



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/01100/2017

**THE IMMIGRATION ACTS**

Heard at Manchester CJC  
On 14 June 2018

Decision & Reasons Promulgated  
On 04 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

R N  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr Medley-Daley, Duncan Lewis solicitors

For the Respondent: Mr McVeety, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a national of Iran born on 5.7.92. The Appellant arrived unlawfully in the United Kingdom on an unknown date likely to have been in early 2010 and claimed asylum on 9 February 2010, following his arrest on 6 February 2010. This was based on a fear of persecution as an ethnic Baloch. This application was refused and his appeal against that decision was dismissed and he became appeal rights exhausted on 30 September 2010. The Appellant made further submissions on 3 May 2011, which were refused. The Appellant then made further submissions on 3 June 2014, which were refused

but with the right of appeal. However, the appeal was dismissed and the Appellant became appeal rights exhausted on 25 January 2015.

2. On 8 July 2016, the Appellant made further submissions based on his conversion to Christianity. These submissions were treated as a fresh claim but refused on 17 January 2017. The appeal against this decision came before First tier Tribunal Judge McGinty for hearing on 13 July 2017. In a decision and reasons promulgated on 24 July 2017, the appeal was dismissed.

3. Permission to appeal to the Upper Tribunal was sought in time on the basis that the Judge had erred in law: (i) in failing to adjourn the appeal, given that the Appellant wished to call a *Dorodian* 01/TH/1537 witness to support his account that he had genuinely converted to Christianity; (ii) in failing to make a material finding *viz* whether the Iranian authorities perceive the Appellant to be a convert on return; (iii) in failing to take account of the judgment in Danian [1999] EWCA Civ 3000 in respect of the Appellant's motivations for attending Church. The renewed grounds of appeal dated 21 November 2017, further asserted that the Judge had failed to take into account the relevant evidence in SSH & HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 308 and AB & others (internet activity – state of evidence) Iran [2015] UKUT 257, in light of the fact that the Appellant is highly likely to be questioned by the authorities on his return to Iran, including his activities in the UK.

4. Permission to appeal to the Upper Tribunal was granted by Upper Tribunal Judge Perkins in a decision dated 16 January 2018, on the following basis:

*“1. I give permission on each ground.*

*2. Although I incline to the view that the refusal to adjourn was a lawful decision on the available evidence the contrary is arguable.*

*3. I am more concerned about point 7 of the Renewed Grounds, namely, whether the Appellant's (alleged) internet profile might create a risk on return.”*

*Hearing*

5. At the hearing before me, Mr Medley-Daley submitted in respect of the first ground of appeal that, in refusing to adjourn there was no indication that the Judge considered fairness, which is the key consideration but was not referred to at any point. There were alternative steps to ensure fairness, eg. he could have stood the appeal down to give the Appellant's then solicitors the opportunity to make enquiries as to when a *Dorodian* witness could attend. He submitted that there was still time in the day for the appeal to be stood down for a telephone call to have been made. Mr Medley-Daley acknowledged that he did not know if this was requested or not but it is a

*Robinson* obvious point. He should have taken it whether raised or not. He submitted that the decision to adjourn was unlawful given that the *Dorodian* witness is essential. He submitted, for clarification that had enquiries been made it would have been confirmed that someone would attend. I noted at that point that the witness was present at the back of the hearing room. Mr Medley-Daley submitted that an adjournment was necessary both in respect of procedural fairness and the overriding objective.

6. In respect of the second and third grounds of appeal, that it was not accepted in light of the above that the assessment of credibility is sustainable. He submitted that there was no dispute that an involuntary returnee would be questioned on return *cf. AB & others* (internet activity – state of evidence) Iran [2015] UKUT 257 and the Appellant cannot be expected to be discreet about his activities on return to Iran and the fact he has converted to Christianity. If there is a real risk that the border guard might perceive that there is something he is hiding then it is reasonably likely that he would be detained, with the risk of Article 3 ill-treatment. In respect of the judgment in *Danian* [1999] EWCA Civ 3000, he submitted that, bearing in mind the Country Guidance decisions and given the risk of detention, you cannot say that this appellant is an ordinary failed asylum seeker as he is a Christian convert and is inciting others to give up Islam.

7. I asked Mr Medley-Daley whether the Appellant was relying upon his Baluch ethnicity as a contributory factor in respect of the risk of return, to which he responded that it was likely to raise questions, given that he has no valid passport and exit stamp and this would bring him to the attention of the authorities and his Baluch ethnicity would be likely to raise further enquiries. He submitted that the Appellant's Christianity is then likely to come out as very few people are likely to withstand interrogation *cf. AB & others* (internet activity – state of evidence) Iran [2015] UKUT 257.

8. In respect of the judgment in *Danian* he submitted that it is necessary to look at the Appellant's activities as a whole and the Judge had failed to do that and to assess risk on return based on what the caselaw says.

9. In his submissions, Mr McVeety submitted that *HJ (Iran)* [2010] UKSC 31 only protects the Appellant if he is a genuine Christian, so if there is a finding he is not genuine then he is not protected. He submitted that the Judge has given valid reasons for finding the Appellant not credible and he does not have a good track record before the Tribunal, having had two previous appeals dismissed, albeit that he accepted that these were on a different basis from the extant appeal based on Christian conversion. He submitted that we are told that the automatic reaction of border guards is that the Appellant is an apostate but there is no evidence to support this at all and it is pure speculation. Mr McVeety submitted that in light of the decision in SSH & HR

(illegal exit: failed asylum seeker) Iran CG [2016] UKUT 308, which is the most recent case there is no risk of persecution.

10. He further submitted that the Appellant has lied and is not a genuine Christian, if the Judge's findings are accepted and that as the Judge recorded at [43] the Appellant is happy to lie to officials and claimed that: "*nobody tells the truth*" when encountering immigration officials. He submitted that *Dorodian* was concerned with motivation and not with what would happen when the person went back to Iran and there was no clear risk on return. In terms of the reference to facebook, if something is put on there which you do not believe then *Danian* may be relevant but it is not consistent with *HJ (Iran)* which has, in effect, superseded it.

11. In respect of ground 1 and the failure to adjourn the appeal, it is clear from [14] of the decision and reasons that clearly the Judge did not have a witness statement from Rev. Coates. There were two witness statements from individuals at Liverpool Cathedral, neither of whom attended. It was not known when or if the witness is able to give evidence and there was a lack of real information before the Judge. At [15] the Judge notes that the absence of a *Dorodian* witness does not preclude the Appellant from being successful as the Judge can consider the evidence of Canon White and the Rev. Eghtedarian. Mr McVeety pointed out that no challenge had been made to the Judge's credibility findings. He further submitted that the appeal had been previously adjourned to a CMRH to enable a date to be fixed and in refusing the adjournment request made prior to the hearing, Designated Judge McClure stated that someone other than Rev. Cates would have to give evidence. In these circumstances, it had been open to the Judge to consider it was fair to continue with the appeal and there was no material error of law.

12. In his reply, Mr Medley-Daley held that the findings on credibility were tied in with the fairness issue and that the attendance of the *Dorodian* witness impacts on everything else and the assessment of credibility. In practice, the absence of a *Dorodian* witness is treated as being fatal. In relation to the consideration of the other two witnesses, they are not ministers at the Church the Appellant currently attends and if they did not have current evidence of his faith at the date of hearing, how could they comment on his faith when they do not know because they have not seen him for a while, as it was 6 months since last letter written in January 2017. He submitted that this is a bit too long for a *Dorodian* witness and this is a relevant consideration. It was not known how long the witness would be off for and no attempt had been made to permit the solicitors to make telephone enquiries and whether an alternative would be made available. There was no indication that the issue of fairness was on the Judge's mind and it was not referred to as part of the test.

13. In respect of Ground 2, Mr Medley-Daley submitted that there have not been any voluntary returns since 2010/2011 and there is a lack of evidence of

what will exactly happen. *SSH* looks at the issue of returns but the statistics the Respondent produced showed either voluntary returns or returning with passports or exit stamps and there was a vacuum in respect of someone in the Appellant's position.

14. He further sought to rely on the judgment in *SB* (risk on return- illegal exit) Iran CG [2009] UKAIT 00053 that the Appellant would be considered as having demonstrated un-Islamic behaviour. He denied it was speculative that the Iranian border guards would ask about the Appellant's asylum claim, as they would want to know what he has been saying about them. He further made reference to the Respondent's COIS report on illegal exit dated July 2016, which makes clear that the Iranian authorities will know that the returnees are failed asylum seekers and thus are guilty of un-Islamic behaviour. Mr Medley-Daley clarified that the risk category is apostasy and not whether he is a genuine Christian. He submitted that at [53] and [54] the Judge has not gone far enough and he should have made findings on whether the Appellant would be perceived as an apostate.

### *Findings*

15. I found an error of law in respect of Ground 1 of the grounds of appeal regarding the approach of the Judge to the adjournment request. I reserved my decision in respect of ground 2 in order to consider the interplay between *Danian* and *HJ (Iran)* (op cit).

16. Dealing firstly with the decision by the Judge not to adjourn the appeal, this was addressed in some detail at [10]-[15] of the decision and reasons. Whilst the Judge gave sustainable reasons for deciding to proceed with the appeal, there is merit in Mr Medley-Daley's submission that at no stage did the Judge consider the issue of fairness, in accordance with the overriding objective to deal with a case fairly and justly. I cannot exclude that, had the Judge considered whether it was fair in all the circumstances to adjourn the appeal, that he would have reached a different conclusion, particularly given that the reason for the adjournment was to bring a witness whose evidence was key to the issue he needed to determine *viz* whether the Appellant's conversion to Christianity was genuine. It is also the case that the Presenting Officer relied on the absence of a *Dorodian* witness in support of his contention that the Appellant's account was not credible. I consider that the failure to even consider putting the appeal back to make further enquiries as to when Rev Coates was likely to be available or whether another witness was available was unfair, in circumstances where the Appellant's then representatives were only informed 3 days before the hearing that Rev Coates would be unable to attend.

17. In respect of the second ground of appeal, the submission on the part of the Appellant's representative at the hearing before the First tier Tribunal

was that the Appellant would be at risk on return to Iran following *HJ (Iran)* and should not be asked to lie. At [54] the Judge rejected the Appellant's account of conversion to Christianity as being genuine and did not accept that he had brought people to the cathedral in Liverpool due to the similarity between and lack of detail in the letters of support from Canon White and Rev Eghtedarian. This was the Judge's primary finding and it was only in the alternative that he went on to hold that the Appellant had only brought people to the church in order to bolster his claim and he did not accept that the Appellant would preach about Christianity or try to convert people on return to Iran. At [55] the Judge went on to consider briefly the fact that there was reference to facebook entries that were said to put him at risk, in the refusal decision but found that no entries were before him and his then representative disavowed reliance upon them.

18. In these circumstances I find no error of law in respect of the second ground of appeal, given that there was an absence of evidence before the Judge upon which the argument that he would be at risk on return as a perceived apostate could be founded. In respect of Mr McVeety's argument that *HJ (Iran)* has in effect replaced *Danian*, I do not consider that this is the case. *Danian* per Lord Justice Brooke, established the following principle:

*"I do not accept the Tribunal's conclusion that a refugee sur place who has acted in bad faith falls outwith the Geneva Convention and can be deported to his home country notwithstanding that he has a genuine and well-founded fear of persecution for a Convention reason and there is a real risk that such persecution may take place. Although his credibility is likely to be low and his claim must be rigorously scrutinised, he is still entitled to the protection of the Convention, and this country is not entitled to disregard the provisions of the Convention by which it is bound, if it should turn out that he does indeed qualify for protection against refoulement at the time his application is considered."*

The principle established in *HJ (Iran)* however, is that if a person acts discreetly on return to the country of origin in order to avoid persecution, then he is a refugee. The question is fact sensitive and depends on the reasons for acting discreetly. In this sense, the two judgments are distinct although both propose a fact sensitive consideration. In either case, the risk of persecution would only come into play if there is a reasonable likelihood that the authorities in the country of origin will become aware of the activities conducted by the asylum applicant in the country of refuge. On the facts found by the First tier Tribunal Judge, in the absence of evidence that the Appellant has been proselytising in the United Kingdom, he would be returned as a Baloch failed asylum seeker and would not fall within any of the risk categories set out in SSH & HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 308.

19. However, in light of the fact that I have found an error in respect of the Judge's refusal to adjourn the appeal, which undermines his findings on the credibility of the Appellant's conversion to Christianity, his decision as a whole is unsustainable.

*Decision*

20. I find an error of law in the decision of the First tier Tribunal Judge. I remit the appeal for a hearing *de novo* before the First tier Tribunal in light of paragraph 7.2.(a) of Senior President's Practice Statement dated 11.6.18:

*"7.2. The Upper Tribunal is likely on each such occasion to proceed to remake the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:*

*(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal."*

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**DIRECTIONS**

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1. The appeal is to be listed for hearing in the First tier Tribunal, Manchester, on the first available date after 4 September 2018
2. The time estimate is 3 hours, 2 witnesses;
3. A Farsi interpreter will be required
4. Any further evidence upon which the parties wish to rely should be submitted seven days prior to the hearing.

*Rebecca Chapman*

Deputy Upper Tribunal Judge Chapman

Dated 1 July 2018