Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11853/2019

THE IMMIGRATION ACTS

Determined under rule 34	**Decision & Reasons Promulgated**
On 21 September 2020	**On 28 September 2020**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

AF
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS (P)

This is a pater determination which has not been objected to by the parties. The form of remote hearing was P (paper determination that is not provisional). A face to face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing.

The documents that I was referred to are in a bundle of 186 pages, the decision of the First-tier Tribunal promulgated on 21 January 2020, the grounds for permission to appeal and post-permission submissions from the appellant, the contents of which I have recorded.

The order made is described at the end of these reasons.

1. The appellant, AF, is a citizen of Iran born in 1967. He appeals against a decision of First-tier Tribunal Judge Skehan promulgated on 21 January

2020 dismissing his appeal against a decision of the respondent dated 18 November 2019 refusing his fresh asylum claim.

2. An anonymity order was made by the First-tier Tribunal which I maintain.

Factual background

3. The appellant arrived in this country in January 2017 on a visitor's visa. In January 2017, he claimed asylum on the basis of his claimed imputed political opinion and the perception of the Iranian authorities that he was a Christian. The claim was refused, and an appeal against that refusal was dismissed by Judge Herbert OBE in a decision promulgated on 5 March 2018. Judge Herbert had some credibility concerns about the appellant's claim, and found that, while the appellant may well have had a subjective fear of persecution, it was not a fear that was rooted in objective justification: see [60]. The operative conclusion was at [62]; the appellant, the judge found, would not have a profile in the eyes of the authorities such that he would be at risk, and would not do anything other than continue his life with his wife and children, and continue as a non-practising Shia Muslim.

4. On 13 May 2019, the appellant made further submissions in support of a materially different claim. The appellant claims that in late October 2018, a telephone call he made to his wife, who still lives in Iran, must have been intercepted by the Iranian authorities. In it he insulted the Iranian regime in robust terms. He claims this led to the authorities telephoning his wife to ask her about the telephone call and her husband, and later attending her home. The police took his wife away for questioning, he claims. The incident was captured on CCTV, which Judge Skehan viewed. The appellant's wife wrote an account of what happened in an email to the appellant on 1 November 2018. In April 2019, the police again visited his wife's apartment. This time, they confiscated the CCTV equipment, telephones and the appellant's son's computer. The appellant's wife and son were taken away for questioning, being detained for a total of four hours. The appellant's wife sent a further email outlining what had happened. The appellant contends that he is at risk of being persecuted in Iran on account of his apostasy, given he has insulted the regime, and is an atheist. His case is that atheists are viewed by the regime as "infidels", and that he is at risk accordingly.

5. The judge accepted that the appellant demonstrated that it was reasonably likely that he was "not religious" and that he was an atheist, but rejected his case that the authorities in Iran had any interest in him due to his atheism. The appellant's wife's evidence (that is, the documents she provided; she did not participate in the hearing) did not mention either atheism or the appellant's claimed imputed political opinion. After reviewing some of the background materials which were said to concern the position of atheists in Iran (see [12]), the judge reached her operative credibility findings at [16]. At subparagraph (a), the judge said that the appellant had provided no reasons for the apparent sudden interest on the part of the authorities in the appellant upon their initial visit to his wife's

apartment in late October 2018. As for the CCTV evidence, "at its highest, the video shows a police person attending the house. This must be weighed alongside the remainder of the evidence provided by the appellant." In relation to the April 2019 incident, the judge found that the appellant's evidence did not mention the alleged anti-regime comments that he made to his wife on 4 April 2019. It was odd, remarked the judge, that the appellant would repeat his anti-regime comments while speaking to his wife on the telephone, given the consequences he claimed his wife had to face the last time he did so. In any event, the April 2019 telephone call had primarily entailed the appellant's wife informing him of the tragic death of his cousin in some floods; the judge did not accept that such news would lead to the appellant changing the topic of conversation to focus on his dissatisfaction with the regime. It was unlikely that the police would be interested in the appellant in April 2019; he had left Iran some 12 years before that, and it was not clear, found the judge, why the police would have such a sudden interest in him leading to a raid on his property.

6. The judge found that the appellant had not demonstrated that he suffered an objective risk of being persecuted on account of his atheism: see [17].

7. At [14] and [19], the judge examined the country guidance concerning Christians in Iran (FS and others (Iran – Christian Converts) Iran CG [2004] UKIAT 00303) and the return of failed asylum seekers generally (SSH and HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 00308 (IAC)) respectively. She considered the need for Christians and failed asylum seekers to demonstrate some reason why the authorities would take interest in them. The appellant had demonstrated no reasons for any such interest. She dismissed the appeal.

Permission to appeal

8. Permission to appeal was granted by Upper Tribunal Judge Jackson on the basis that it was arguable that the judge failed to take into account all relevant evidence. Specifically, she did not mention or consider an email dated 1 November 2018 from the appellant's wife concerning the claimed visit from the authorities in October 2018. It was also arguable that the judge failed properly to consider the background materials concerning the position of atheists in Iran.

Consideration under rule 34

9. Judge Jackson gave directions stating that it was her provisional view the questions of whether the decision of the First-tier Tribunal involved the making of an error of law, and, if so, whether the decision should be set aside, could be determined without a hearing. The appellant was directed to provide any written submissions on those issues within 14 days, which he did. Judge Jackson directed that the respondent had 21 days within which to respond. There has been no response from the respondent.

10. Paragraph 4 of the Senior President of Tribunal's *Pilot Practice Direction: Contingency arrangements in the First-tier Tribunal and the Upper Tribunal* dated 19 March 2020 provides that, "where a chamber's procedure rules allow decisions to be made without a hearing, decisions should usually be made in this way, provided this is in accordance with the overriding objective, the parties' ECHR rights in the chamber's procedure rules about notice and consent." Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 provides, where relevant:

> "(1) Subject to paragraphs (2) and (3), the Upper Tribunal may make any decision without a hearing.
>
> (2) The Upper Tribunal must have regard to any view expressed by a party when deciding whether to hold a hearing to consider any matter, and the form of any such hearing."

11. The starting point for my consideration as to whether it would be appropriate to determine the issues identified by Judge Jackson without a hearing is the overriding objective. Rule 2(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 provides that the overriding objective of the Upper Tribunal is to "deal with cases fairly and justly". That includes, at (2)(c), "ensuring, so far as practicable, that the parties are able to participate fully in the proceedings", and, at (d), "using any special expertise of the Upper Tribunal effectively". Also relevant is the need to avoid delay, so far as compatible with proper consideration of the issues: see paragraph (2)(e).

12. I am mindful of the fact the respondent has not responded to the directions, but I am satisfied that the respondent had been served with the directions that accompany Judge Jackson's grant of permission to appeal. The appellant did not object to the error of law issue being determined on the papers. Bearing in mind the need to avoid unnecessary delay, and the absence of an application by the respondent to extend time within which her response may be submitted, I am satisfied that it is consistent with the overriding objective, and that it would be fair and just, to determine the questions identified for resolution by Judge Jackson without a hearing.

Discussion

13. The grounds of appeal, and the supplementary submissions relied upon by the appellant, are primarily targeted at the judge's factual analysis of the evidence relied upon by the appellant. An appeal only lies to the Upper Tribunal on a point of law and not on a point of fact. The question, therefore, for my consideration, is whether the findings reached by the judge were open to her on the evidence or whether, as the appellant contends, she fell into an error of the sort described at R (Iran) v Secretary of State for the Home Department [2005] EWCA Civ 982 at [9].

14. The central submission of the appellant relates to the judge's analysis of the incidents in late October 2014. It is necessary to set out what the judge said here in full:

> "The appellant says that following a call with his wife on 24/10/2018, his wife was visited by the authorities who questioned her in relation to his whereabouts. No reason is given for the authority's [*sic*] apparent interest in the appellant."

15. The appellant submits that it was not open to the judge on the evidence to say that "no reason" was given for the apparent interest of the authorities. He submits that the judge failed to have regard to an email from the appellant's wife, sent shortly after the incident on 1 November 2018, in which his wife set out in further detail what happened, from which, it is submitted, the judge should have been able to ascertain what the reasons for the visit were. The material part of the email stated as follows:

> "Greetings. I [name given], am the wife of [the appellant]. It was on 24 October 2018 [Persian calendar: 02/08/1097] at 6 PM when I was talking with my husband [the appellant] about life and everything. Suddenly, my husband became very agitated and lost his cool and started swearing against the regime. After I had ended the telephone call with my husband I received a call just five minutes later from the police. They threatened me with violence and imprisonment. I cried a lot. I asked them what the matter was and what I had done. They told me to shut up and said that everything that had been said had been recorded. They added that my husband's file still had a black mark against it. They asked me when my husband was going to return. I said that if he was going to come back, they would know before I did. It was not too long – in fact, it was 9 o'clock the same evening – that they rang the doorbell. I opened the door and saw that it was the police. The police told me that I had to go to the police station."

16. The email continues with the appellant's wife describing how she was taken to the police station and questioned for around three hours on topics such as what her husband is doing in the United Kingdom, when he is coming back, and whether she had any news of him. She then describes returning home upon being released by the police to find that the telephone line was not working. She asked the telephone company what had happened, and they told that they had been ordered to cut the line.

17. Although the judge referred in general terms to the appellant's wife having submitted "emails" in the plural, that was in the context of reciting the appellant's account of the second police visit to his wife, which took place on 4 April 2019: see [7.e]. At [8], the judge summarised the documentation in the bundle that she considered to be salient. The judge's discussion in this paragraph relates only to the account given in the second email sent by the appellant's wife, dated 28 April 2019. The judge does not mention the 1 November 2018 email at any point in her decision.

18. While it is while it is trite law that a judge does not need to repeat back to the parties the evidence upon which they have relied, the judge was under a duty to resolve key factual conflicts, and to give reasons which were rationally open to her on the evidence before her. The judge dismissed the appellant's account of the initial interest of the authorities in his wife on the basis that "no reason" had been given for their apparent interest in him. It may be that what the judge meant was that there was

no reason for the authorities to have been monitoring his wife's telephone line in Iran *in the first place*, and for that reason she was rejecting the entire account. Alternatively, it may be that the judge had overlooked this email as, after all, she made no reference to it at any point in her decision. Putting aside for one moment the question of how an asylum seeker could reasonably be expected to know why a murderous and brutal regime chooses to focus on one person rather than another, I find that the uncertainty that arises from [16.a] prevents the reader of the decision from understanding the basis upon which this key aspect of the appellant's account was rejected. It is not clear whether the judge overlooked the email, or whether she considered it, and placed a question mark over the entire incident on account of her concerns that "no reason is given" for the apparent interest of the authorities. I find the judge's analysis at [16.a] does not disclose sufficient reasons for her rejection of the claimed incident in late October 2020.

19. The "no reason" findings at [16.a] formed the foundation for the remaining findings of fact. At [16.b], the judge noted that she had viewed the CCTV evidence provided by the appellant of the claimed October 2018 incident outside the apartment. She summarises the footage in the decision, and her summary is consistent with the account given by the appellant (and the email of 1 November to which she did not refer), although it does not appear to display the appellant's wife being taken for questioning. The judge added that the CCTV evidence "must be weighed alongside the remainder of the evidence provided by the appellant." It is, of course, correct to state the evidence must be viewed in the round. The difficulty arises here, however, because the judge appears to be anchoring her sceptical analysis of the CCTV footage on the basis of her flawed analysis at [16.a].

20. There are other aspects of the judge's analysis of the core account by the appellant which were open to her on the evidence. However, the judge failed to take into account key evidence in the form of the 1 November 2018 email, and in doing so failed to give sufficient reasons for her findings at [16.a], and so, as a result, tainted the remainder of her credibility analysis.

21. I find that the above error goes to the heart of the judge's credibility analysis and was, therefore, an error such that the entire decision must be set aside with no findings of fact preserved.

22. The appeal is remitted to the First-tier Tribunal to be heard by a different judge, with no findings of fact preserved.

Notice of Decision

The decision of Judge Skehan involved the making of an error of law and is set aside with no findings of fact preserved.

The matter is remitted to the First-tier Tribunal to be heard by a different judge.

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 their 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 *Stephen H Smith* Date 21 September 2020

Upper Tribunal Judge Stephen Smith