Upper Tribunal
(Immigration and Asylum Chamber)
Appeal Number: IA347912014

THE IMMIGRATION ACTS

Heard at: Field House	**Decision & Reasons Promulgated**
On 7th December 2015	**On 20th May 2016**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

PSK
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C. Fielden, Counsel instructed by Leonard & Co Solicitors
For the Respondent: Ms E. Savage, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of the Islamic Republic of Iran date of birth 25th July 1987. He appeals with permission[1] the decision of the First-tier Tribunal (Judge McLachlan) to dismiss his appeal against a decision to remove him from the United Kingdom pursuant to s10 of the Immigration and Asylum Act 1999.

2. The Appellant made a claim to international protection in December 2013 advancing a fear of serious harm upon return to Iran. He claimed to have had a love affair with a woman who was married to an official within the security services. The affair had been discovered, and both the Appellant and his lover had fled Iran for fear of imprisonment, prosecution and punishment for adultery and/or

[1] Permission granted on the 24th March 2015 by First-tier Tribunal McDade

serious physical harm from her husband. Although the Secretary of State accepted that the Appellant may have had a relationship when he was a younger man the claim to have carried on the relationship once the woman in question was married was rejected as not credible. International protection was refused. By the time the matter came before the First-tier Tribunal the Appellant had a second plank to his case. He claimed to have a well-founded fear of persecution in Iran for reasons of his religious belief: since his arrival in the United Kingdom he had converted to Christianity.

3. The First-tier Tribunal did not accept that either claim was true. In a determination dated 28th January 2015 Judge McLachlan found there to be a number of inconsistencies and implausibilities in the account. Although he, like the Respondent, accepted that the Appellant had in the past been in a relationship, he rejected the Appellant's claim to have had an affair with a married woman. The Appellant had produced a document said to be a summons for his attendance at the Revolutionary Court. He gave evidence that it had been delivered to his parents' home in Iran on the 27th January 2014, and it had been scanned and emailed to him by a friend still in Iran. The summons had been the subject of commentary by an expert witness, Mr Rashti. Of this document the determination states:

> "34. So far as the summons itself is concerned, I note that Mr Rashti has given as his opinion that on the face of it, the details of the summons would appear to correct. From the copy he has examined, Mr Rashti opines that the contents are accurate.
>
> 35. However Mr Rashti also makes it plain that his report does not amount to an assessment of the credibility of the Appellant, but solely to give his opinion on the authenticity of the summons.
>
> 36. I have found the Appellant to lack credibility and, having considered the evidence in the round, I am not satisfied that the Appellant has established that production of the copy summons is reliable corroboration of what he claims."

4. In addressing the claimed conversion to Christianity, the determination notes the evidence given by the Appellant and three additional witnesses, but concludes that the Appellant has not proved, to the appropriate standard, that he has genuinely converted to Christianity.

5. The grounds of appeal challenge the findings on Christianity and in respect of the summons, but permission has only been granted in respect of the latter. That ground is that notwithstanding the findings on the affair and any risk arising therefrom, the evidence of the expert Mr Rashti had been accepted, and given his views the summons should therefore have been regarded as authentic. The determination failed to address any risk arising from the fact that the revolutionary court had issued a summons against the Appellant.

Error of Law

6. On the 8th September 2015 I heard submissions on whether the decision of the First-tier Tribunal contained an error such that it should be set aside.

7. The Respondent was that day represented by Mr Kandola who submitted that the findings at paragraphs 34-36 of the determination do not amount to an acceptance that the summons is in fact genuine. Paragraph 36 reflects a *Tanveer Ahmed* assessment, and the Judge clearly concluded that the summons was not reliable corroboration of the Appellant's claims. In the alternative it was submitted that the Tribunal was under no obligation to conduct a discrete risk assessment in respect of the summons. There had been no alternative narrative advanced about why the summons might have been issued and in those circumstances it is difficult to see what conclusions the Tribunal might have reached.

8. Ms Fielden relied on the words of the determination which in her submission clearly indicated that the Tribunal had accepted that Mr Rashti was an expert and that his opinions could be given weight. If he found that the document was real, the Tribunal was not obliged to do the same but if it did not, reasons had to be given.

9. In a written decision dated the 8th September 2015 I found there to be an error of law in respect of the summons. What had at first sight been an unpromising ground of appeal has been made out. The opening sentence of paragraph 36 reveals that the summons was not considered as part of a rounded *Tanveer Ahmed* assessment. The Tribunal begins by finding the oral evidence of the Appellant not to be credible, then uses that to find that the summons cannot be regarded as reliable. The proper approach would have been to consider all of the evidence together. Although the expert Mr Rashti had offered his opinion that the summons was genuine and explained why, it was open to the Tribunal to reach a different conclusion about the authenticity of the document. If that was the case, however, reasons should have been given. It is not clear from paragraph 36 what those reasons might have been other than the fact that the account had already been rejected, for which see above. The determination appears to accept Mr Rashti's expertise and objectivity. Mr Rashti's conclusion was that the summons was "entirely genuine". In those circumstances the Tribunal should have considered whether any discrete risk arose from the investigation being conducted into the Appellant by the Revolutionary Court in Esfahan.

10. The remainder of this otherwise well-reasoned determination was upheld. The decision was only set aside in respect of the summons, and the parties agreed that the re-making of this part of the decision

would follow from further evidence and submissions.

The Re-Made Decision

The Evidence

11. The summons is said to have been sent to the Appellant by his mother. It is produced under cover of letter dated 10th September 2014 in which his mother records that on the 4th November 2013 government agents came to the family home looking to arrest the Appellant. She states that they took some belongings and the Appellant's computer. The Appellant's mother explains that the summons was delivered by hand in February 2014, then:

> "After two weeks you had not attended the court, another writ of summons was issued by the Revolutionary Court for you, and then after a few days two officers holding an arrest warrant came to our door to arrest you.
>
> During this period they have arrested your father several times, each time interrogating him about you. My dear [P] do you see how much trouble you have put yourself and us into, by doing this childish act? I just hope that you are more careful with your behaviour from now on and do not do anything that embarrasses us again. I still cannot believe that you have done such a disgraceful act"

12. A copy of a summons has been provided with a certified translation. The original Farsi version shows it to be *pro-forma* and relevant sections completed by hand. It purports to have been issued on the 27th January 2014 by the Isfahan Revolutionary Court, branch 4. It is addressed to the Appellant and gives the reason for his required attendance as "to provide explanations regarding adultery and fornication". It is signed by a Lieutenant Heidari and it is recorded that it was handed to the Appellant's father, who has signed for receipt. In a pre-printed section the recipient is advised:

> "If you have appointed your lawyer and also know of any people who are witnesses to this case, you must introduce them to this office before the due date, so that they could be summoned. The consequences of not attending this office will be your arrest, and in case you don't attend the court on due date, the court will issue a verdict in absentia. If you gave a good reason why you cannot attend, according to Article 116 of the Criminal Code of Procedure of the Public and Revolutionary Courts, you must inform the court of your reason"

13. The summons was subject to examination by Dr Rashti[2]. In respect of the summons Dr Rashti found that the address given for the court is correct and that branch 4 of the Revolutionary Court in Isfahan does indeed deal with adultery cases. Dr Rashti checked the dates that appear on the summons and they are consistent; the court was open on the date that it was issued. The emblem on the top of the document is correct, and all the details that one would expect to see are present: in particular the "text, details and format are exactly the same as the Esfahan court use". The stamp size, colour and shape is correct. Dr Rashti compared the document with one which he knows to have been issued by the Revolutionary Court in Esfahan and this one accords to that. Taking all of these matters into account Dr Rashti finds the document to be entirely genuine.

14. Prior to the re-making the Appellant sought further opinion from a recognised expert on Iranian affairs[3], Ms Anna Enayat of St Antony's College, Oxford. Ms Enayat's report, prepared with her customary diligence and observance of the *Ikarian Reefer* principles, is dated 2nd December 2015. Her detailed conclusions, insofar as they are relevant to the issue before me, can be summarised as follows:

- Prosecutions regarding "adultery and fornication" could potentially be brought under two parts of the Iranian criminal code

- Under the law of *zena* prosecution can be brought for unlawful sexual intercourse. This is a crime for which the punishment is fixed by God: a *Hadd* crime. The prescribed punishment for an unmarried party (like the Appellant) is 100 lashes

- Under Article 637 of Book 5 of the Law of Islamic Punishment prosecution can be brought for any act deemed "immoral" which does not amount to *zena*. Examples are given such as attending a party where women are not wearing *hijab*, to being caught kissing. The discretionary punishment upon conviction is up to 99 lashes

- Conviction of a *zena* offence or under Article 637 can be based on confession, the evidence of 4 male witnesses, or matters

[2] No issue is taken with Dr Rashti's expertise. He has been providing expert reports for the Tribunal for a number of years. He is recognised as having particular expertise in the verification of legal documents emanating from Iran, having worked as a lawyer in Iran and having set up the filing system in Astaneh Asharfieh General and Revolutionary Court. Dr Rashti holds a database of over 850 samples of various legal documents, of which 300 are believed to be fake. In assessing the authenticity of a document he is able to compare it against identified samples in this collection.

[3] Ms Enayat has been providing expert evidence on Iran to the British courts since 2001. She was formerly an academic in Iran and has been at St Antony's College since 1983. She has taught, written and researched widely on the Middle East but is recognised as having particular expertise in respect of Iran: see for instance BA (Demonstrators in Britain – risk on return) Iran CG [2011] UKUT 36 (IAC). The Respondent does not challenge her expertise or objectivity in this case.

within the "knowledge of the judge". The latter can arise from matters such as circumstantial evidence, hearsay, local enquiries, reports from law enforcement officers etc. The report cites a case where conviction was secured on the basis of a single "suspicious" text message. A party having disappeared and not making himself available for investigation/trial is likely to be taken as evidence against him in this context

- Once a case is opened under either the *zena* provisions or Article 637 (upon a complaint being lodged by an individual), it becomes a public matter and must be pursued (even if the complainant withdraws)

- Such crimes cannot be tried *in absentia*. In the absence of a party the case remains open until one or both parties involved reappears. There is no statute of limitations

15. This latter point was supported by a footnoted reference in the 2015 Code of Criminal Procedure. Noting that the summons was purportedly issued in 2014 I sought clarification, by way of further submissions, as to whether the Code of Criminal Procedure in force on the relevant date was the same, or whether there would at the time have been scope for a trial to be heard in the absence of the witness.

16. My request resulted in an addendum report by Dr Enayat which came under cover of letter dated 15th March 2016. There was unfortunately a delay in the report being joined to the file, and this has delayed further my promulgation of this already very late determination. My sincere apologies to both parties for that.

17. Dr Enayat's addendum report explains that there have only ever been two post-revolutionary Codes of Criminal Practice, one issued in 1999 and an amended version in 2015. The provision excluding 'divine right' cases from *in absentia* hearings has remained the same in both, the wording of Article 217 of the 1999 Code being adopted in Article 406 of the 2015 Code.

Discussion

18. The question before me is whether the Appellant has established, with reference to a summons purporting to have been issued against him by the Revolutionary Court in Iran that he faces a real risk of serious harm if returned to Iran. The standard of proof is one of "reasonable likelihood".

19. I have four items of evidence. There is the summons itself, the letter from the Appellant's mother dated 10th September 2014 explaining how it was served, and the expert testimony of Dr Rashti and Dr Enayat.

20. I accept that the evidence of the Appellant's mother is consistent with that which he has given. That is to be expected, since his information has allegedly come from her. However I also accept the point made by Ms Savage that even accepting that the letter does emanate from the lady in question, there is only a limited weight that could be attached to it, given her obvious interest in supporting her son.

21. The more significant evidence is that of the document itself, and the expert opinion that I have been given on it.

22. The summons indicates that the Appellant is wanted for crimes of "adultery and fornication". I accept and find as fact that under Iranian law crimes of this nature can be tried either as *zena* or as "immoral acts" not falling under that heading. The punishment can be up to 100 lashes for either and I accept Ms Enayat's assessment that the strict rules of evidence relating to adultery under Islamic law are in practice not always applied in the Iranian courts. Convictions can be secured on as little as adverse inferences drawn from suspicious text messages, applying the amorphous notion of the "knowledge of the judge". In light of this I am satisfied that a man facing prosecution for such a crime would be at a real risk of ill treatment upon return to Iran. Ms Fielden additionally pointed out that the Appellant's prolonged disappearance may well be taken against him should he face prosecution today.

23. The question then is whether that summons is reasonably likely to be reliable. If it is it matters not that I do not know why the Appellant actually faces such charges. The fact that he has not advanced an alternative narrative to the one already rejected would be irrelevant.

24. I have attached some weight to the report of Mr Rashti. I appreciate that Mr Rashti is well placed to assess the particulars of Iranian legal documents and to consider whether they accord with his knowledge about how such forms are filled in, the address of courts etc. I accept without hesitation that Mr Rashti is an honest and objective witness. I have borne in mind that Mr Rashti's expertise is in the authentication of such documents.

25. I must however also have regard to Ms Enayat's clear and carefully researched evidence that crimes of this kind are not, according to the Criminal Code, tried *in absentia*:

> "Hadd crimes, and ta'zir crimes classified as belonging to the 'rights of God' or 'shari'a crimes' (as is the case with article 637) cannot be tried in absentia. That is to say, the file remains open until one or both of the parties reappear. If/when they do the prosecution will resume".

26. Ms Fielden properly concedes that this evidence is at odds with

the words that appear on the face of the summons: "The consequences of not attending this office will be your arrest, and in case you don't attend the court on due date, the court will issue a verdict in absentia".

27. I bear in mind that it is always possible that just as Judges in Iran might deviate from the strict rules of evidence, so officials might deviate from the strict rules of procedure. I have considered whether the investigating officer, Lieutenant Heidari, might have misunderstood the court's powers. That possibility must however be discounted: the threat of in absentia hearing has not been written by Lieutenant Heidari. It appears on a pre-printed section of the summons. It is extremely unlikely that Branch 4 of the Revolutionary Court in Isfahan, where such 'divine right' prosecutions take place, would be using a pro-forma with the wrong law on it. I appreciate that Mr Rashti found the details on the summons to be in accordance with his understanding of what forms issued by the Revolutionary Court in Isfahan look like. His report does not however address the point arising from the Enayat report. Directions were issued in January 2016 giving the parties an opportunity to submit further evidence on the matter, but no further comment was received from Mr Rashti. It does not appear that he has considered whether the warning that appears on the face of the summons is in accordance with the applicable Code of Criminal Procedure. It is evident from Dr Enayat's evidence that it is not.

28. I am not satisfied, on the lower standard of proof, that the summons can be relied upon. The Appellant has advanced no credible evidence as to why it might have been issued, and its threat of in absentia hearing is contrary to the law in Iran.

29. It follows that on the limited grounds upon which this decision was remade the Appellant has not discharged the burden of proof and the appeal is dismissed.

Decision

30. The determination of the First-tier Tribunal contains an error of law and it is set aside only to the extent identified above.

31. I re-make the decision in the appeal as follows: "the appeal is dismissed on all grounds".

32. Having regard to the nature of the evidence I make the following direction for anonymity, pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders.

> "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"

Upper Tribunal Judge Bruce
18th May 2016