



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/11719/2017

THE IMMIGRATION ACTS

Heard at Manchester
On 11th May 2018

Decision & Reasons Promulgated
On 1st June 2018

Before

THE HON. MR JUSTICE LANE, PRESIDENT

Between

SM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Schwenk, Counsel, instructed by Greater Manchester
Immigration Aid Unit
For the Respondent: Mr Bates, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of Iran of Kurdish ethnicity, challenges the decision of the First-tier Tribunal, Judge of the First-tier Tribunal Ian Howard, which was promulgated on 29th December 2017, in which the First-tier Tribunal dismissed the appellant's protection claim. Permission was granted by the First-tier Tribunal by reference to the grounds of application, which were not settled by Mr Schwenk of Counsel, who appears for the appellant at today's hearing. Mr Bates appears on behalf of the respondent Secretary of State.
2. The judge was faced with the unrepresented appellant at the hearing before him. The judge asked the appellant a number of questions. At paragraph 5 the judge said: "Being unrepresented I took him through what I understood to be the bases of his

claim. He agreed the matters discussed were the bases of his claim.” Regrettably, what those matters were finds no expression in the judge’s decision.

3. Mr Schwenk submits that in the circumstances the First-tier Judge must as a matter of law be taken to have accepted what was the position of the appellant as set out in the latter’s asylum claim. In order to understand what that was we need to look at pages A2 and A3 of the respondent’s bundle. We see there that the appellant said that he feared returning to Iran because he would be persecuted, in his words “for failing to join the Iranian Army and for disobeying the government’s demands”. He considered that he would be dealt with very harshly with the very minimum punishment being imprisonment. He would also be viewed as a traitor and would not be allowed to live a peaceful life.
4. The appellant described receiving two separate letters from the government requiring him to join the army. A third letter was “threatening in nature, ordering me to join the army or risk being arrested by the government’s officials”. After that third letter government officials did indeed come to the appellant’s house. He said they did so in order to prosecute him for not joining the army. Happily perhaps for the appellant, he was not at home on that occasion but other family members were. The officials entered the house by force to search for the appellant and instead arrested the appellant’s father, whom they humiliated, particularly as the family was Kurdish. The appellant then received notification via telephone that his father had in fact died of a heart attack whilst in police custody. The appellant said that he feared the main intelligence agency in Iran, who had no restrictions on their actions.
5. The appellant also underwent a detailed Home Office interview in connection with his claim and we see the questions and answers for that in the Home Office bundle. He referred to the letters and also to the death of his father. Accordingly, there was, it is plain, a high degree of consistency between the account given initially by the appellant in his own words and later to the Home Office interviewer.
6. The First-tier Judge referred in the decision to the country guidance case of SSH and HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 308. He said that this case was authority for two propositions drawn from the head note; namely a person whom it is sought to return to Iran, who does not possess a passport, will be returnable on a laissez passer, which can be obtained from the Iranian Embassy, and that those of no adverse interest do not face a real risk of persecution/breach of Article 3 rights by reason of illegal exit from Iran; nor does such a risk exist at the time of questioning. Accordingly, at paragraph 21, the judge concluded that the fact of being returned to Iran as a failed asylum seeker would not per se create a real risk of persecution.
7. The judge then said it is “nonetheless the case that those who seek to evade national service do not escape sanction. The respondent has considered the position of those such as the appellant in a document entitled ‘Country Policy and Information Note Iran: Military service Version 1.0 October 2016’”. The judge also correctly noted that there was no discrete country guidance from the Upper Tribunal on the matter of draft evasion in Iran.

8. The judge quoted from the CPIN document. He noted what is said at 2.2.3 and 4, that there was “no evidence to suggest that the Iranian government viewed a person’s refusal to partake in military service as an act of political disobedience and that if persons are punished it is likely to be for the criminal offence of evading or deserting national service. The nature and duration of punishment will depend on the person’s circumstances.”
9. The judge noted 7.2 of the document, which dealt with an official report from the Netherlands Ministry of Foreign Affairs. Later in the same paragraph he noted that the same source as was there quoted did not know whether, in practice, the Iranian authorities pursued a policy of actively tracking down and prosecuting draft evaders and deserters. All of this led the judge to conclude tersely at paragraph 26 that the punishment the appellant was likely to be subjected to for evading national service does not render him liable to persecution.
10. At paragraph 27, the judge dealt with the issue as to whether or not being in the military in Iran might require the appellant to engage in conflicts that were internationally condemned. The judge did not consider that there was evidence to suggest that those performing military service in Iran would be required to engage in any military acts which are contrary to the basic rules of human conduct. In so finding the judge was, it seems to me, clearly focusing his attention on Syria and Yemen since he mentioned those countries in the preceding sentence of that paragraph.
11. Having made those findings, the judge turned to the issue of human rights. At paragraph 29 of the decision the judge found that the same factual matrix as he had deployed in connection with asylum also satisfied him that returning the appellant to Iran would not breach the United Kingdom’s obligations under Article 3 of the ECHR.
12. All this is challenged by Mr Schwenk by reference to the very documents that the judge had considered. So far as the country guidance case of SSH is concerned, Mr Schwenk drew particular attention to paragraphs 23 and 25. On paragraph 23, the submission by Mr Schwenk on behalf of the appellant was, if I can paraphrase it, that the position of the appellant upon return would be different from an ordinary “mere” failed asylum seeker. Such a person may well not be of adverse interest to the authorities in Iran. The appellant, by contrast, would be of adverse interest because his history as described earlier and as, it seems, accepted by the First-tier Judge showed very particular adverse interest, including but not confined to a forceful visit to the appellant’s home.
13. Thus, the submission goes, the relevant paragraph of the country guidance case is 25, which states as follows:

“We should say at this point that we have no hesitation in agreeing with the submissions of Mr Mills that the evidence shows a real risk of persecution/ill-treatment in breach of Article 3 for a person who is imprisoned in Iran. This appears to be common ground.”
14. The second document is the CPIN document, to which I made reference earlier. This is also relied on by Mr Bates, who seeks to defend the judge’s decision. The document, in my view, requires more extensive and careful analysis than it received from the

First-tier Judge. The first passage of relevance is 2.3.1. This states that whilst there is no evidence that those completing their military service have been deployed to Syria, it is important to note that members of Iran's armed forces have been deployed in Syria in support of President Bashar al-Assad. The Assad regime and its allies have carried out indiscriminate attacks that directly targeted civilians and have been accused of perpetrating war crimes.

15. More generally, paragraph 2.4.11 states as follows:

"Draft evaders are liable for prosecution. A person who deserts from the army will have to continue military service upon return if he is under the age of 40. Evading military service for up to a year during peace time or two months during war can result in between three and six months added to a person's military service. Longer draft evasion (more than a year in peace time or two or more months during war) may result in criminal prosecution."

Mr Schwenk lays heavy emphasis upon that last passage in 2.4.11 and points out, in my view correctly, that this appellant on hypothetical return to Iran would have been evading military service for well more than a year.

16. The next passage of relevance is 2.4.14:

"It is unlikely that in the majority of cases the consequence of a person's general unwillingness to serve in the armed forces or objection to enter a 'combat zone' will be such that they can make out a claim for protection. However, longer draft evasion may result in criminal prosecution and draft evaders are being arrested in increasing numbers. Decision makers should consider whether those claiming to be unwilling to serve in the armed forces can 'buy out' of compulsory service."

Pausing there, there is no indication from the Secretary of State that this appellant would be able to do that. Indeed, in his asylum claim he asserted to the contrary.

17. Paragraph 7.2.1 of the same document relates to the Danish Immigration Service Fact-Finding Report. That says:

"A person who deserts from the army will have to continue the military service upon return, if he is under the age of 40. Individuals who are over the age of 40 will not be asked to do military service. If a person has deserted or evaded the military service and returns to Iran after the age of 40, he will receive a financial punishment and possibly imprisonment. This is subject to arbitrary ruling. ... According to the Attorney-at-Law, a person who evades military service may be punished. According to military law, if a person had to serve twenty months of military service and evades, the length of the service will increase to 24 or 26 months. The Attorney-at-Law added that according to 'previous legislation' a person may also be fined a few thousand US dollars instead of serving extended military service. However, the Attorney-at-Law stated that it is still to be seen how recent changes in law are used in practice, i.e. whether a person will be fined or must serve extra time."

It is fair to say that from this passage the emphasis seems to be very much upon either doing additional military service or paying a fine as a punishment that might result from prosecution for evading the draft.

18. 7.2.2 deals with an official report of the Netherlands Ministry of Foreign Affairs. That says as follows:

“Young men from the age of 18 who are called for military service but do not present themselves to the authorities are considered as draft evaders. There is no alternative military service in Iran and conscientious objection is not recognised. Draft evasion is liable for prosecution. Persons who evade military service for up to three months during peace time (or up to fifteen days during war) must serve three months in addition to the regular term. If the draftee is absent for longer than three months during peace time (or fifteen days during war), the military service will be extended by six months. Longer draft evasion (one year during peace or two months during war) may result in criminal proceedings before a military court. Draft evaders risk losing social benefits and civic rights including their right to work, to education or the right to set up a business. If a draft evader evaded reports for military service voluntarily, the duration of service will be extended by three months, whereas if a draft evader is arrested, he is obliged to serve for an extra six months.”

19. Finally, paragraph 8.1.6 deals with an article in *Iran Wire* regarding the position of what are said to be ethnic and religious minorities within the Iranian armed services. They are said to suffer disproportionately in that they represent a high percentage of those who are driven to commit suicide.
20. The issue therefore is whether one can extract from the totality of the CPIN document, material that may show that in the particular circumstances of this appellant's case he would receive punishment in the form of imprisonment and, if he would, then, whether that punishment is of a military or civil nature, it seems plain from paragraph 25 of the country guidance case of SSH that he risks treatment in breach of Article 3 of the ECHR.
21. Did the judge deal properly with the totality of that evidence? I find the answer is, no.
22. The material looked at in the round points towards the likelihood of punishment for draft evasion, even in the case of someone who has evaded for a considerable period of time, being either a fine or an extension of military service. So far as the latter is concerned, it obviously makes sense for a regime that operates a system of compulsory military service to make use of draft evaders by placing them in the military. However, read as a whole and particularly bearing in mind what is said about the unpredictable nature of the Iranian authorities, it seems to me that there is sufficient in the material to give rise to a real risk of imprisonment on return in the case of this appellant. I say that because, crucially in my view, his account of what happened to him before he left Iran, which falls to be treated as having been accepted by the judge, points very clearly to there being specific adverse interest in him. One also bears in mind that he is of Kurdish ethnicity. That was a relevant matter, ignored by the judge, in considering whether the risk is such as to amount to a real, realistic one rather than a fanciful one. There is sufficient evidence to give rise to a real risk that this particular appellant would suffer a period of detention.

23. Therefore, the grounds of appeal are made out. The judge failed properly to examine the evidence before him. It therefore falls to me to re-make the decision. For the reasons I have given, it is not only possible but indeed necessary for this Tribunal to re-make the decision on the basis of the accepted findings of fact in the First-tier Tribunal and to place those in the context of the country guidance and the information relating to military service and draft evasion in Iran. Having done so, for the reasons I have articulated, I consider that there is a real risk of the appellant suffering serious ill-treatment.
24. I do not consider that Refugee Convention reasons are made out. There is exiguous reference made in the interview to the possibility of the appellant not wishing to serve in the Iranian forces for political or religious reasons. I do not consider that that amounts to a properly articulated claim that might engage the Refugee Convention.
25. I also do not consider that military service carries with it a real risk of an Iranian having to fight in internationally condemned conflicts, in particular in Syria. The evidence that I have made reference to stops well short of suggesting such a real risk. I agree with Mr Bates that the evidence relating to Afghans relied upon by Mr Schwenk points, if anything, in the opposite direction. Those are persons who have been given inducements in the form of the possibility of obtaining Iranian citizenship in order to take part in the Syrian conflict.
26. For these reasons, I re-make the decision by allowing the appellant's appeal on protection grounds by reference to the obligations of the United Kingdom under the Qualification Directive. In other words, the appellant is entitled to humanitarian protection. He also would face a real risk of breach of Article 3 if he were returned and I allow his appeal on that ground also.

Decision

The appeal is allowed on humanitarian protection grounds and human rights 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

Dated: 30 May 2018

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber