Upper Tribunal

(Immigration and Asylum Chamber) Appeal Number: AA/12488/2015

THE IMMIGRATION ACTS

Heard at Field House, London
On the 21st April 2016

Decision & Reasons Promulgated
On the 4th May 2016

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MR MOHAMMAD MOHAMMADI AGHDAM

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr De Ruano (Legal Representative)

For the Respondent: Mr Duffy (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge J. McIntosh promulgated on the 9th February 2016 in which he dismissed the Appellant's appeal on asylum grounds, humanitarian protection grounds, under the Immigration Rules and under the ECHR.

Background

2. The Appellant is a citizen of Iran who was born on the 21st September 1986. The Appellant initially arrived in the United Kingdom on the 23rd June 2011 and claimed asylum. His initial asylum application was refused on the 15th July 2011, and he sought to appeal that decision to the First-tier Tribunal. First-tier Tribunal Judge Williams refused that appeal in September 2011 and that decision was upheld by Deputy Upper Tribunal Judge Alis on the 16th April 2012. The Respondent received further submissions on behalf of the Appellant on the 20th March 2015, which formed the basis of the decision appealed to the First-tier Tribunal dated the 14th September 2015. The Respondent rejected the Appellant's further claim for asylum and humanitarian protection.

3. It is the Appellant's case that he is an atheist who has rejected Islam in a very public way on social media, which he claimed was likely to attract the adverse attention of the Iranian authorities were he to be returned. It is his case that he has become involved with a Council of Ex-Muslims of Britain (CEMB) and that there was a letter dated the 17th December 2015 from Maryam Namazie, the spokesperson of the organisation, confirming that he was an active member within the organisation, together with similar letters that had been written dated the 2nd June 2014 and the 12th March 2015. It is his case that as a result of his activities on social media and attending demonstrations in London he would be detained and killed by the Iranian authorities and that his brother has been threatened and informed that the authorities will kill the Appellant because of his decision to leave Islam. The Appellant also argued that he would be required to complete military service upon return, because although he is no longer of compulsory age, he would be seen as having deliberately delayed his military service.

The Decision of First-tier Tribunal Judge McIntosh

4. Within the decision of First-tier Tribunal Judge McIntosh, the Judge found at [29] that the Appellant's evidence was that whilst in Iran neither he nor his family were

particularly religious and that during that time he did not come to the attention of the authorities. The Judge found that the Appellant's involvement with the CEMB as an atheist arose a considerable time after he left Iran and that there was nothing significant in the Appellant's conduct to attract adverse attention of the Iranian authorities, having reference to the case of AB and Others (Internet Activity – State of Evidence) Iran [2015] UKUT 0257 (IAC) at [29]. The Judge found that the Appellant's involvement with the CEMB was minimal and that his activities on social media were limited and that in such circumstances his profile would not be regarded as prominent. He found that the Appellant did not have any particular political or religious views prior to leaving Iran and he would have been of little interest to the authorities when he left and further found that he was not satisfied that the Appellant held any particularly strong views in respect of religion or politics now.

5. The First-tier Tribunal Judge went on to consider the effect of the Appellant's departure from Iran in relation to his risk on return and how the Country Information and Guidance at paragraph 5.1.6 referred to a fine being imposed for leaving Iran illegally. The Judge noted how Dr Kakhki, a special advisor to the Centre for Criminal Law and Justice and Associate for the Centre for Iranian Studies at Durham University had stated in a general report on the risk of returning dated the 5th December 2014 that:

"According to a new amendment of Article 34 of Passport Law (21/1/1020) any Iranian who leaves the country illegally, without a valid passport or similar travel documents will be sentenced to between one and three years' imprisonment, or receive a fine between 500,000 and 3,000,000 Tomans (approximately £108 to £650)".

6. The Judge went on to find that on the evidence before him the Appellant did not have a well-founded fear of persecution for convention reasons as the Appellant did not have an active involvement on social media relating to his conduct as an atheist and that although the Appellant left Iran illegally there was no adverse interest in respect of his departure. The Judge went on to find that in respect of his

failure to complete military service the Appellant had not indicated that he would be ill-treated as a result of his failure to complete military service at an appropriate time and that the Appellant had not established that he would be subject to persecution or a real risk of serious harm upon return. The Appellant's appeal was therefore dismissed on asylum grounds, humanitarian protection grounds, under the Immigration Rules and also under the ECHR, the Judge having found that the Appellant did not have a family or private life sufficient to allow his appeal on Human Rights grounds under Article 8.

7. The Appellant has sought to appeal that decision to the Upper Tribunal.

The Grounds of Appeal

8. Within the Grounds of Appeal it is argued, inter alia, that even though the Judge found that the Appellant's internet activity was minimal, which was not accepted, that this did not negate the risk in view of the Upper Tribunal's decision in AB and Others (Internet Activity – State of Evidence) Iran [2015] UKUT 0257 (IAC). It is argued that sur place activities can be much more significant activities before leaving the country of origin and that lack of activity prior to flight is no basis to reject a sur place activity claim. It is further argued that the Judge appeared to accept that there were dangers relating to illegal exit but then gave no reason for finding that the Appellant will not be at risk at [32]. It is argued that the Judge has given insufficient reasons in respect of his findings that the Appellant will not be at risk and has failed to properly deal with the case of AB and Others and the findings of the Upper Tribunal between paragraphs 448 and 450 of that decision.

The Grant of Permission to Appeal

9. Permission to appeal in this case has been granted by First-tier Tribunal Judge Landes on the 15th March 2016, on the grounds that it is arguable that the decision was insufficiently reasoned and in particular that the Judge failed to deal with what was said in the case of AB and Others (Internet Activity – State of Evidence) Iran

[2015] UKUT 0257. It was stated that the Judge had referred to the finding that the Appellant had left Iran illegally and accordingly bearing in mind the quote from Dr Kakhki's report the Appellant would arguably be someone who on return fell within the "pinch point" noted in AB and that it was arguable that even minimal activity did not negate risk and that the Judge's reasoning that the Appellant did not have a well-founded fear of persecution because he did not have an active involvement on social media relating to his conduct as an atheist was inadequately reasoned.

The Rule 24 Reply

10. Within the Rule 24 reply dated the 24th March 2016, the Respondent argues that the First-tier Tribunal Judge directed himself appropriately and that the Judge did have regard to the submissions made in respect of the case of AB and that it should be noted that the primary finding of AB was that there was not sufficient evidence for the panel to be able to give formal country guidance on the issue. It was argued that a balanced reading of AB would show that the Judge's comments were a reasonable reflection of the overall findings.

11. It is on that basis that the appeal came before me in the Upper Tribunal.

Oral Submissions

12. In his oral submissions Mr De Ruano relied upon the written Grounds of Appeal and argued that there was a clear material error of law in the way that the Judge dealt with the Appellant's risk upon return in light of the case of AB and Others (Internet Activity – State of Evidence) Iran [2015] UKUT 0257, and said that he could not add much to the detailed reasons given within paragraphs 4 to 8 inclusive of the Grounds of Appeal, which he relied upon.

13. Mr Duffy on behalf of the Respondent sought to argue that although the case of AB and Others was authority for the proposition that the greater the level of activity

the greater the risk, he argued that the case of AB and Others had not come to clear conclusions and that clear country guidance was not given regarding the activities that would lead to risk and that the Judge's analysis of AB and Others was a fair reading of the case and that there was no material error. He argued that even if there was an error, it was not material, as the result would have been the same in any event given the low level of internet activity undertaken by the Appellant.

14. In his submissions in reply, Mr De Ruano submitted that the case of AB and Others had indicated that even a low level of activity could give rise to a real risk of persecution and that the Judge's analysis did reveal a material error of law.

My Findings on Error of Law and Materiality

15. The head note in the case of AB and Others (Internet Activity – State of Evidence) Iran [2015] UKUT 0257 (IAC) reads "the material put before the Tribunal did not disclose a sufficient evidential basis for giving country or other guidance upon what, reliably, can be expected in terms of the reception in Iran for those returning otherwise than with a 'regular' passport in relation to whom interest may be excited from the authorities into internet activity as might be revealed by an examination of blogging activity or a Facebook account. However, this determination is reported so that the evidence considered by the Upper Tribunal is available in the public domain".

16. However, when one actually reads the decision within AB and Others, although not giving full and comprehensive guidance, the Upper Tribunal did make specific findings which are of significant relevance to this case.

17. The Upper Tribunal found specifically within AB and Others that:

"455. We do reject Mr Rawat's submission that a high degree of activity is necessary to attract persecution. It is probably the case that the more active persons are, the more likely they are to be persecuted, but the reverse just does not apply.

We find that the authorities do not chase everyone who just might be an opponent, but if that opponent comes to their attention for some reason then that person might be in quite serious trouble for conduct which to the ideas of western liberal society seems of little consequence.

456. The fact that people who do not seem to be of any interest to the authorities have no trouble on return is not really significant. Although Iran might be described as exceedingly touchy there is no reason to assume that the State persecutes everyone and the mere fact of being in the United Kingdom for a prolonged period does not lead to persecution. It may lead to scrutiny and that is what concerns us most. The fact is that although there may be quite a large number of people who choose to go to Iran their fate is of little value in determining what risk, if any, might be faced by a person who is not willing to return. Clearly an Iranian citizen is more likely than someone not familiar with the country to appreciate the risks that he or she really faces in the event of return. A person with no profile, with nothing to hide and whose biggest fault is to have overstayed in another country may well feel that he has done nothing to attract attention and will therefore go home. Such a person may well be right and will not produce statistics showing a risk of persecution.

247. We accept the evidence that some people who have expected no trouble have found trouble and that does concern us. We also accept the evidence that very few people seem to be returned unwillingly and this makes it very difficult to predict with any degree of confidence what fate, if any, awaits them. There is clear evidence that some people are asked about their internet activity and particularly for their Facebook password. We can think of no reason whatsoever to doubt this evidence. It is absolutely clear that blogging and activities on Facebook are very common amongst Iranian citizens and it is very clear that the Iranian authorities are exceedingly twitchy about them. We cannot see why a person who would attract the authorities sufficiently to be interrogated and asked to give account of his conduct outside of Iran, would not be asked what he had done on the internet.

Such a person could not be expected to lie, partly because that is how the law is developed and partly because, as is illustrated in one of the examples given above, it is often quite easy to check up and expose such a person. We find that the act of returning someone creates a 'pinch point' so that returnees are brought into direct contact with the authorities in Iran who have both the time and inclination to interrogate them. We think it likely that they would be asked about their internet activity and likely if they have any internet activity for that to be exposed and if that is less than flattering of the government to lead to the real risk of persecution".

18. The case of AB and Others therefore does establish that people even with a low degree of activity might still come to the adverse attention of the Iranian authorities. Further, as was set out within paragraph 457 of AB, the act of returning someone creates a 'pinch point' so that returnees are brought into direct contact with the authorities in Iran who have both the time and inclination to interrogate them and that it is likely that they would be asked about their internet activity and likely that if they have any internet activity for that to be exposed and if that is less than flattering of the government to lead to a real risk of persecution.

19. Judge McIntosh's stated at [30] that "I have found that generally the Appellant's involvement with the organisation CEMB to be minimal, his activities on social media to be limited and therefore in those circumstances his profile will not be regarded as prominent" and at [29] that "the Appellant's involvement with the CEMB as an atheist arose a considerable time after he left Iran. I find there is nothing significant in the Appellant's conduct to attract the adverse attention of the Iranian authorities". However, these findings do not properly and adequately explain how the Appellant would not be seen to be a person who falls within the 'pinch point' who is being returned to Iran and who would then be likely to be subject to questioning by the Iranian authorities and asked about his internet activity. Judge McIntosh did not find that the Appellant was not involved with the Council of Ex-Muslims of Britain as claimed or that he had not publicly stated on the internet that he did not believe in God and that God does not exist as set out

within [23] of the Judgment, or that the website link included a photograph of the Appellant.

20. The Judge appears to have concluded that although the greater the activity the greater the chance of adverse attention, that thereby the Appellant's involvement must be great and his profile must be regarded as prominent before he would be at risk upon return. It is clear upon the close reading of AB and Others that is not what the Upper Tribunal was stating. Quite the opposite. It is possible for someone with a low profile to be at risk, but each case turns upon its own facts. However, the fact that Judge McIntosh appears to have required there to be a prominent profile before risk could be established without explaining why the Appellant would not fall within the 'pinch point', does mean that his decision is inadequately reasoned in this regard, and it does appear that he has applied too high a test. I therefore do find that this amounts to a material error. I do not accept the submission made by Mr Duffy that any such error in this regard is immaterial, given that it goes specifically to the risk that the Appellant might face upon return and the Judge's assessment of that risk. It cannot be said that the decision must have been the same irrespective of the Judge having misapplied what the Upper Tribunal stated in AB and Others, in having failed to deal with the point regarding whether or not the Appellant will fall within the 'pinch point' of people who would be asked by the Iranian authorities about their possible internet activity, and the fact that he could not be expected to lie in respect thereof.

21. Further, although Judge McIntosh at [32] did refer to the Country Information Guidance at paragraph 5.1.6 referring to a fine being imposed for leaving Iran illegally and how Dr Kakhki, a special advisor to the Centre for Criminal Law and Justice and Associate of the Centre for Iranian Studies at Durham University had stated in a general report on the risk of return dated the 5th December 2014 that "according to a new amendment of Article 34 of Passport Law (21/1/1020) any Iranian who leaves the country illegally, without a valid passport or similar travel documents, will be sentenced to between one and three years' imprisonment, or

receive a fine of between 500,000 and 3,000,000 Tomans (approximately £108-£650)", he has also not adequately explained why, given his finding that the Appellant had left Iran illegally, that he would thereby not be subjected to persecution for convention reasons upon return, were he to be imprisoned or risk imprisonment simply on the Judge's finding, upon return for having left Iran illegally. However, given the fact that the country guidance case of SB (Risk on Return – Illegal Exit) Iran CG [2009] UKAIT 00053 held that illegal exiting per se did not give rise to a real risk of persecution upon return, the Judge's failure to properly explain his findings in respect of the risk of imprisonment or fine for illegal exit and the effect upon risk upon return, does not amount in such circumstances to a material error.

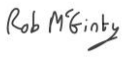
22. However, for the reasons set out above, given that the Judge has not adequately explained his reasons as to why the Appellant would not be at risk upon return as a result of his internet activity as an atheist and in having applied too high a test, the decision of First-tier Tribunal Judge McIntosh does reveal a material error of law and is set aside in its entirety. Given that the findings regarding the extent of the Appellant's activities as an atheist and consequently his risk upon return will need to be re-examined in its entirety, it is appropriate for the case to be remitted back to the First-tier Tribunal for re-hearing de novo before any First-tier Tribunal Judge other than First-tier Tribunal Judge McIntosh.

Notice of Decision

The decision of First-tier Tribunal Judge McIntosh does reveal a material error of law and is set aside;

The case is remitted back to the First-tier Tribunal for re-hearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge McIntosh.

Signed



Deputy Judge of the Upper Tribunal McGinty Dated 23rd April 2016