



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/00554/2016

THE IMMIGRATION ACTS

At: Manchester Civil Justice Centre
On: 8th October 2018

Decision & Reasons Promulgated
On 12 October 2018

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

VA
(anonymity direction made)

Appellant

And

Secretary of State for the Home Department

Respondent

For the Appellant: Ms G. Patel, Counsel instructed by Broudie Jackson and
Canter
For the Respondent: Mr C. Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Iran born in 1961. He seeks international protection on the grounds that he has a well-founded fear of persecution in Iran for reasons of his imputed political opinion.

2. By its decision of the 18th July 2017 the First-tier Tribunal (Judge PJ Holmes) allowed the Appellant's appeal with reference to Article 3 of the European Convention on Human Rights. That decision has not been appealed by the Respondent and is undisturbed.
3. The matter in issue in this onward appeal is whether the Appellant should be excluded from the protection of the Refugee Convention by virtue of Article 1F(a) of the Refugee Convention:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;"

Anonymity Order

4. The Appellant has been granted international protection. 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, 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 to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”

The Findings of the First-tier Tribunal

5. Before me the parties agreed that the facts, as accepted by the First-tier Tribunal, were as follows:
 - The Appellant served as a member of the Iranian armed forces during the Iran-Iraq war in 1980-1988 [§24]
 - In 1986 he was stationed in the southern Iraqi marshes near the Majnoon oilfield when he was ordered to participate in firing new ammunition which was identified to the Appellant as being chemical weapons (mustard gas) [§29]

- The Appellant initially refused the request of a person in civilian clothing to fire, but upon command from his commanding officer did so, in the belief that he would be shot if he refused
 - The gun was used for approximately 40-50 minutes, the shells being aimed at Iraqi Army positions on Majnoon Island
 - In 2012 the Appellant was approached by members of the security forces and asked to take part in training new recruits, as an old army colleague had done. He had refused. It emerged that the colleague had told a class he was training about the incident near Majnoon Island, and that he had subsequently disappeared, after having been driven to work by members of the Sepah. The Appellant had fled Iran fearing that the Sepah somehow suspected him of complicity in the leaking of the state secret, that fear arising from the fact that the Etelaat attended his family home and conducted a search of it, whilst telling the Appellant's daughter that they were looking for him.
6. From these findings of fact the First-tier Tribunal drew the following legal conclusions. The claim is one capable of engaging the Refugee Convention in that the feared harm was for reasons of the political opinion imputed to the Appellant [§20]. The use of chemical weapons is unquestionably a war crime: Article 8.2 (b) (xviii) of the Rome Statute of the ICC ("employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices") [§28]. The Appellant had admitted his participation in that crime [§30] and thus *actus reus* was proven. As to *mens rea* the Tribunal directed itself to Article 30 of the Rome Statute which requires that the person intended to engage in the activity in question (loading and firing the mustard gas shells) and that he knew the consequences (the asphyxiation of Iraqi troops). The Appellant's defence of duress failed – for reasons I explore below – and as a result he must be excluded from the protection of the Refugee Convention by virtue of Article 1F thereof [§35]. He had however established himself to be at a real risk of serious harm should he be returned to Iran and his appeal therefore fell to be allowed on Article 3 grounds [§36 & 39].
7. The First-tier Tribunal's reasoning on the Appellant's Article 1F defence is set out at its §30-34. The Tribunal directs itself that duress is a defence under Article 31(1)(d) of the Rome Statute:

Article 31 Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

...

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of

continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

- (i) Made by other persons; or
- (ii) Constituted by other circumstances beyond that person's control.

8. It goes on to consider the guidance given by the Upper Tribunal in AB (Article 1F – defence – duress) Iran [2016] UKUT 376 (IAC):

1. *In response to an allegation that a person should be excluded under Article 1F(a) of the Refugee Convention because there are serious reasons for considering that the person has committed a crime against peace, a war crime or a crime against humanity as defined in the Rome Statute, there is an initial evidential burden on an appellant to raise a ground for excluding criminal responsibility such as duress.*
2. *The overall burden remains on the respondent to establish that there are serious reasons for considering that the appellant did not act under duress.*

9. In respect of the burden and standard the determination notes the conclusions in AB to the effect that where, in a case like this, the Respondent produces sufficiently clear, credible and strong evidence that a war crime has been committed, there is an evidential burden upon the claimant to raise a defence of duress. The standard of proof does not need to reach the civil standard but a “merely abstract danger or simply an elevated possibility that a dangerous situation might occur would not suffice and the threat relied upon must be objectively given and not merely exist in the perpetrator’s mind”. If that reasonable defence is raised the overall legal burden rests on the Respondent to show that there are serious reasons for considering that the Appellant did not act under duress.

10. Having regard to the evidential burden on the Appellant the Tribunal turns to examine the evidence presented. The Appellant relied on a report prepared by Ms Roya Kashefi in respect of the operative laws in force in Iran in 1986. Ms Kashefi was asked “what would be the likely consequences for an Iranian soldier of the rank of commander were he to refuse an order from a colonel to fire on enemy soldiers during the Iran-Iraq war in the circumstances described by the Appellant?”. The First-tier Tribunal expresses regret that only two passages in Ms Kashefi’s report actually attempt to answer that question. Ms Kashefi concluded that had the Appellant refused to carry out orders “there would have been a real possibility” of him being tried as a *Mohareb* and subjected to punishment including the death penalty: the Tribunal finds this conclusion to be a “gross anachronism” given Ms Kashefi’s own evidence that the religious offence of *Mohareb* (trans: “enmity against God”) was only introduced into Iranian martial law by Article 29 of the 2003 Armed Forces Penal Code, some 17 years after the events in question. Her report appears to

indicate that the law actually in operation in 1986 was one drafted in 1939 which “clearly stated death as punishment for any disobedience or refusal of superiors’ orders during a state of war or emergency”. To support that conclusion, she footnotes a reference to the Iranian government website ‘majlis’, citing the relevant passage of the 1939 law in Farsi. Of that reference the Tribunal said this:

“I have visited the website in question and find it to be entirely in Farsi. It contains a huge document arranged over 400 numbered articles. I was nevertheless able to locate the article numbered 329 in Arabic numerals, and find that the words quoted in the footnote (which of course I cannot read, but I identify by their shape alone) do appear there, but they comprise only the first 1½ lines of a six-line article. If, which is possible although Ms Kashefi does not say so, this online document represents the Code in force prior to the 2003 Armed Forces Penal Code, I am unable to say from the evidence before me whether the text represents the original Code, or the post-1992 re-drafts and amendments that Ms Kashefi mentions. For all of the above reasons I find myself unable to attach weight to Ms Kashefi’s opinion.”

11. The Tribunal concludes, at §35, that the result of the shortcomings of the Kashefi report is that the Appellant has failed to discharge the evidential burden of raising the defence of duress. That being so the Tribunal declined to go on to consider whether there were “serious reasons for considering” that the Appellant had not in fact acted under duress. The appeal was thereby dismissed with reference to Article 1F of the Refugee Convention.

The Appeal to the Upper Tribunal

12. Before me at a hearing on the 30th July 2018 the Appellant pursued the following grounds of appeal against the First-tier Tribunal decision:
 - i) That the First-tier Tribunal erred in law in failing to treat the Appellant’s own subjective fear as sufficient to discharge the evidential burden of proof;
 - ii) The Tribunal misinterpreted Ms Kashefi’s evidence, in particular in failing to have regard to her evidence that the post-2003 law was the “genesis of the law which was in force when the Appellant was involved in the testing of the chemical weapons”;
 - iii) The Tribunal errs in failing to assess whether the Respondent had discharged the legal burden;

- iv) There was an unfairness and procedural irregularity in the First-tier Tribunal's approach to Ms Kashefi's footnote. She is an academic whose objectivity and expertise were unchallenged by the Respondent. If the Tribunal had any reason to doubt the validity of her evidence about the operative law in 1986 (ie the death penalty enshrined in the 1939 Code) it should have said so, and given the parties the opportunity to address its concerns. The fact that the Judge was unable to read the Farsi text was not relevant: Ms Kashefi is the expert, she had read it, and absent a specific challenge or reason to doubt that her interpretation was correct, the Tribunal should have accepted the evidence at face value.

13. For the Respondent Mr Bates opposed the appeal on all grounds and made various additional submissions as to why the appeal should have been dismissed, on the basis that this went to the materiality of any error that might be established before me.

14. In a decision promulgated on the 24th August 2018 I made the following findings.

Error of Law

15. At paragraph 63 of AB the Tribunal summarises the five cumulative requirements to be met in order to raise a defence of duress under Article 31 of the Rome Statute:

- i. There must be a threat of imminent death or of continuing or imminent serious bodily harm;
- ii. Such threat requires to be made by other persons or constituted by other circumstances beyond the control of the person claiming the defence;
- iii. The threat must be directed against the person claiming the defence or some other person;
- iv. The person claiming the defence must act necessarily and reasonably to avoid this threat;
- v. In so acting the person claiming the defence does not intend to cause a greater harm than the one sought to be avoided.

16. As AB makes clear, the “threat” mentioned at (i) must be objectively well-founded. There is therefore no merit in the Appellant’s grounds (i) and (iii). The evidential burden on the Appellant can only be discharged if all five elements of the defence are demonstrated. If the Tribunal did not consider that to be the case, there can have been no error in it not treating the Appellant’s subjectively held belief as determinative. The first question before the Tribunal was whether the Appellant’s belief that he would be shot if he refused to fire those shells was well-founded. That is the question addressed by its analysis of Ms Kashefi’s evidence, and it was that analysis that assumed the greatest significance in the submissions made before me.
17. Ms Kashefi, for reasons not understood by the First-tier Tribunal, chose to confine her report to a narrow legalistic analysis of the likely outcome of a refusal to obey orders on a Persian Gulf battlefield in 1986. I am similarly perplexed, and can only assume that Ms Kashefi, an expert of considerable standing in this Tribunal, understood that to be the limited remit of her evidence. The points that she makes in her brief report are:
- i) That the punishment for such disobedience is currently meted out under the 2003 Armed Forces Act, Article 29 of which includes provision for the death penalty where the actions of the perpetrator lead to supremacy of the enemy over Iran;
 - ii) Iranian law was not immediately reformed after the 1979 revolution, but took some time to be codified in accordance with Shi’ite *sharia* jurisprudence;
 - iii) The operative law in 1986 was still the old one, drafted in 1939. This provided that the punishment for a refusal to obey superiors’ orders during a state of war or emergency would be death.
18. Having had the opportunity to read Ms Kashefi’s report myself I can find no support for the contention in ground (ii) that the 2003 Code discussed at some length by Ms Kashefi was relevant because the “genesis” thereof was the 1939 Code. What it says at paragraph 3 of the report is that the Code was redrafted in 1992, again in 1997 and again in 2003. As the First-tier Tribunal note, the report does not explain what amendments if any were made; nor does it state in terms that the 2003 Code is in essence the same as that in force from 1939, albeit with a more religious veneer. There is therefore no merit in ground (ii). That leaves ground (iv).
19. Ms Patel’s complaint is that absent any challenge to her objectivity or expertise Ms Kashefi’s evidence should have been accepted with no further investigation into her sources. Thus when she wrote: “Article 329 of the 1939 laws clearly stated death as punishment for any disobedience or refusal of superiors’ orders

during state of war” that was sufficient to discharge the evidential burden of proof, at least in respect of the first of the five requirements set out in AB (at paragraph 12 above). She submitted - I paraphrase - that the Tribunal had no business checking on the footnote, and that having done so it was irrational and unfair of it to reject the evidence on the ground that the Judge could not read Farsi. Ms Kashefi can read Farsi and that is why she is the expert. Even if the Judge was entitled to query Ms Kashefi’s sources, it was incumbent upon it to raise any concerns at the hearing (or, presumably, post-hearing in written directions). As Counsel, Ms Patel had been quite unaware of the Tribunal’s misgivings about Ms Kashefi’s conclusions and as such had not considered it necessary to address the point.

20. I am not satisfied that it was in any way unreasonable for the Judge to read Ms Kashefi’s footnote. Tribunals being offered expert opinion are entitled to know the expert’s sources and where those sources are cited as footnotes, they are entitled to have regard to them: AM (fair hearing) Sudan [2015] UKUT 00656 (IAC). I am nevertheless that the Tribunal did act unfairly in this case. Having referred itself to the footnote, and having found questions arising from it, the fair and just thing to do would have been to invite further explanation from Ms Kashefi and if necessary, comment from the parties: see for instance AM (fair hearing) and EG (Nigeria) v ECO (Lagos) [2018] UKAIT 00015. That need was particularly acute where the questions arose from the fact that the text was in a different language and so not accessible to the Tribunal. The truth is that the Tribunal had no means of knowing whether the Farsi text on the *majlis* website supported Ms Kashefi’s evidence or not. In those circumstances it was bound to revert to her and to ask for a translation if it considered, as it apparently did, that the expert opinion in the main body of the report was insufficiently clear.
21. For that reason I set the decision of the Tribunal aside to the limited extent identified above.

The Re-Made Decision

22. When the hearing resumed before me on the 8th October 2018 Mr Bates for the Respondent indicated that he could no longer realistically oppose the appeal. That was because in the hiatus between the hearings further evidence had been obtained from Ms Kashefi. In her report dated the 27th September 2018 she makes two key points.
23. The first is that the operative law at the date of the war crime was, as she explained in her first report, Article 329 of the 1939 Code. Under the heading ‘Rebellion, Nullifying Orders, Insult, Disobedience - Misdemeanour, Felony and their Punishments’ the Article provides:

“Any military personnel who is ordered to advance towards the enemy or carry out duties assigned by his superior against the enemy or armed insurgents and refuses to do so and the insubordination nullifies the order, will be sentenced to death”

Any ambiguity in her original report is thereby dispelled: in terms of law, the position was that the Appellant faced execution for failing to obey orders on the battlefield.

24. The second point made in the report is that the war with Iraq was characterised by gross human rights abuses on both sides. Examples given in Ms Kashefi's report include the Iranian policy of 'human wave' mine clearance, in which thousands of young men and children as young as 9 were driven into the battlefield to clear the way for troops advancing behind them. The use of chemical weapons was widespread, as was the indiscriminate shelling of civilians. Ms Kashefi concludes that since "observing human rights and due process were among the last considerations, if at all" there was a real risk that the Appellant would have been summarily executed had he refused to fire that shell.
25. In view of the Respondent's concession I need not set out Ms Kashefi's evidence in any further detail. Mr Bates accepted that the defence of duress under the Rome Statute was made out. The Appellant cannot therefore be excluded from the Refugee Convention by operation of Article 1F and his appeal must be allowed.

Decisions

26. The decision of the First-tier Tribunal contains an error of law such that the decision must be set aside to the extent identified above. The First-tier Tribunal decision to allow the appeal with reference to Article 3 ECHR is maintained.
27. The appeal is allowed under the Refugee Convention.
28. There is an order for anonymity.

Upper Tribunal Judge Bruce
8th October 2018