Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/02124/2015

THE IMMIGRATION ACTS

Heard at Liverpool	**Decision & Reasons Promulgated**
On 16 February 2018 & 3 May 2018	**On 4 May 2018**

Before

Deputy Upper Tribunal Judge Pickup

Between

Mohammad [M]
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the appellant: Dr E Mynott, instructed by Broudie Jackson Canter
For the respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the resumed hearing of the appellant's appeal against the decision of First-tier Tribunal Judge Davies promulgated 18.8.17, dismissing on all grounds his appeal against the decision of the Secretary of State, dated 23.1.15, to refuse his protection claim.

2. First-tier Tribunal Judge Parker granted permission to appeal on 6.11.17.

3. Thus the matter came before me on 16.2.18 as an appeal in the Upper Tribunal, on which occasion Mr C Bates represented the Secretary of State.

Error of Law

4. For the reasons summarised below, at the hearing on 16.2.18 I found such error of law in the making of the decision of the First-tier Tribunal as to require the decision to be set aside.

5. The case has a long history. The appellant claimed asylum on arrival in the UK in 2012, on the basis of imputed political opinion. He claims to have attended demonstrations in Tehran but was not detained or identified. However, he had a contract to supply fruit to a member of Sepah. When he was not paid and threatened to report the matter, he was arrested by his contact in Sepah on grounds of participating in the demonstrations. He was mistreated in detention, but eventually released on bail to attend court. He did not attend court, but fled Iran, making his way to the UK.

6. His claim was rejected in the decision of the Home Office, for the reasons set out in the letter of 23.1.15 (RFR). His appeal against that decision was dismissed by First-tier Tribunal Judge Tobin, in the decision of the Tribunal promulgated 5.10.15. The appellant sought, and on 25.11.15 was granted, permission to appeal to the Upper Tribunal.

7. In the decision of the Upper Tribunal promulgated 20.12.16, Upper Tribunal Judge Chalkley found errors of law in the decision of the First-tier Tribunal. It was found that Judge Tobin failed to consider the future risk on return and the questions of sufficiency of protection and internal flight, as well as the risk he might face on return having fled Iran whilst on bail. Judge Chalkley also found that the judge also failed to make any findings in respect of the arrest warrant document produced by the appellant. Both parties agreed that the decision could not stand. In the circumstances, the decision was set aside and remitted for rehearing in the First-tier Tribunal. However, Judge Chalkley preserved both the finding in the appellant's favour at [26] of Judge Tobin's decision, and the rejection of the claim to Christian conversion from [34] onwards, against which there had been no appeal.

8. The remitted appeal was reheard by First-tier Tribunal Judge Davies. The appellant was not called to give evidence; the appellant relied on the documentary evidence and the hearing proceeded by way of submissions only.

9. In his decision promulgated 18.8.17, Judge Davies expressed surprise at the error of law decision of Judge Chalkley, noting that, in his view, the findings did not accord with the contents of Judge Tobin's decision. However, at [7] he affirmed that those observations at [5] and also those made at [6] of his decision, did not affect the way in which he made the findings and decided the appeal.

10. The grounds complain of procedural impropriety and unfairness on the part of Judge Davies. Despite the assurance that his comments would not affect the way in which he made the findings, it was submitted that it is clear from the findings [36] onwards that the judge allowed his view that that Judge Tobin had correctly dealt with the issues to influence his own

findings, infecting and influencing the outcome of the appeal to the appellant's prejudice.

11. Complaint is also made as to [39] of Judge Davies' decision, in respect of which it is submitted that he failed to give weight to material evidence. The judge there stated that no evidence had been put before the Tribunal that the appellant could not contact the office of the Supreme Leader. Reference is made in the grounds to [15] where the judge stated that he had considered all the evidence and concluded at [45] that the Iranian authorities would offer protection to the appellant against a corrupt Republican Guard. It is submitted that the country evidence before the Tribunal did not support this conclusion. Reliance is placed on the country background information at [45] and [47] that security forces routinely torture and ill-treat detainees with impunity; and at [59] that there was official corruption, a lack of judicial independence and government transparency, and that officials have ignored or failed to investigate credible allegations of mistreatment. It is submitted that Judge Davies could not have considered all the evidence and it cannot be said that there was no evidence that the appellant could not make contact with state authorities. It is submitted that the conclusion of Judge Davies at [45] that the appellant had been mistreated by a non-state actor, a corrupt Republican Guard, and at [40] that the guard was not acting under the sanctions of the Iranian State, was unreasoned, irrational, wholly unsupported by evidence, and unsustainable.

12. With regard to the arrest warrant, addressed at [41] of Judge Davies' decision, it is submitted that he relied solely on the findings of Judge Tobin and failed to undertake an independent assessment of this aspect of the appeal.

13. In granting permission to appeal, Judge Parker noted that Judge Chalkley preserved only Judge Tobin's findings on lack of credibility of Christian conversion, and the positive findings at [26] of the decision, that the appellant had extensive injuries consistent with being a victim of torture. "*Although the other findings of IJ Tobin were set aside, it is apparent from the decision of IJ Davies that he adopted some of them (eg at paragraphs 41 and 44). The findings of fact made by IJ Davies are not supported by adequate, or any, reasons. For these reasons alone, I find that there is an arguable error of law in the decision.*"

14. Whilst the findings at [37], [38] and [40] do mirror those of Judge Tobin, I find that they were findings independently open to the judge on the appellant's own evidence. Although somewhat brief, the reasoning is clear. On the evidence it was open to the judge to conclude that the actions of the sole Sepah member, a Republican Guard, were of a non-state actor, acting corruptly by instigating the appellant's detention. It was open to the judge to reject the proposition that that person would have had access, some two and a half years after the events, to information or evidence that the appellant had attended the demonstrations. The judge concluded that the guard may simply have been acting in this way to avoid payment of the outstanding debt.

15. However, it is clear that at [41] Judge Davies relied on Judge Tobin's assessment of the arrest warrant document, despite the finding of Judge Chalkley that Judge Tobin had made no clear findings. Judge Davies recites that Judge Tobin attached little weight to the document, on the basis that there was no other supporting evidence in relation to it, though the appellant would have been well-able to obtain additional evidence. Judge Davies purported to adopt that reasoning to also attach little or no weight to the document and concluded that the document does not indicate that it is reasonably likely that the Iranian authorities have any adverse interest in the appellant.

16. At [42] the judge concluded that the appellant had failed to demonstrate to the lower standard of proof that he was ever bailed on the basis that his father put forward the security of his own property. However, it appears that the finding is not justified by any reasoning.

17. At [44] Judge Davies stated that it was his view that these credibility issues were clearly set out in the decision of Judge Tobin and went on to find that the false claim to be a Christian convert further damaged his credibility.

18. Notwithstanding the declaration that he made the decision in the appeal without being affected by (a) his view as to Judge Chalkley's assessment of Judge Tobin's decision, and (b) his own view that Judge Tobin had properly dealt with these issues, the way in which Judge Davies drafted his decision, repeatedly referring back to Judge Tobin's findings and expressly taking some of them into account, undermines confidence that there has been an independent assessment of the appellant's case. Although I accept that some of the contested findings were open to Judge Davies and were adequately reasoned, other findings, such as that at [42], appear to be without any reasoned justification. Read as a whole, the decision gives the impression, if not the fact, that Judge Davies merely adopted the findings made by Judge Tobin on the contested issues, despite the conclusion of the Upper Tribunal that those findings had not been adequately made, or not made clearly.

19. Despite the Rule 24 reply, dated 12.12.17, which submitted that Judge Davies made findings which were open to him and "had regard to Judge Tobin's findings and was guided by Upper Tribunal Judge Chalkley's determination, "Mr Bates indicated that he could not defend the decision and did not resist the setting aside of the decision.

20. In all the circumstances, I was not satisfied that the decision of Judge Davies met the Tribunal's overriding duty to act fairly and justly, and concluded that it must be set aside and remade.

21. I considered with the two representatives at the initial hearing of 16.2.18 whether this is a case that should be remitted to the First-tier Tribunal, or whether it could be dealt with in the Upper Tribunal. Unfortunately, the appeal has already been before the First-tier Tribunal on two previous occasions.

22. Mr Bates submitted that there remain arguable issues for the Secretary of State to pursue, including whether the Republican Guard was acting under the authority of the state, or whether his actions and the consequences for the appellant were those arising from a non-state actor. The arrest warrant/summons also remains a live issue. However, it was agreed that no further evidence needs to be taken and that the hearing could proceed by way of submissions only.

23. In the circumstances, having regard to the Senior President's Practice Statement, I concluded that this was a case that can be resolved in the Upper Tribunal. However, the parties were not in a position to make those submissions immediately and it required adjournment for a resumed hearing.

24. I specifically directed that, by agreement, the resumed hearing would proceed by way of submission only without any oral evidence, and on the basis of the existing evidenced that was before the First-tier Tribunal and Judge Davies.

25. That resumed appeal hearing came back before me at Liverpool on 3.5.18, when the respondent was represented by Mr A McVeety.

26. The tribunal had the advantage of Dr Mynott's skeleton argument, prepared in accordance with the directions I issued on 19.2.18. Having considered the matter further, Mr McVeety took the view that on the positive findings of Judge Tobin preserved by Judge Chalkley, the Secretary of State could not justifiably argue that the treatment received by the appellant on detention in Iran, whether or not instigated by a rogue officer, did not amount to institutional mistreatment by other officers of the Iranian state, so that the appellant would be at real risk of further mistreatment on return, pursuant to SSH & HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 00308 (IAC). In the circumstances, Mr McVeety did not resist the appellant's appeal.

27. To summarise the position, the appellant's claim to Christian conversion has been dismissed and is no longer pursued. However, significant positive findings were preserved in the appellant's favour. These included that the appellant had sustained extensive injuries consistent with being the victim of torture. The judge found the expert report provided a powerful and credible account of injuries sustained, so that there could be little doubt that the appellant had been brutalised and subjected to a disturbing degree of violence. His account of torture included being severely beaten, struck with glass objects, given electric shocks, burnt with cigarettes and acid, and raped three times. Other medical evidence was to the effect that his psychological state could be directly attributed to the solitary confinement and torture he experienced in detention and at the hands of the Iranian authorities.

28. It follows that on the preserved findings, the tribunal has to accept that the appellant had already been subjected to a disturbing degree of violent mistreatment, consistent with being the victim of torture and thus of persecution and serious harm. I see no reason to disturb those findings of

fact made in the First-tier Tribunal after careful consideration of the evidence.

29. Whilst the appellant's arrest may have been instigated out of spite by the rogue Sepah officer he had been dealing with, he was arrested by two uniformed police officers and was placed in police detention. The subsequent treatment was at the hands of persons other than the Sepah officer and thus involved other state actors, including police or security officers acting in concert and inside a state facility. The appellant's claim is that when released he was required to sign an undertaking not to engage in further political activity. It is reasonable in all the circumstances to conclude that the past persecution or mistreatment was at the hands of state agents and not merely one rogue officer.

30. The fact that he had already been subjected to persecution or serious harm, is recognised as an indication of a well-founded fear of similar persecution on return to Iran, unless there are good reasons to consider that such treatment would not be repeated.

31. Mr McVeety conceded and I find that the treatment received by the appellant, as found by Judge Tobin and preserved by Judge Chalkley, reaches the minimum level of severity as to amount to persecution. The ostensible reason for treatment was in relation to attendance at demonstrations and thus comes within imputed political opinion. Mr McVeety agreed that it amounted to persecution within the Convention and thus humanitarian protection did not need to be considered.

32. The country evidence in relation to Iran indicates that torture and mistreatment of detainees is widely used and with impunity. Allegations of mistreatment have been ignored or been inadequately investigated. Complainants are often threatened with further mistreatment. The CPIN indicates that those who fear rogue state agents are unlikely to be able to access effective state protection to the Horvath [2000] UKHL 37 standard.

33. In SSH & HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 00308 (IAC), the Upper Tribunal issued country guidance in which it was held whilst ordinarily there was no risk on return after illegal exit, if there are any particular concerns arising from a person's previous activities in Iran or the UK, then there would be a risk of further questioning, detention and potential ill-treatment. On the preserved findings, the appellant must be at a heightened risk.

34. The argument of Dr Mynott was that in cases where the abuse is not directly authorised by the state, but there is 'non-conforming behaviour by official agents which is not subject to a timely and effective rectification by the state,' an asylum seeker will fall to be recognised as a refugee. Mr McVeety accepted and I so find that wherever this case falls on the spectrum between a rogue actor and state-sanctioned persecution, there must, on the preserved findings, be a real risk that the Iranian authorities will not be able to provide any sufficiency of protection to the appellant on return to Iran. If anything, the state appears unwilling to prevent or give protection to an individual against such mistreatment. Given the past

persecution, there must be a real risk on return that he will fall to be further questioned and mistreated, whether or not he is wanted under an arrest warrant.

35. In the light of the concession and findings summarised above, it was not necessary to resolve the issue of the arrest warrant.

36. In the circumstances, I find that there is a well-founded fear of persecution on return so that the appellant is entitled to protection under the Convention.

Conclusion & Decision

37. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remake the decision by allowing the appellant's appeal on asylum grounds.

Signed

Deputy Upper Tribunal Judge Pickup

Dated

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014. Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

I make no fee award.

Reasons: No fee is payable and thus there can be no fee award.

Signed

Deputy Upper Tribunal Judge Pickup

Dated