act 2002 governed the appeal, the associated new amended provisions of the Immigration Rules did not. However, it was acknowledged by Mr Richards that this error of law was not material since the Judge had, in substance, applied the correct test, namely undue harshness. I consider this concession properly made. It follows that this error of law is not material.

7. Permission to appeal was granted on the further ground that the FtT had engaged in impermissible speculation in its assessment of the seriousness of the Appellant's offending in [67] of the determination. The focus of this complaint was the Judge's expression of opinion that the Appellant's attack on his victim was not "*sustained*". In the very concise sentencing transcript, the Crown Court Judge described the attack as "*serious*" and stated unequivocally that it consisted of "*one blow*", causing a single injury. Furthermore, it is clear from the remainder of the transcript that, having regard to the considerations that the Appellant had committed no previous crime of violence – and was thereby acting "*totally out of character*" – and his health problems, the sentence would be tailored in a manner which would permit him to be released from custody "*relatively soon*", with full allowance for his remand detention pre-trial (188 days). Having regard to the contents of the sentencing transcript, I conclude that this ground of appeal has no merit.

8. The third ground on which the Secretary of State was given permission to cross appeal is couched in the language of "*irrationality/inadequate reasoning/no reasoning*". The gist of the reply by Mr Bandegani, of Counsel, on behalf of the Appellant, is that this amounts to a mere disagreement with the Judge's findings and conclusions. As I have highlighted above, it is common case that the Judge, in considering the impact of the proposed deportation of the Appellant on his wife and daughter, applied the correct test of undue hardship. This is the criterion

("*unduly harsh*") introduced by section 117C(5) of the 2002 Act, as amended. It is common case that the Appellant's wife is a "*qualifying partner*" and his daughter is a "*qualifying child*".

9. In my judgment, it is important to recognise that the FtT was engaged in an exercise of evaluative assessment. Furthermore, the determination must be considered as a whole. I further consider that, in the context of this case, the threshold for intervention on appeal by this error of law Tribunal is that of irrationality. There is no suggestion that the Judge committed any material error of fact or that any material fact or consideration was disregarded or that any alien fact or consideration was permitted to intrude. Furthermore, the Judge correctly acknowledged the importance of section 55 of the Borders, Citizens and Immigration Act 2009. In [63] and [64] of the determination, the Judge considered, separately, the predicted impacts on the Appellant's spouse and daughter of his deportation. In doing so, he identified material facts and considerations, concluded that the test of undue hardship was satisfied and, in my view, provided an adequate explanation of this conclusion. I am satisfied, accordingly, that this ground of appeal has no merit.

DECISION

10. As a result:

(a) I set aside the decision of the FtT whereby the Appellant's asylum appeal was dismissed.

(b) I affirm the decision of the FtT whereby the Appellant's appeal under Article 8 ECHR was allowed.

(c) I consider that remittal to a differently constituted FtT for the purpose of remaking the decision on the Appellant's appeal is appropriate. This is influenced by the nature of the error of law which I have found and the inability of the Appellant to proceed to a remaking hearing in the wake of the decision which I pronounced on 05 March 2015.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 05 March 2015