Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/00132/2016

THE IMMIGRATION ACTS

Heard at: Manchester	**Decision & Reasons Promulgated**
On: 27th September 2017	**On: 3rd October 2017**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

MB
(anonymity direction made)

Appellant

And

The Secretary of State for the Home Department

Respondent

Secretary of State for the Home Department

Appellant

And

MB
(anonymity direction made)

Respondent

For MB:	**Mr Holmes, Counsel instructed by Greater Manchester Immigration Aid Unit**
For the Secretary of State:	**Mr Mills, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. MB is a male national of Iran born in 1984. He seeks international protection on the grounds that he faces a real risk of persecution in Iran because he has converted to Christianity from Islam. It is further asserted on his behalf that any attempt to remove him would give rise to a real risk of a violation of the United Kingdom's obligations under Article 3 of the European Convention on Human Rights (ECHR), in that there would be a reasonable likelihood that he would commit suicide or otherwise inflict serious injury by self-harm.

2. In its decision dated the 3rd January 2017 the First-tier Tribunal (Judge Malik) dismissed the appeal on asylum grounds, rejecting the contention that MB was a genuine convert to Christianity. The appeal was however allowed with reference to Article 3, the Tribunal accepting that there was a real risk MB would attempt suicide or otherwise harm himself if faced with removal.

3. Both sides applied for permission to appeal. Both now have it[1]. I deal first with MB's appeal against the asylum decision.

Anonymity Order

4. MB has made a claim for international protection and has diagnosed mental health difficulties. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

> "Unless and until a tribunal or court directs otherwise, MB is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst others, both parties. Failure to comply with this direction could lead to contempt of court proceedings"

[1] MB was refused permission to appeal by First-tier Tribunal Judge Martins on the 19th January 2017. He renewed his application, this being refused by Upper Tribunal Judge Kebede on the 9th February 2017. MB challenged this decision in the High Court and by Order of His Honour Judge Davies sitting as a Judge of the High Court on the 3rd June 2017 Judge Kebede's decision was quashed. Vice President Mr CMG Ockelton granted permission on the 29th June 2017. The Secretary of State for the Home Department was granted permission to appeal by First-tier Tribunal Judge Martins on the 19th January 2017.

Asylum

5. Three issues arise in MB's appeal:

   i) He had relied on a medical report prepared by Freedom From Torture which confirmed him to have scarring and psychological symptoms consistent with his account of past persecution in Iran; his first head of challenge is that the Tribunal failed to assess this evidence in the round with the remaining material. I shall refer to this as the 'Mbanga' ground, after the decision in Mbanga v Secretary of State for the Home Department [2005] EWCA Civ 367 in which the Court of Appeal held that decision makers should not address medical evidence only after a negative conclusion on credibility has been reached.

   ii) MB had brought three witnesses to court with him who testified to his regular attendance at Church and their belief that he was a genuine Christian. MB places reliance on the guidance in Dorodian v Secretary of State for the Home Department (01/TH/01537) and asserts that the First-tier Tribunal erred in failing to follow it.

   iii) In submissions before the First-tier Tribunal Counsel for MB, Mr Holmes, had advanced what he referred to as an 'alternative' case. If the Tribunal were not satisfied that MB was a genuine convert to Christianity, it should nevertheless allow the appeal on the ground that it is the fact of MB's baptism that will give rise to a real risk of harm. It is accepted that as a failed asylum seeker he will be questioned on return to Iran: SSH and HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 308 (IAC). It is accepted that he should not be expected to lie: HJ (Iran) and HT (Cameroon) [2010] UKSC 31. It is submitted that it is reasonably likely that the receiving officer in Tehran would view baptism and attendance at church to be matters requiring further investigation even if MB were to protest that they had been cynical attempts to gain asylum. It is accepted that such further investigation would involve ill-treatment amounting to serious harm: SSH and HR. The ground of appeal is that the First-tier Tribunal omitted to address this submission.

Mbanga

6. In approaching its work on asylum the First-tier Tribunal did not have a blank canvass. That is because MB had previously appeared before a differently constituted Tribunal in the context of an asylum appeal. In 2009 he had claimed asylum advancing a fear of political persecution for his involvement in the 2009 reform protests. He stated *inter alia* that he had been beaten by the baseeji who had hit him with a metal bar about the head so that he had lost consciousness. In a decision promulgated on the 7th April 2000 that claim had been rejected on the facts by an Immigration Judge K. Gordon who found the account to contain significant discrepancies. In deciding this case therefore, Judge Malik was obliged to treat Judge Gordon's findings as her starting point: see paragraph 41 of the decision where she directs herself to the *Devaseelan* [2] guidelines.

7. Before Judge Malik MB introduced new evidence. He maintained that he had told Judge Gordon the truth about being beaten by the baseeji in 2009 but added that he had had three encounters with the authorities before that. In approximately 2005 he had been sentenced to 82 lashes for the crime of consumption and possession of alcohol. He was arrested eight months later for the same offence and received a similar sentence. Then in approximately 2006 he had got into a fight in the street with two men whom he later discovered to be baseeji. He was detained, threatened and tortured. He was held in detention for 5 days. During this detention his ankle was broken when a metal filing cabinet was pushed on to his leg. He had been taken to hospital and whilst receiving treatment had absconded from detention.

8. MB's new statements were not the only fresh evidence to be submitted. He further relied on medical evidence, consisting primarily of a report prepared by Dr Hamer of Freedom From Torture (FFT) who had spent approximately ten hours with MB during four appointments in October and November 2015. Following questions from the Secretary of State Dr Hamer produced a brief addendum. As a result of his physical examination of MB Dr Hamer identified 33 scars on his body. MB himself attributed 2 of these to an accident at work, and said that 21 had been self-inflicted during episodes of self-harm. Eight were attributed by MB to having been ill-treated in Iran; he denied any awareness of two linear scars to his back which appeared in the area where he claimed to have received lashes. Dr Hamer evaluated those scars in accordance with the Istanbul Protocol and concluded that the six scars to MB's face and skull were individually consistent with, but as a group highly consistent with, the attributed cause of being beaten about the head with a blunt instrument. The two linear scars to the back were found to be consistent with him having been lashed. Injuries to his ankle were found to be highly consistent with having had

[2] Devaseelan v Secretary of State for the Home Department [2002] UKIAT 00702; Djebbar v Secretary of State for the Home Department [2004] EWCA Civ 804

his ankle crushed when a filing cabinet was pushed onto his leg. In respect of MB's psychological state he reported suffering from a number of symptoms including anxiety, depression, intrusive memories and nightmares. He reported feeling suicidal and admitted to having self-harmed with non-suicidal intent using implements such as razor blades and broken glass to 'release' his anxiety (this was borne out by the 21 other scars recorded by Dr Hamer). Dr Hamer opined that MB is suffering from depression and PTSD, and that this could impact upon his ability to recall matters accurately.

9. The key finding on this matter in the determination is found in paragraph 43, where the Tribunal states

> "... even accepting the appellant has sustained scars to his face which are highly likely to have been sustained by force and that depression and PTSD may have affected his recall, the basis of the appellant's claim as set out in the determination of his first appeal and the findings therein, highlight a number of inconsistencies regarding his account of what happened in June 2009, which the availability of medical evidence now does not reconcile. For this reason I find the appeal now of the appellant's claimed involvement in demonstrations in 2009 is materially the same as it was at the first appeal; those issues were settled, found not to be credible and I see no reason now to revisit them".

10. Having initially framed his attack in terms of weight, in his oral submissions Mr Holmes clarified his position: the complaint is that there is a structural failing in the way that the Tribunal approached the evidence. It should *first* have assessed whether, applying Devaseelan, there was new material to be assessed. Having made that judgement it was then bound to revert to the standard practice of evaluating the material in the round. The persuasive medical evidence could not be discounted simply on the basis that Judge Gordon had not found the original account to be credible, as the final sentence of the passage set out above might suggest. As to the concerns expressed by Judge Malik about discrepancies, Mr Holmes pointed to the opinion of Dr Hamer that MB's psychological condition is such that he very well might find it difficult to present his experiences in ordered chronological fashion.

11. Despite the impressive way that Mr Holmes made his submissions, I am unable to accept them. That is because they are contrary to the guidance in the starred decision of Devaseelan that Judge Malik was bound to apply.

12. MB's testimony and the FFT report would fall into the fourth class of new material discussed in Devaseelan, namely evidence which could have been before the first Tribunal but was not. At guideline (4) the Vice-Presidential panel held that such evidence should be viewed with the "greatest circumspection", going on at (7) to say this:

> (7) **The force of the reasoning underlying guidelines (4) and (6) is greatly reduced if there is *some very good reason* why the Appellant's failure to adduce relevant evidence before the first Adjudicator should not be, as it were, held against him.** We think such reasons will be rare….
>
> Having said that, we do accept that there will be occasional cases where the circumstances of the first appeal were such that it would be right for the second Adjudicator to look at the matter as if the first determination had never been made. (We think it unlikely that the second Adjudicator would, in such a case, be able to build very meaningfully on the first Adjudicator's determination; but we emphasise that, even in such a case, the first determination stands as the determination of the first appeal.)

13. The force of this guidance is not then, that having identified new evidence decision-makers should start their deliberations afresh, applying all the usual safeguards as to standard, weight and the careful attention that must be paid to the evidence of independent experts. Rather the Tribunal in Devaseelan found that such new evidence should be treated with the "greatest circumspection" unless some very good reason establishes why the earlier omission should not be held against the appellant. The reason advanced is recorded at paragraph 44 of the decision to be that MB had a bad experience with the police when he arrived in the UK and that he was fearful of being returned to Iran. Judge Malik did not consider that to be a good reason. First of all no mention had been made of any difficulties with the British police before. Secondly it was hard to see why mentioning these events would increase the chances of being returned to Iran, or of MB having perceived that to be the case. Having found no good reason why these events were not narrated to the Gordon Tribunal, the guidelines obliged Judge Malik to treat the evidence thereof with the greatest circumspection. Which is in fact what she did, giving several other reasons why she was not minded to attach weight to the medical report along the way. Having read the determination with care I am unable to find that a Mbanga error occurred here.

14. Ground 1 is not made out.

Dorodian

15. Ground 2 as pleaded reads: "the Judge has failed to properly apply the guidelines expounded in *Dorodian*, and has failed to properly address the evidence of the Appellant's conversion".

16. In his oral submissions Mr Holmes made various criticisms of the approach taken to the question of conversion. He submitted that all of the evidence ran contrary to the conclusion reached by the Judge, that the reasons given for going against that weight of evidence were not adequately reasoned and that the Tribunal appears to have misunderstood the facts in certain respects.

17. MB had called three *Dorodian* witnesses, the Reverend Nicholas Bundock of St James and Emmanuel Church of England Church in Didsbury, Mr Colin Hardicre, a senior member of the congregation at the same church and the Reverend Hossein Khalifehhadi, an ordained Christian minister of Iranian origin who was called in by this church (and others in the North West) to help minister to Iranians who wished to convert to Christianity, or who had already done so. All three attested that they had known MB since April 2016 when he began to regularly worship at St James and Emmanuel. All three believed him to be a sincere Christian, and were aware that he had been baptised in 2013 in the Catholic faith. They were aware that some years earlier he had attended Catholic church in Manchester. Taking their testimony alongside other documents in the bundles the following matters appeared to be uncontentious:

    a) the assertion that MB had first attended church in the UK sometime in 2011;

    b) that he continued to regularly attend that church for some two and a half years;

    c) that he was baptised at St Clements Church in 2013;

    d) that he stopped attending between 2014-2015 because, on his evidence, he was destitute and experiencing mental health problems;

    e) that he had maintained contact with his former Priest during that period;

    f) that he had started attending the church in Didsbury in April 2016 and continued to be a regular worshipper; and

    g) that his *Dorodian* witnesses were giving their honest opinion about him.

18. Having accepted all of those matters the Tribunal nevertheless went on to find against MB on the matter of whether or not he was a *genuine* convert to Christianity. At paragraph 46 the decision reads:

> "Pastor H said in his evidence the first time he saw the appellant his faith was not strong, but he was committed to getting baptised and to attend church. Even if the appellant had not been able for whatever reason to attend church for a number of years, it does not explain why his faith was not strong, as he had previously been baptised, nor does it explain why his rush to be baptised again, having been baptised previously. When Pastor H was asked, why if the appellant's faith was not strong, the church made a decision to baptise him, he said that this was because of the language barrier at the Catholic Church, he could explain more and the appellant had a limited knowledge of Christianity before. This suggests the appellant's claim to have understood and embraced the Christian faith fully, in September 2013, when he was baptised in the Catholic Church, to be without foundation and does not explain why the appellant would have such a limited knowledge of his faith in 2016."

(I take 'Pastor H' to be Reverend Hossein Khalifehhadi).

19. Of this passage Mr Holmes submitted the following. First, there is a significant mistake of fact in that there was no evidence that MB had been baptised twice, or had sought to be baptised twice. There was accordingly no "rush to baptise", with the negative connotations that evidently had for the Tribunal. The evidence was that Reverend Hossein had been asked to prepare MB for his Confirmation. His evidence about the developing strength of MB's faith, and knowledge, was in that context perfectly legitimate. Second, (other than the foregoing) it was unclear on what the Tribunal based its finding that MB had "such limited knowledge" of the faith in April 2016. In fact, his knowledge had never been tested, with the Immigration Officer who conducted the interview electing to ask only five basic questions. Third, MB has nowhere declared that in 2013 he understood the Christian faith "fully".

20. I have read the Record of Proceedings. It indicates that the term "baptism" did indeed arise in Reverend Hossein's testimony. He was asked whether MB had "been baptised before" and he replied that he had, in the Catholic Church. The record states that he then said "he said he want baptism full conversion"; he goes on to give the evidence (recorded in the determination) about the language barrier in the Catholic Church. At the end of his evidence the Judge asked him when MB was "baptised"; the answer is recorded as "In April, B in June": I take this to mean that he started attending the church in April, and was baptised in June. It is therefore quite understandable how the Tribunal was left with the

impression that MB had "rushed" to undergo a second baptism once he started attending the church in Didsbury. I do accept however that Reverend Hossein's evidence has given rise to a misunderstanding. His testimony notwithstanding it is clear from the remaining evidence that the ceremony that MB underwent on the 19th June 2016 was his Confirmation as a Christian. That is apparent from the Certificate of Confirmation, and the statements of MB and his *Dorodian* witnesses, all of whom refer to a Confirmation and make no mention of a second baptism. It is unfortunate that this matter was not addressed in re-examination so that Reverend Hossein was given an opportunity to clarify. Had he been asked, it is quite possible that the Tribunal's concerns on this point would have been allayed. His comments about the increasing strength of MB's faith, and his understanding of Christianity, are wholly consistent with the journey between baptism and confirmation. Although it is an error for which the Tribunal can hardly be blamed, I do accept that the reasoning cited is based on a misunderstanding of the evidence and to that extent must be set aside. The question of whether MB is a 'genuine' Christian remains a moot point.

21. Returning to the grounds as originally pleaded, I do not think it is one that needs to be re-determined by any further evidence. That is because in Dorodian the Tribunal accepted, on the basis of six months attendance at church, that the appellant was a Christian. His regular attendance, confirmed by his witnesses, spoke for itself. The importance of such attendance, and the importance of such witnesses to it, are the essence of the *Dorodian* guidelines, which have very little to do with the exercise of making windows into a man's soul:

> a) no-one should be regarded as a committed Christian who is not vouched for as such by a minister of some church established in this country: **as we have said, it is church membership, rather than mere belief, which may lead to risk**;
>
> b) no adjudicator should again be put in the position faced by Mr Poole in this case: a statement or letter, giving the full designation of the minister, should be sent to the Home Office at least a fortnight before the hearing of any appeal, which should give them time for at least a basic check on his existence and standing;
>
> c) unless the Home Office have accepted the appellant as a committed church member in writing in advance of the hearing, the minister should invariably be called to give oral evidence before the adjudicator: while witness summonses are available, adjudicators may reasonably expect willingness to do so in a genuine case;
>
> d) if any doubt remains, there is no objection to adjudicators

> themselves testing the religious knowledge of the appellant: judicial notice may be taken of the main beliefs and prayers of the Church.

(emphasis added).

22. As set out at [17] above, there were three *Dorodian* witnesses in this case, and unchallenged written evidence from the Catholic Church that MB had worshipped there for some two and half years, and had been baptised there. That was evidence that in itself potentially established risk. As HHJ Gilbart put it in SA (Iran) [2012] EWHC 2575 (Admin), it is a dangerous thing for anyone to attempt to work out what someone else truly believes, and it is an exercise that is, in the context of Iran, perhaps unnecessary :

> "I am at a loss to understand how that is to be tested by anything other than considering whether [the claimant] is an active participant in the new church. But I accept that such judicial boldness as this judge showed does not necessarily undermine a decision in law if he does so, and his decision was not successfully appealed. But that is not the only point. **There must be a real risk that if she has professed herself to be a Christian, and conducted herself as one, that profession, whether true or not, may be taken in Iran as evidence of apostasy**".

(emphasis added).

23. This leads me to MB's final ground, the 'alternative' submission that it is MB's outward profession of faith, rather than his true inner feelings, which are of significance in assessing risk.

Risk on Return

24. I accept that before the First-tier Tribunal it was argued on MB's behalf that he would be at risk on return to Iran simply by virtue of his having proclaimed himself a Christian, having attended church and having been baptised/confirmed. That much is apparent from the skeleton argument which appears in the bundle, supported by the case report of SA (Iran). I accept that it is a submission which is not expressly addressed in the determination. Is that omission material?

25. Mr Mills accepted that MB is likely to be questioned on arrival in Tehran. He further accepted the proposition that if he is asked a question about why he claimed asylum, MB cannot be expected to lie in order to protect himself: see RT (Zimbabwe) and Ors v Secretary of State for the Home Department [2012] UKSC 38. He submitted however that MB cannot establish, even to the lower standard, that he would be asked about the basis of his asylum claim. I am

unable to accept that submission. That is because it is clear from the evidence given – and accepted - in SSH and HR that the authorities in Iran *will* conduct enquiries about failed asylum claims. In that case the Upper Tribunal heard evidence from expert witness Dr Kakhki about the procedures followed on arrival at Tehran. His evidence is set out in Appendix 1 of that decision. He indicated that a person who did not have a valid passport would have to apply for a 'Barge Obour', that is to say an emergency travel document, from the embassy in London. The embassy would alert the authorities in Tehran so that the returnee would be questioned on his arrival about whether or not he had left Iran illegally [at §9]. Dr Kakhki considered it possible that there would be some investigation into the individual concerned by the embassy in the UK, depending on the circumstances [at §10]. The returnee would certainly be questioned about a failed asylum claim:

> "35. Dr Kakhki's evidence is that the Appellants would face questioning not simply about the manner of their illegal exit from Iran but also about their failed asylum claim. Indeed, his evidence is also that, even without illegal exit, a person who has made a failed asylum claim would face questioning if they are returned on a Barge Obour".

This initial questioning could last between two to five hours, and be conducted by members of the Iranian Revolutionary Guard Corps: see paragraph 14 of the main decision.

26. Even assuming that MB is subject to the shortest of interviews and his interrogation is not led by a member of the ICRG, applying the lower standard of proof I am satisfied that when he is asked "about his failed asylum claim" that will involve questions about what the basis of that claim is. It is implicit in the findings in SSH and HR, and the concession to this effect by Dr Kakhki, that not every failed claim will elicit interest from the Iranian authorities. Indeed it is implicit that most will not. Both appellants in that case, for instance, had advanced false claims of involvement in Kurdish politics, and neither were judged to be at any risk on return. I am however satisfied that an admission of a) having claimed to be Christian b) having been formally baptised and c) having regularly attended church is the kind of information that is reasonably likely to elicit further questions. That is because it is *prima facie* an admission of apostasy, considered a capital offence under Sharia law (see paragraph 6 of Dorodian). Mr Mills is of course right when he says that MB could protest that he remains a Muslim and that his conversion was all a pretence, but in the context of an Islamic state, where "religious minorities are viewed with suspicion and treated as a threat to a theocratic system bent on imposing a strict

interpretation of Shia Islam"[3] it appears to me that MBs answers are reasonably likely to cause "particular concern" for his interviewer. See paragraph 23 of SSH and HR:

> "The evidence in our view shows no more than that they will be questioned, and that if there are any particular concerns arising from their previous activities either in Iran or in the United Kingdom or whichever country they are returned from, then there would be a risk of further questioning, detention and potential ill-treatment".

27. It follows that I find the failure of the First-tier Tribunal to address this submission to be a material omission in the determination. I set the decision on risk for reasons of religious belief aside and re-make the decision by allowing the appeal on asylum grounds.

Article 3

28. The reasoning in the determination is brief. The Tribunal notes the conclusions of Dr Hamer, made after seeing MB during October and November 2015. It records that in March 2016 he was admitted to hospital after stabbing himself and that he was discharged with a diagnosis of PTSD. From there it goes on to find that there in Iran there is mental health provision. The conclusion is reached:

> "Yet the issue here is the potential for the appellant to take his own life if a removal decision is made. The latest medical evidence before me suggests the appellant has made a serious attempt of self harm in March this year and on balance considering the comments of Dr H, I find there is a real risk he may do so again if removed".

29. The Secretary of State's complaint about this is twofold. First, it is submitted, the Tribunal failed to apply the six principle framework set out in J v Secretary of State for the Home Department [2005] EWCA Civ 629. Secondly, that the Tribunal has failed to consider the assumption that mechanisms would be put in place by the UK authorities to protect MB during the period covering communication of the decision and his removal: AA v Secretary of State for the Home Department [2005] UKIAT 00084. There was no evidential basis for concluding that there would be failing of protection in this country.

30. I find both grounds to be made out.

[3] Home Office Country Information and Guidance Iran: Christians and Christian Converts (Dec 2015) at [4.1.3]

31. The reasoning in the determination certainly addressed the first two questions posed in J, as well as the fourth principle. The Tribunal properly directs itself that suicide is a type of serious harm capable of engaging Article 3. Although there is no express finding that there would be a causal link between the risk and the removal, that much is clear from the evidence of Dr Hamer that is set out at paragraph 50. The sixth question is addressed, in that the Tribunal makes clear findings that there is in Iran provision for the care of those with mental health difficulties. I am unable to find that the Tribunal addressed the fifth principle, namely whether there was an objective underpinning for the subjective fear. Having rejected MB's claims to have been persecuted in the past in Iran, and the possibility that he would face persecution for reasons of his religious belief in the future, it is unclear how on the facts this test could be met. As for the intervention on the part of the authorities in the UK the Tribunal does not appear to weigh in the fact that MB has had support, protection and treatment for his mental health problems thus far. For those reasons I set the decision in respect of Article 3 aside.

32. As to the remaking I am of course faced with a very different factual matrix from that applied by the First-tier Tribunal. I have accepted that there is a real risk of serious harm to this appellant by virtue of his formal conversion to Christianity. I am therefore satisfied that Article 3 is engaged. As to whether there might be a discrete risk arising because of the risk of self-harm or suicide, I do not consider it appropriate that I make any finding to that effect. The report of Dr Hamer is now almost two years old. I have not been provided with any up to date assessment of MB's mental health upon which I could properly conduct such an analysis. I note that MB has been receiving regular treatment (in the form of psychological counselling and medication) since that report was written, and his condition may well have improved.

Decisions

33. The determination of the First-tier Tribunal contains material errors of law and it is set aside. The decision is remade as follows:

'The appeal is allowed on protection grounds.
The appeal is allowed on human rights grounds.'

34. There is an order for anonymity.

Upper Tribunal Judge Bruce
29th September 2017