



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

Appeal Number: AA/01309/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 24<sup>th</sup> September 2018**

**Decision & Reasons  
Promulgated  
On 15<sup>th</sup> October 2018**

**Before**

**UPPER TRIBUNAL JUDGE McWILLIAM**

**Between**

**AD  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr P Draycott, Counsel, instructed by Paragon Law  
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer of the  
Specialist Appeals Team

**DECISION AND REASONS**

**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.

1. I have anonymised the Appellant because of the nature of his case.

### *The background*

2. The Appellant is a citizen of Iran. His date of birth is 14 September 1996. His claim for asylum was refused by the Secretary of State on 8 January 2015. The Appellant appealed against that decision. His appeal was dismissed by Judge of the First-tier Tribunal C Burns, in a decision that was promulgated on 15 April 2015, following a hearing at Birmingham on 24 March 2015. The Appellant's appeal was dismissed on asylum grounds and under Articles 2, 3, 6 and 8 of ECHR.
3. The Appellant was refused permission to appeal by the First-tier Tribunal (the "FTT") the Upper Tribunal (the "UT"). The decision of the UT was quashed by order of His Honour Judge Pearce issued on 11 May 2018, following the grant of permission by Holroyde LJ in the Court of Appeal. The salient parts of Lord Justice Holroyde's decision read as follows: -

"I do, however, see at least arguable merit in the ground of appeal relating to the likelihood that the claimant's being imprisoned for draft evasion if returned to Iran. It is in my judgment arguable that at paras 45 and 54 of his judgment the FtT Judge accepted the expert evidence that there was a real risk of such imprisonment, but then failed properly to consider the submissions as to whether such imprisonment would be disproportionate and/or would give rise to a real risk of serious harm. It may be that, upon analysis, the argument will be unsuccessful; but in my view it has not thus far received due consideration. Given the potential consequences of an error of law in this regard, I am by a narrow margin persuaded that there is a compelling reason why permission to apply for JR should be granted."

4. The Vice President of the Upper Tribunal Judge Ockelton granted permission on 4 June 2018 in the light of the decision of Holroyde LJ. The matter came before me on 24 September 2018 to determine whether Judge Burns made an error of law. I heard submissions from both parties.

### *The decision of the FTT*

5. The FTT dismissed the Appellant's claim on refugee grounds. The judge rejected the Appellant's claim to be at risk on return based on his support for the KDPI. The judge found the Appellant not credible. The judge went on to consider risk on return and in doing so applied *SB (risk on return-illegal exit) Iran CG [2009] UKAIT 0053*, in which it was found that illegal exit was not a factor which in itself was a significant risk factor. Before the judge there was expert evidence of Roya Kashefi. The judge attached little weight to this evidence in respect of the Appellant's alleged activities with KDPI. The judge concluded as follows at paragraph 45: -

"At paragraph 35 and beyond in the expert's report, the expert deals with difficulties that the Appellant may face for failing to complete his military service. This would lead to a sentence of imprisonment which

of itself would not mean that the Appellant is a refugee entitled to protection under the 1951 Convention or that this imprisonment would amount to inhuman or degrading treatment under Article 3.”

6. Mr Mills conceded that if I decided that the judge made a finding that the Appellant would be imprisoned, in the absence of a counter or cross-challenge, the appeal must be allowed on Article 3 grounds. It is common ground that prison conditions are sufficient to meet the threshold to engage Article 3. Mr Mills primary submission was that there was no such finding by the judge. He urged me to consider paragraph 45 together with paragraph 54.

### *Article 3*

### *Conclusions*

7. The only sensible reading of paragraph 45 is that Judge Burns found that the Appellant would be imprisoned on return. I conclude that the judge unambiguously concluded at paragraph 45 that the Appellant, having failed to complete his military service, would be imprisoned. The description of “some difficulties” at paragraph 54 does not undermine this finding when it is considered in the context of the judge having failed to appreciate that imprisonment crossed the Article 3 threshold. There was no counter challenge raised by the Secretary of State in the event that the UT found that there was a finding made that the Appellant would be imprisoned (for example that the finding was not open to the judge or that it was inadequately reasoned).
8. There is a material error of law because the judge concluded that the Appellant would be imprisoned and contrary to the law as it presently stands, he concluded that this would not lead to the UK breaching its obligations under Article 3.

### *Further submissions made by the Appellant*

9. This was not the end of the matter because the Appellant’s case as presented by Mr Draycott is that imprisonment will amount to persecution, and the Appellant should be granted refugee status. Thus, according to Mr Draycott, the judge erred in dismissing the claim on asylum grounds.
10. The submissions advanced orally and in Mr Draycott’s skeleton argument went well beyond the grant of permission. The UT has a free-standing duty to take obvious points in an Appellant’s favour (the “Robinson duty”). However, I reject the submission advanced on behalf of the Appellant that the issue now raised was such an obvious point giving rise to a duty to hear it.
11. Mr Draycott drew my attention to [14] the decision of the judge which reads; “It was agreed that the Convention reason was that the Appellant claimed to have a well-founded fear of persecution in Iran on the basis of his imputed political opinion” in support of his submission that it was not a

new point but had been considered by the FTT. It was Mr Draycott's view that the judge was referring at [14] to draft evasion in addition to the Appellant's claim to have connections with the KDPI. In his view it follows that it is not necessary for the grounds to be amended to allow him to challenge the decision on protection grounds.

12. Mr Mills, in response, submitted that the issue of draft evasion was advanced before the FTT on the basis that return to Iran would breach the UK's obligations under Article 3 and not that it amounts to persecution. According to Mr Mills the judge at [14] referred to the Appellant's core claim to be at risk on account of his involvement with KDPI. In any event, Mr Mills indicated that he was able to engage with the arguments now advanced by Mr Draycott. He did not consider himself to be disadvantaged by the last-minute advancement of a wholly new ground of appeal challenging the judge decision to dismiss the appeal on asylum grounds.
13. I proceeded to hear submissions on the new issue. However, I do not accept Mr Draycott's wholly opportunistic and misconceived interpretation of [14] of the decision of the FTT. He sought to advance a wholly new argument which was not advanced before the FTT and which has not been raised in the grounds of appeal. Mr Draycott must be aware that this is the case because he represented the Appellant at the hearing before the FTT and drafted the skeleton argument. In addition, he drafted the grounds of appeal to the UT. The arguments raised on an appeal are limited to the grounds for which permission has been granted. I refuse permission to amend the grounds. In any event, there is no substance in the argument now advanced for the reasons I will go on to explain.
14. The argument now advanced is out in full in the skeleton argument. I do not need to repeat it here in any detail. I have summarised the arguments advanced and which he expanded upon in oral submissions. The Appellant argues that the treatment he will be subjected to falls with Articles 9 and 10 of the Qualification Directive. In support of the argument Mr Draycott relied on *MI (Fair Trial, Pre-Trial Conditions) Pakistan CG [2002] UKIAT 02239* and *EM (Eritrea) v Secretary of State for the Home Department [2014] 2 WLR 409*. The Appellant relied on the decision of the Grand Chamber of the European Court of Human Rights at paragraphs 102 to 111 of *Bayatyan v. Armenia [2011] 54 EHRR 467* and *Shepherd v Federal Republic of Germany [2015] 3 WLR 611 CJEU*. It was submitted that within relevant international materials the definition of conscientious objector is construed broadly with reference to paragraph 11 of the UNHCR's Guidelines on International Protection No. 10 "Claims to Refugee Status related to Military Service within the context of Article 1A (2) of the 1951 Convention ..." of 12 November 2014.
15. The Appellant argued that the judge erred in failing to engage with the fact that being subject to imprisonment for draft evasion prima facie gives rise to the Convention reason; namely on political grounds, with reference to the UNHCR's guidelines. In addition, it was argued that the Appellant is a member of a social group. In support of this the Appellant relied on

paragraph 56 of Advocate General Sharpston's opinion in *Shepherd*. The Appellant relied on *PK (Draft evader; punishment; minimum severity) Ukraine [2018] UKUT 00241* to support his argument that in general the imposition of a custodial sentence upon a draft evader will normally result in persecution.

16. Reliance was placed on the Respondent's Country Policy Information Note (the "CPIN") Iran: Military service (October 2016 – 24 October 2016) with reference to paragraphs 2.4 to 3.14. The CPIN indicates that the longer the period of draft evasion, which stands at more than four years in the Appellant's case, the greater the risk of prosecution and imprisonment upon return to Iran. Mr Draycott argued that draft evaders may have a distinct identity, being perceived as being different. Reference was made to page 21 of the CPIN at 7.2.5: -

"Middle East Eye reported that:

'Between 30,000 and 35,000 people have already been arrested this year for attempting to dodge military service, [General Moussa Kamali, Chief Conscription Officer for the Iranian armed forces] said. 'The process of identifying and arresting fugitives will be intensified this year,'

Kamali said.'"

17. Mr Draycott submitted that the Appellant would be perceived as an opponent in the light of draft evasion and that he is a failed asylum seeker of Kurdish ethnicity. He will be interrogated and mistreated. Reliance was placed on *SSH and HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 00308*. *AB and Others (internet activity – state of evidence) Iran [2015] UKUT 0257* was also relied on in support of the submission that although the authorities do not chase everyone, it is likely that the Appellant will come to their attention.
18. Mr Mills submitted that the Appellant was not found to be political. He has no personal history that would give rise to him being marked out. Being a Kurd and/or a failed asylum seeker is not sufficient to establish imputed political opinion. He submitted that there is nothing in the CPIN which would suggest that Kurds are marked or targeted.

#### *The Appellant's protection claim*

#### *Conclusions*

19. I find that the Appellant will be treated like any other draft evader. He has committed a criminal offence because he simply does not want to do military service. This is probably because it is a significant interference with his life. As found by the judge he does not have a political opinion and he will be treated as somebody who has simply broken the law. There is no evidence to support an argument that draft evaders who are Kurds and/or failed asylum seekers will be discriminated against or treated disproportionately.

20. There is no dispute that the Appellant is a draft evader. If Judge Burns is correct and he will be imprisoned, any sentence imposed on him would not come within Article 9 of the Qualification Directive. The evidence before me does not establish that the criminal justice system relating to draft evasion in Iran and the penalties imposed are not compatible with human rights entitlement. This is not made out in the CPIN. There is no evidence that the penalties are applied disproportionately for any reason.
21. The evidence does not establish that there is a nexus between draft evasion and political opinion in Iran. Whilst there is evidence of an increasing number of draft evaders and the process of tracking them down has intensified (see 2.4.12 and 7.2.5), the evidence is not sufficient to establish that the Appellant will be considered as a political opponent because he is a draft evader (and a Kurd).
22. At no time in these proceedings has the Appellant advanced a case that he is a conscientious objector or that he is anything other than someone who does not wish to complete military service. It is not his case that he refuses to complete military service because this would associate him with breaches of IHL. The argument under Article 10 and the argument that the Appellant is a member of a particular social group has no substance on the facts of this case.
23. *AB* does not establish that this Appellant if subjected to arbitrary interview will be perceived as a political opponent. I have considered what the UT stated in *SSH and HR* particularly at [34]: -
  - “34. It was not suggested to us that an individual faces risk on return on the sole basis of being Kurdish. It was however agreed that being Kurdish was relevant to how a returnee would be treated by the authorities. For example, the Operational Guidance Note refers at 3.12.14 to the government disproportionately targeting minority groups, including Kurds, for arbitrary arrest, prolonged detention and physical abuse. No examples however have been provided of ill-treatment of returnees with no relevant adverse interest factors other than their Kurdish ethnicity, and we conclude that the evidence does not show risk of ill-treatment to such returnees, though we accept that it might be an exacerbating factor for a returnee otherwise of interest. Accordingly, we conclude that it has not been shown that a person in the position of these appellants faces a real risk on return to Iran either on the basis of what would happen to them when questioned at the airport or subsequently if they were convicted of an offence of illegal exit. With regard to *HR* specifically, it does not appear to be disputed that he is Kurdish and that he is undocumented: hence we see no reason for remittal. Prosecution for illegal exit is an outcome not generally experienced by such returnees, and where it does occur, the most likely sentence in relation to the illegal exit charge would be a fine. It has not been shown that there would be a real risk of prosecution under Article 500 for propaganda against the state on the basis of having made an asylum claim which was found to be false. Accordingly these appeals are dismissed”

24. The UT in *SSH and HR* or *AB* did not make findings which support the Appellant's case that he would be interrogated and mistreated because of his ethnicity and/or he is a failed asylum seeker. It is possible that he will be arrested for draft evasion; however, the background evidence does not establish that he is at risk of being of interest to the authorities for any other reason. The UT did not deal with the issue of draft evasion in either of the above cited cases. However, the evidence does not establish that a lawful arrest for draft evasion, would become discriminatory or that the penalty would be disproportionate because of the Appellant's ethnicity and/or because he is a failed asylum seeker. If Judge Burns is correct, and the Appellant is imprisoned, as opposed to receiving the penalties described in the background evidence, this will give rise to the UK breaching its obligations under Article 3. However, there is no substance in the arguments now advanced by the Appellant that he would be persecuted on account of his real or imputed political opinion or because he is a member of a particular social group. The judge's decision to dismiss this appeal on protection grounds is lawful and sustainable.

### ***Error of Law***

25. The judge erred because he found that the Appellant would be imprisoned on return and that this would not amount to a breach of Article 3. It is acknowledged by the Secretary of State that prison conditions in Iran reach the high Article 3 threshold. It follows that the decision of the judge to dismiss the appeal under Article 3 is set aside. I remake the appeal, allowing it on Article 3 grounds.

### **Notice of Decision**

The appeal is allowed under Article 3

The appeal is dismissed on asylum grounds

### **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 Joanna McWilliam

Date 9 October 2018

Upper Tribunal Judge McWilliam