Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/10908/2012

THE IMMIGRATION ACTS

Heard at North Shields	**Determination Promulgated**
On 18th June, 2013	**On 3rd July, 2013**
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Before

Upper Tribunal Judge Chalkley

Between

ALI AKBAR HASSANI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: *Ms M Rasoul of Counsel*
For the Respondent: *Mrs H Rackstraw, a Home Office Presenting Officer*

DETERMINATION AND REASONS

1. The appellant is a citizen of Iran, who was born on 18th December, 1978. On 23rd November, 2011, the respondent decided to remove the appellant as an illegal entrant and the appellant appealed to the First-tier Tribunal. His appeal was heard by First-tier Tribunal Judge Duff on 24 January, 2013,

and in a determination promulgated on 4th February, 2013, First-tier Tribunal Judge Duff dismissed the appellant's appeal on asylum grounds, humanitarian protection grounds and human rights grounds.

2. The appellant's claim was based on him having been bought up in Tehran and having worked in an electrical shop before beginning national service in 1997. During his national service he was in a unit commanded by a General Soloki and some time towards what should have been the end of his service he had a serious disagreement with that individual, as a result of stamping the leave booklets of three members of his unit who were followers of the Baha'i faith. The general disagreed with this and a fight occurred between the appellant and the general. The appellant maintains that he was arrested and detained for a week because of this argument.

3. The appellant was obliged to serve a further eighteen months' national service as punishment for this incident, but only completed this in 2006, because he absconded on a number of occasions and was missing for a considerable period. He eventually completed his national service when persuaded by his family to return and do so but was unable to obtain either a driving licence or passport without completing that service. Eventually the appellant went to work again in the electrical shop but his brother-in-law obtained employment with a local branch of the Sepah forces. He initially fulfilled one role in Sepah, but then after some time moved to another role in which he was monitoring people in the community who were suspected of being against the ruling regime or otherwise of interest to the authorities. He was uncomfortable in that role, because suspects were detained and tortured by the organisation for which he was working. The appellant spoke to his brother-in-law and to his superior officer asking not to continue in that role but he was told that he could not leave. The appellant stayed at home and did not go and do his job, but after a while the authorities came to his home and he was taken back to his place of work, questioned and informed that he must attend a military court. He was detained and then sentenced to one and a half year's in detention. After some time in detention the appellant was released on bail subject to a number of conditions. The appellant subsequently left Iran.

4. Before the Immigration Judge was an expert report from Mohammad Kakhki. He is a member of the Iranian bar who practised in the Iranian courts for a number of years. He obtained a PhD in Middle Eastern Politics and Law at Durham University in 2008 and is a special adviser to the Centre for Criminal Law and Criminal Justice at Durham University. Additionally he is an associate director of the Islam Law and Modernity Research Centre at Durham Law School. He provides holistic analysis and updates of Country of Origin Information Reports and since 2003 has been providing expert opinions on Iranian law and procedure.

5. At paragraph 33 of the determination, First-tier Tribunal Judge Duff notes the expert's report and says that since much of the report deals with

generalities of the situation in Iran and its conclusions depend upon the appellant having given a truthful account and not being credible he finds the report loses much of its impact. He notes that the report deals with an Iranian legal document, a copy of which is at pages D1 and D2 of the respondent's bundle, and says that this part of the report appears to be persuasive in relation to that Iranian legal document and suggests that the document is a genuine one issued by the Iranian authorities. He goes on, however, to suggest that the document is shrouded in mystery and its whereabouts are unclear. A copy of the Iranian legal document was provided to the respondent, but no original has ever been supplied, either to the respondent or to the judge. The judge went on to say that he felt he could attach little weight to the report, since the expert did not attend for cross-examination and the original Iranian legal document in questions has never been seen by the respondent or by the Tribunal.

6. The determination was challenged and in granting permission Designated Immigration Judge Barton said this:-

> "The application now before me on behalf of the appellant incorporates overlong grounds taking issue with several aspects of the determination. I focus here upon two matters raised which are arguable and which certainly warrant discussion at an oral hearing in order to determine (after input from both parties) whether there has been an error of law:
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> (1) The judge's decision to attach no weight to the arrest warrant (paragraph 33) was arguably influenced too much by the whereabouts of the original document being unknown, so that he found it 'shrouded in mystery and its whereabouts are entirely unclear.' However, the grounds explain that it was in transit to and from the expert and the solicitors now have the original back in their possession.
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> (2) The Article 8 family life assessment arguably failed to take account of the current application by the appellant's wife for settlement, an application which is now said to have been granted."

7. Ms Rasoul addressed me at some length and explained that the appellant's father-in-law had now been recognised as a refugee. Before her marriage to the appellant, the appellant's wife made application to the respondent as her father's dependant and has now been granted leave to remain in the United Kingdom. In addressing me in respect of the grounds, Ms Rasoul took me to paragraph 33 of Immigration Judge's Duff's report and suggested that he had erred, because while it was not at the time known where the original Iranian legal document was it was perfectly clear that the expert had actually seen the original. The second challenge dealt with the issue of proportionality. The judge did not, in the view of the appellant, adequately consider the interests of and the impact on the appellant's wife and daughter of removal. The appellant's wife is an invalid and wheelchair bound and the judge failed to take account of that and failed to take account of the fact that the documents before him indicated that she had made application for indefinite leave.

8. For the respondent Mrs Rackstraw relied on the Secretary of State's written response under Rule 24. The judge could not be criticised for his

approach when it was clear from the determination that the whereabouts of the warrant (the Iranian legal document) was just simply unknown. The judge makes it clear that Counsel did not have the original and was unaware of the whereabouts of the original, despite the fact that the expert claimed to have seen it. The judge could not be criticised in his approach.

9. So far as the second challenge is concerned, the judge cannot be criticised for not 'second guessing' the outcome of the appellant's wife's application for indefinite leave to remain. The grounds amount largely to further representations and the correct avenue for the appellant is not via the appeal system but by way of further submissions to the Secretary of State. Ms Rasoul did not wish to respond, but she did clarify that the appellant's child was now a British subject and in possession of a British passport although, at the date of the judge's determination, the child was not a British subject.

10. I have concluded that the determination **does contain an error on a point of law**. If First-tier Tribunal Judge Duff was concerned as to the whereabouts of the original warrant, he should have put the representatives on notice and adjourned in order that they could have time to find it and produce the original, either to the respondent or to the Tribunal. In simply saying he could place little weight to the expert's report because the expert did not attend for cross-examination and the original document has not been seen by the Tribunal respondent, he acted unfairly and erred in law.

11. I do not believe that he erred in relation to the appellant's Article 8 claim; he very clearly did, at paragraph 43 and again at 44, take account of the fact that sadly the appellant's wife is significantly disabled and needs assistance with daily activities.

12. Paragraph 7 of the Senior President's Practice Statement provides as follows:-

> "**7. Disposal of appeals in Upper Tribunal**
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> 7.1 Where under Section 12(1)of the 2007 Act (Proceedings on appeal to the Upper Tribunal) the Upper Tribunal finds that the making of the decision concerned involved the making of an error on a point of law, the Upper Tribunal may set aside the decision and, if it does so, must either remit the case to the First-tier Tribunal under Section 12(2)(b)(i) or proceed (in accordance with relevant Practice Directions) to remake the decision under Section 12(2)(b)(ii).
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> 7.2 The Upper Tribunal is likely on each such occasion to proceed to remake the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-
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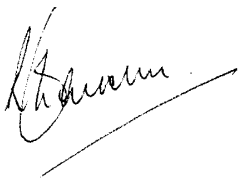
> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact-finding which is necessary in order for the decision in the appeal to be remade is such that, having regard to the overriding objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal.

7.3 Remaking rather than remitting will nevertheless constitute the normal approach to determining appeals where an error of law kin found, even if some further fact-finding is necessary."

13. I am satisfied that this is an appeal which falls squarely within paragraph 7 of the Senior President's Practice Statement, given the length of time the parties would have to wait for the matter to be relisted before me in South Shields or at Field House and that it could, conversely, be heard relatively speedily by the First-tier Tribunal and in view of the overriding objective following the onward conduct of the appeal, I have decided that this appeal be remitted to the First-tier Tribunal for a hearing afresh before a First-tier Tribunal Judge, other than First-tier Tribunal Judge Duff.



Upper Tribunal Judge Chalkley