



IAC-AH-DN-V1

**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: AA/07960/2014

**THE IMMIGRATION ACTS**

**Heard at Birmingham  
On 26<sup>th</sup> January 2016**

**Decision & Reasons Promulgated  
On 11<sup>th</sup> February 2016**

**Before**

**UPPER TRIBUNAL JUDGE HEMINGWAY**

**Between**

**A B**

**~~{ANONYMITY DIRECTION NOT MADE}~~**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms H Masih (Counsel instructed by Wick & Co Solicitors)

For the Respondent: Mrs R Pettersen (Senior Home Office Presenting Officer)

**DECISION AND DIRECTIONS**

1. This is the Appellant's appeal to the Upper Tribunal, brought with permission granted on 1<sup>st</sup> July 2015, against a decision of a Judge of the First-tier Tribunal (Immigration and Asylum Chamber) (hereinafter "the judge" unless otherwise stated) promulgated on 8<sup>th</sup> June 2015, by which he dismissed the Appellant's appeal against the Respondent's decision of 24<sup>th</sup> September 2014 refusing to grant him asylum or any other form of international protection and deciding to remove him from the UK.

2. The Appellant, who was born on 6<sup>th</sup> April 1996, is a national of Iran. He had sought asylum on the basis that he would be at real risk of persecution upon return to Iran as a Christian convert. His appeal was heard by the judge along with an appeal relating to his brother FB who had separate representation. The judge dismissed the Appellant's appeal, in large measure, because he found the account of events he had offered not to be a credible one. The brother's appeal was also dismissed on the same basis.
3. An application for permission to appeal to the Upper Tribunal was made on behalf of this Appellant. It does not appear that an application was filed by those representing his brother but, in any event, it was only the application of this Appellant which was before me. The Grounds of Appeal to the Upper Tribunal contended that the judge had erred in law by applying an incorrect standard of proof (the balance of probabilities rather than real risk) and had also erred in a considerable number of other ways with respect to his treatment of the evidence before him.
4. Permission having been granted, there was a hearing before the Upper Tribunal (in fact before me) and representation was as stated above. I am grateful to both representatives for their assistance. I indicated to the parties that I would hear argument first of all, concerning the standard of proof issue and, only then, if it were necessary, would I hear argument concerning the other grounds.
5. As to the standard of proof point, it is to be noted that the judge, when summarising the Respondent's position, had observed at paragraphs 16 and 21 of the determination, that the Respondent had taken the view that the two Appellants before him (the Appellant before me and the brother) had failed to show to a "reasonable degree of likelihood" that they would be at risk of persecution upon return. At paragraph 26 of the determination, though, the judge said this;

"This is an appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002. The Appellant bears the burden of proof and the standard is the balance of probability. Although I am looking at the Rules as at the date of decision, I am considering the Appellant's circumstances as at the date of the appeal hearing and have taken into account all of the evidence before me."
6. At a later point in the determination, in fact at paragraph 94, the judge said;

"I do not accept that the Appellants face a real risk of persecution if they are returned to Iran ..."
7. Clearly, when considering arguments pertaining to international protection, the applicable standard of proof is that which is often referred to as "the real risk test". That has always been accepted as amounting to something less demanding than a balance of probabilities. Therefore, perhaps absent wholly unusual or exceptional circumstances, there will be a material error of law if a judge genuinely applies a balance of

probabilities test when considering issues regarding asylum, humanitarian protection or Article 3 of the European Convention on Human Rights.

8. Ms Masih acknowledged the references to a “reasonable degree of likelihood” at paragraphs 16 and 21 of the determination but said that the determination was not saved by those references because they were merely part of the judge’s summary of what had been the Respondent’s position. Mrs Pettersen relied upon the opening words of paragraph 94 of the determination but acknowledged that she was “in some difficulty”, given the content of paragraph 26.
9. It seems to me that, in general terms, the fact that a real risk test is to be applied where international protection issues are concerned is a cardinal principle of which, ordinarily, all First-tier Tribunal Judges in the Immigration and Asylum Chamber would be aware. That might afford support for the proposition that the judge would, in reality, have been applying a real risk test notwithstanding what was said at paragraph 26 and that the insertion of those words into the determination amounted to no more than a drafting oversight. The reality is that that might well have been the position. However I do accept that significant uncertainty is created in the mind of a reader of the determination by the different indications given at paragraphs 26 and 94. I would accept that what is said at paragraphs 16 and 21 does not necessarily point to the judge applying the correct standard of proof because, there, he was simply summarising what the Respondent’s position had been. That leaves us with two different indications as to the standard of proof being applied, those appearing at paragraphs 26 and 94. Other than what is said at paragraph 94 I can find nothing in the judge’s analysis which clearly indicates that, notwithstanding the misdirection at paragraph 26, he was, when considering the evidence and making his findings, in practice, applying a real risk test. The uncertainty therefore is such, in my judgment, as to render the decision unsafe so that, I am afraid to say, it has to be set aside. Although I did not hear argument as to the other grounds of challenge, it not having been necessary, I might well have concluded that what was stated therein amounted to no more than a disagreement with the findings and conclusions. Nevertheless, set aside is the appropriate course.
10. Having indicated my view to the parties I invited submissions as to the mode of the remaking of the decision. Ms Masih urged me to remit to the First-tier Tribunal on the basis that such is appropriate, as here, where the whole of a credibility assessment must be revisited. Mrs Pettersen agreed that remittal to the First-tier would be the correct course. I have decided to accede to the parties’ wishes on that issue bearing in mind that nothing is to be preserved from the judge’s determination, bearing in mind that there will have to be significant new fact-finding which is the First-tier Tribunal’s particular area of expertise and bearing in mind that that would preserve the Appellant’s appeal rights with respect to the prospect of any ongoing appeals. I have given directions for the new First-tier Tribunal hearing below.

## **Directions to the First-tier Tribunal for the Rehearing of this Appeal**

11. A. The case is remitted to the First-tier Tribunal with nothing preserved from the original decision of the First-tier Tribunal which was promulgated on 8<sup>th</sup> June 2015.
- B. The appeal shall be listed at the Birmingham Hearing Centre (Sheldon Court) with a time estimate of three hours. The Appellant is to be provided with a Farsi speaking interpreter.
- C. The First-tier Tribunal will have to reach findings and conclusions on all issues raised by this appeal and will not be bound in any way by any of the findings and conclusions previously made.
- D. If the parties wish to rely upon any witness statements, background material or other documentation not previously filed, then this should be sent to the First-tier Tribunal in the form of an indexed and paginated bundle, in sufficient time for it to be received at least five working days prior to the date which will be fixed for the rehearing of the appeal. A copy bundle must, simultaneously, be sent to the other party.
- E. The appeal shall not be listed before Judge James.

### **Decision**

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. I set aside the decision. The case is remitted to the First-tier Tribunal with the above directions.

### **Anonymity**

The First-tier Tribunal did not make any anonymity order.

Signed

Date

Upper Tribunal Judge Hemingway

### **TO THE RESPONDENT FEE AWARD**

As no fee is paid or payable I make no fee award.

Signed

Date

Upper Tribunal Judge Hemingway