Upper Tribunal
(Immigration and Asylum Chamber)

SSH and HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 00308 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 May 2016	
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Before

UPPER TRIBUNAL JUDGE ALLEN
UPPER TRIBUNAL JUDGE SOUTHERN
UPPER TRIBUNAL JUDGE SMITH

Between

SSH (FIRST APPELLANT)
HR (SECOND APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the 1st Appellant:	Mr R Drabble QC and Ms R Pickering, instructed by Parker Rhodes Hickmotts Solicitors
For the Respondent:	Ms L Busch QC, instructed by the Government Legal Department
For the 2nd Appellant:	Mr A Mills, instructed by Christian Gottfried & Co Solicitors
For the Respondent:	Ms L Busch, QC instructed by the Government Legal Department

(a) An Iranian male whom it is sought to return to Iran, who does not possess a passport, will be returnable on a laissez passer, which he can obtain from the Iranian Embassy on proof of identity and nationality.

(b) An Iranian male in respect of whom no adverse interest has previously been manifested by the Iranian State does not face a real risk of persecution/breach of his Article 3 rights on return to Iran on account of having left Iran illegally and/or being a failed asylum seeker. No such risk exists at the time of questioning on return to Iran nor after the facts (i.e. of illegal exit and being a failed asylum seeker) have been established. In particular, there is not a real risk of prosecution leading to imprisonment.

DECISION AND REASONS

1. Both appellants are nationals of Iran. Their appeals against decisions of the First-tier Tribunal have been listed before us to enable us to give country guidance on the issue of risk on return to Iran for a person who left that country illegally, is a failed asylum seeker and is undocumented. As we set out below at paragraphs 6-8 a person would not be returnable unless documented to the extent described there, but they would not be documented in the sense of possessing a passport.

2. The first appellant, SSH, is of Kurdish ethnicity. He claims to be at risk on return on the basis that he would be seen as a member of PJAK (Party for a Free Life in Kurdistan) and for having weapons in his house. The judge concluded that his account was fabricated and it was rejected in its entirety.

3. The second appellant, HR, is also of Kurdish ethnicity. He claimed to be at risk on return on account of his support for the Kurdish cause, distributing books and leaflets to other like-minded Kurds. He became afraid for his own safety when a friend of his was detained by the authorities in Iran for taking part in similar activities. The judge accepted that he was politically aware and in all probability a supporter of the Kurdish cause in general terms but was not satisfied that there was any evidence of him being a member of any particular political party. Otherwise his claim was found to lack credibility including a finding that he was most unlikely to be identified by reference to his internet activity.

4. We had an expert report and detailed oral evidence from Dr Kakhki, who had given evidence previously in the country guidance case of SB (risk on return – illegal exit) Iran CG [2009] UKAIT 00053. We have summarised that evidence separately as we also have the detailed and careful submissions from the representatives, for which we are grateful. All three members of the panel have contributed to the writing of this decision.

5. As set out above the issues in this case are risk on return on account of illegal exit from Iran, being a failed asylum seeker and being undocumented. Clearly we must assess risk in relation to these matters both separately and cumulatively. In asylum appeals the standard of proof requires the appellant to show a 'real and substantive risk' or a 'reasonable degree of likelihood' of persecution for a Refugee Convention reason (R v Secretary of State for the Home Department ex parte Sivakumaran [1988] AC 958: including the need to show that there is a real, as opposed to a fanciful risk of future events happening (MH (Iraq) [2007] EWCA Civ 852.

Documentation

6. The issues in respect of a lack of documentation are not so much matters which would lead to a risk on return (other than in respect of an example to which we shall come subsequently) but are rather to do with the process through which a person who is a failed asylum seeker and/or left illegally would have to go in order to return to Iran.

7. It is clear from Dr Kakhki's evidence that the situation may be different for a person who left Iran lawfully and a person who left unlawfully, but in either case such a person who finds himself undocumented while in the United Kingdom would have to engage with the same process. At paragraph 12 of Dr Kakhki's report in HR's case it is said that, according to the passport law and related official guidelines, in order to enter Iran a national should be in possession of a passport, travel document or a "barge obour", the latter being a temporary travel document issued by the embassy and valid only for twenty days and for just a single entry. This is in effect a *laissez passer* of the kind which a number of countries employ as a temporary travel document, and we shall refer to it subsequently in this decision as a *laissez passer*. Dr Kakhki goes on to say that in order to obtain a *laissez passer* an application form would have to be completed and there would have to be submitted original photographic proof of identity which should be in the form of a birth certificate and/or a national identity card, submission of a ticket or a booking confirmation showing the date of intended return to Iran and a letter from the Home Office explaining the person's status within the United Kingdom. Taken at its highest, this would entail informing the Iranian authorities that the person was a failed asylum seeker rather than simply a person without leave to remain in the United Kingdom, but we accept that the former status would be likely to be revealed by the person since they cannot be expected to lie.

8. Dr Kakhki had a conversation with an official at the Iranian Consulate in January 2016 from which it is clear that the applicant must first prove that he or she is an Iranian national and the *laissez passer* will not be issued simply on the basis of what a person says about their national identity and nationality. A person in the position of these appellants who lacks a passport and can therefore not show that they left Iran legally would be asked and would have to say why they had left illegally. Whether the Iranian system would be able to verify the claim of a person who simply said they had lost their passport and they had left lawfully is not a matter on which we had evidence and we do no more than mention the point in passing. The case proceeded on the basis that the authorities would be, or would be made aware of the illegal exit from Iran by both appellants. It seems also, from Dr Kakhki's evidence, that when the request for a *laissez passer* is made the embassy will carry out security checks concerning the kind of activities the particular person had been involved in while out of Iran. The outcome of such checks would not lead to refusal of a *laissez passer* but such information would be passed on to the authorities in Iran. It can be seen from the Danish Refugee Council Report of 2008, at tab 10 of the Secretary of State's bundle, at page 281 of the bundle, that if a person is from an ethnic or religious minority background or has engaged in opposition or political activities the consulate or embassy might not issue them with a travel document . This contrasts with Dr Kakhki's evidence that the embassy is obliged to issue a travel document if

the person can establish Iranian nationality. This view seems preferable, but in any event the issuing of a travel document would not mean that they would not potentially face problems with the Iranian authorities on return to Iran. In the cases with which we are concerned in this country guidance decision, that kind of background would be lacking, and consequently there would be no reason why a *laissez passer* would not be granted on application by an undocumented Iranian, (assuming they can prove their nationality), who had left Iran illegally and was a failed asylum seeker.

Detention/Questioning

9. Thereafter there are said to be two stages at which a person potentially faces difficulty. The first, which we shall consider under this heading, is the matter which was emphasised in particular by Mr Drabble QC in his submissions, that being the risk at the time of questioning on return to Iran. It is clear from Dr Kakhki's evidence that a person who returns to Iran on a *laissez passer* will be questioned. We accept that this is likely to be the case. The authorities will have been notified of the basis upon which the person has obtained the *laissez passer* and, it was argued by Mr Drabble, the questioning would not be cursory but would be lengthy and interrogatory and that interrogation would be likely to involve techniques amounting to persecution and/or breach of Article 3. Dr Kakhki also suggested that the Iranian authorities at the airport hold a 'wanted list' which is checked on arrival, but he had no evidence of this, and accepted that the list was a confidential document, to which he has no access. We consider that the evidence does not establish that a person returned on a *laissez-passer* would be on a wanted list.

10. The other matter, which we consider in detail below under a separate heading, is that of risk of prosecution, imprisonment and as a consequence ill-treatment as a consequence of being a person who left illegally and/or is a failed asylum seeker.

11. On the issue of risk in the course of initial questioning and detention, Mr Drabble drew our attention to several issues addressed in the case law. For example in SB at paragraph 63 there is mention of an indefinite period of detention while the person's case was investigated further. That however has to be seen in the context of a person who had told the military court judge that he had lied and had jumped existing bail and subsequently failed to surrender to the authorities. That is a very different context from a person without a relevant history as in the cases we have to consider. In BA (demonstrators in Iran – risk on return) Iran CG [2011] UKUT 36 (IAC), the panel noted that a person's immigration history, including how they left the country, would be a factor triggering enquiry/action on return, but they had seen no evidence to lead to the conclusion that merely having exited Iran illegally might cause an appellant to be subjected to persecution. In AB & Others (internet activity – state of evidence) Iran [2015] UKUT 00257 (IAC), there is reference at paragraph 457 to the act of returning someone creating 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. That however was in the context of people who had engaged in internet activity, and it is relevant to note also that at paragraph 470 the Tribunal said that a person who is returning to Iran after a reasonably short period of time on an ordinary passport, having left illegally, would almost certainly not attract any

particular attention at all. It went on to say at paragraph 471 that where a person's leave to remain had lapsed and they might be travelling on a special passport there would be enhanced interest and the more active they had been the more likely the authorities' interest could lead to persecution. That is essentially a comment rather than evidence, and though it agrees with what is said by Dr Kakhki, it takes matters no further in our view as to the risk of ill-treatment on return during a period of questioning. In particular as it cites no evidence to support the view expressed, and also it is a remark made in the context of evaluating risk on account of blogging activities, and the reference to 'more active' would not be applicable to a person with no relevant profile.

12. As regards the background evidence to which Mr Drabble took us, there is first the Country Information and Guidance Report from the Home Office entitled "Iran: Illegal Exit", and dated January 2016. The evidence from the International Organisation for Migration (IOM) set out at section 4.1.1 of that report included the statement that the IOM were aware of nobody being arrested when travelling back to Iran on a *laissez passer* but emphasised that they were only dealing with voluntary returns and had no knowledge of the situation of deportees, if any. They said that so far they had not had any experience with people being arrested by the authorities at the airport. That would of course be another issue if the person concerned had been involved in criminal activities abroad and was on the Interpol list. The IOM considered that questioning of the person returned on a *laissez passer* might take a few hours. There is no reference to anything other than questioning, but this evidence has to be seen in the context of voluntary returnees only, and it is unclear whether those referred to were voluntary returnees who left Iran legally or illegally.

13. There is a section in that report which is concerned with the treatment of returnees who exited illegally, and this contains quotations from various sources. Mr Mirfakhar, the Director General of Consular Affairs at Iran's Ministry of Foreign Affairs, was quoted in the April 2009 Danish Immigration Service Report as saying that a person who has left Iran illegally and who was not registered on the list of people who cannot leave Iran will not face problems with the authorities upon return though they may be fined. This was evidence set out in the Danish Refugee Council Landinfo and Danish Immigration Service February 2013 joint report. The Danish Immigration Service Report of 2009 was told by a "western embassy" that the embassy's knowledge was that people who had left Iran illegally were not detained upon return. They did not know what would happen if a person was unable to pay the fine. A different western embassy told the Danish Immigration Service that an Iranian citizen could return even if he or she had left the country illegally but the punishment would depend on the acts committed before leaving Iran and they might be fined for illegal exit but they did not know the size of the fine. An unnamed attorney at law thought that the fine would be around US$200 to 300. If a person had outstanding issues with the authorities other than illegal exit he or she might very likely be punished for those upon return. There is then a quotation from a report of Dr Kakhki (5 December 2014) which is in the same terms as we have set out elsewhere in this decision that a person who leaves illegally will be sentenced to between one and three years' imprisonment or receive a fine, although no examples

of imprisonment actually occurring are given. This is a "taaziri" punishment which is a deterrent and its severity is at the discretion of the judge.

14. There is also evidence in this regard in the Danish Refugee Council Report of 2008 to which we have referred above. A western embassy told the interviewers that a person who entered Iran on a *laissez passer* might be questioned by airport authorities on arrival and they knew of two cases where the people were interviewed for three to five hours by the Iranian Revolutionary Guards Corps. An international organisation in Tehran told the interviewers that a person entering on a *laissez* passer might be fined for illegal exit or subject to one or two hours' interrogation and did not know if there might be any further consequences in relation to the interrogation.

15. There is a general consistency to this evidence that a person returning on a *laissez passer*, having left Iran illegally, would be subjected to no more than a fine and probably a period of questioning although there is no indication in the evidence that that questioning would be of a kind or in a place where ill-treatment could be expected. Mr Drabble cites the USSD Report in connection with pre-trial detention, which is said to be often arbitrarily lengthy, and the Home Office CIG on "Iran, Prison conditions", containing references to lengthy interrogations, including, frequently, torture. However, there is no evidence to show that a period of questioning in the context with which we are concerned can be equated to pre-trial detention; nor does the evidence establish that it would take place in a prison. The point that Mr Drabble makes however is that the examples given relate purely to a situation where the person exited illegally and say nothing about the extra risk to which they might be exposed as a consequence of being a person who was also a failed asylum seeker. In this regard he took us to the Home Office Country Origin Information Service Report of January 2013, at page 105 of his bundle, itself quoting from an Amnesty International Report of February 2012, quoting a report issued by a Swiss refugee agency, quoting an unnamed judge as saying that asylum seekers are interrogated on return whether or not they have been political activists in Iran or abroad and if they have tried to conduct propaganda against Iran they are culpable and are detained until a judge decides the sentence.

16. We note in passing that this appears to contrast a person who is a failed asylum seeker with a person who tried to conduct propaganda against Iran rather than the automatic assumption being made that because they have sought asylum they must be deemed to have tried to conduct propaganda against Iran. The particular offence in question is Article 500 of Book 5 of the Islamic Penal Code which states: ..."anyone who undertakes any form of propaganda against the state... will be sentenced to between three months and one year imprisonment". This is quoted in an Amnesty International Report: "Flawed Reforms: Iran's new Code of Criminal Procedure" 11 February 2016, where it is said that in practice Article 500 is generally used to restrict the peaceful exercise of the rights to freedom of expression, association and assembly, noting that its definition is entirely left to the discretion of judges. It is relevant in passing to observe that being a failed asylum seeker is not mentioned in the report as an example of the kind of person whose conduct might fall within the ambit of this provision and in this regard it is also relevant to note a statement within a country advice from the Australian Government Refugee Review Tribunal, quoted in a report of 17 October 2014 of the Refugee Documentation Centre (Legal Aid

Board, Ireland) "Iran: Information on the Treatment of Returned Asylum Seekers", that: "it is unclear as to whether any of these examples of ill-treatment are attributable to political beliefs imputed by authorities due to asylum claims made while abroad". This is in the context of noting that at least some returnees from Australia and elsewhere had attracted varying degrees of interest on the part of the authorities ranging from simple monitoring to ill-treatment during detention or interrogation. But, as the report makes clear, it is not known whether any of these cases concerned failed asylum seekers; nor indeed what their full history was.

17. As regards the Landinfo Country of Origin Information Report on Iran: Returned Asylum Seekers 19 April 2011, it is said there that little available information is to be found regarding the situation for asylum seekers who have returned to Iran. It is said for example that UNHCR are not aware of cases where Iranian asylum seekers have been subjected to imprisonment or torture after returning to Iran from Turkey. The report points to signals in increased Iranian interest in asylum seekers, in particular quoting an article signed by a former Supreme Court Judge, Judge Mallahzadeh, in 2011 (we take this to be the same judge as referred to in paragraph 15 above), stating that people who have attempted to obtain a grant of asylum by constructing false stories risk prosecution and accusations of spreading propaganda against the regime. Amnesty International, when asked to comment on this, said that it was something of a concern and they would interpret the article as a sign of greater willingness by the authorities to address or deal with such returnees though it was said that frankly Amnesty was not sure of their actual capacity to do so, both in terms of the security forces' ability to track such returnees and the court's ability to process such cases. Although that report perhaps betrays a slight ignorance of the procedures which will lead to a degree of knowledge as to the activities in the United Kingdom as we have set out above, it is relevant as it regards the speech by the judge as a clear warning. Thereafter the Landinfo Report considers various other pieces of evidence and concludes that the Iranian authorities in varying ways have demonstrated an increased interest in political activity among those in opposition living abroad and considers that these signals can be interpreted as a statement supporting a more offensive Iranian stance with regard to political opposition activity among the exiles, including the asylum seekers.

18. That however in our view takes matters very little further forward. A statement by a retired judge in 2011 that Iranians seeking asylum abroad on a false basis could be prosecuted under Article 500 is some way away from establishing a real risk, particularly in the absence of any examples of such cases in the subsequent period. It also says nothing about the particular issue with which we are concerned in this section of our judgment about risk during the time of questioning on return.

19. The Landinfo Report goes on to refer to recent cases of returned asylum seekers who are said to have been arrested upon return to Iran. The first of these is Rahim Rostami who was returned from Norway to Iran in February 2011 and it is said that he was ill-treated. There is also the case of Danial Hadi Khanlo who was forcibly returned to Iran in 2006 and was said to have been imprisoned and subjected to brutal abuse. Another example concerns a man who was sent from Norway to Iran in 2008 with only an ID card which the Iranian authorities claimed was false. He was said to have been arrested upon arrival at the airport in Tehran and ill-treated and

asked about whom he had been in contact with abroad. He was in prison for two days and eventually returned to Norway. A further example is a woman who was deported in 2006 from the United Kingdom to Norway under the Dublin II Agreement and thereafter sent on to Iran and allegedly subjected to extreme violence during her imprisonment.

20. The difficulty with all these cases is that it is entirely unclear, due to the lack of detail, what the cases were fully concerned with. The example from 2008 may be said to relate back to what we said earlier about people returning as a consequence of having obtained *laissez passer* documentation from the state outside Iran from which they were returned. Return with an ID card only is a different matter entirely from returning on a *laissez passer* where at least the person's identity and nationality have been validated by the consulate or embassy and of course it would be likely to engender problems if the card was believed to be false. Very little detail is given concerning the woman deported in 2006 and likewise in relation to Mr Khanlo. Rostami is a case on which we shall say a little more in the next section, but again the difficulty for these purposes lies in the absence of evidence as to the full circumstances of his case, bearing in mind that we are concerned simply with risk on the basis of being a failed asylum seeker and having exited illegally.

21. It is relevant at this point also to refer to the letter of 25 February 2016 from Mr Griffiths, the Assistant Director of Immigration Enforcement concerning the numbers of failed asylum seekers who have been returned to Iran. He notes that since 2013, 267 people have been returned of whom 39 were enforced returns and 228 were voluntary departures. They would all have been in possession of valid travel documents or would have stated at the Iranian Embassy that they wished to return. It was known that other European countries were carrying out voluntary and unescorted forced returns and the majority of these were voluntary, mainly because the Iranian authorities did not agree to issue travel documents for enforced returns. Mr Griffiths asked various questions of the FCO Chargé d'Affaires in Tehran, and was told, following the matter having been raised with the Director of the Ministry of Foreign Affairs Social Department, that Iranian nationals entering Iran on a *laissez passer* usually face minimal formalities at the airport. They were required to fill in a form which took around ten minutes and were then free to go. He said they would not be questioned unless they had been involved in or suspected of having been involved in a crime when overseas. He did not respond specifically to such questions as whether there is a special court at Tehran Airport to deal with undocumented returnees and whether there are lengthy investigations into returnees which would involve them being bailed or imprisoned while investigation takes place. It may be that the latter can be seen to have been dealt with implicitly in the response.

22. Mr Drabble argued that this was an inadequate exchange given the failure to respond in detail to the questions and was simply wrong in what it said about the absence of questioning at the airport. We see force in what Mr Drabble says in this regard. The evidence overall does suggest that people are likely to be questioned rather than there being an entire absence of questioning. In this regard among other things Mr Drabble pointed to the Austrian Red Cross Iran COI compilation of September 2013 and in particular at pages 141 to 142 of the bundle prepared in

support of HR's case which contains the reference from the Swiss Refugee Council to which we have referred above the (retired Supreme Court) judge stating that returning asylum seekers are placed in detention for several days until the police had verified they had not engaged in any political activities, after which they are released.

23. This has to be seen, as with all these pieces of evidence, in the context of the evidence overall. In our view the evidence does not establish that a failed asylum seeker who had left Iran illegally would be subjected on return to a period of detention or questioning such that there is a real risk of Article 3 ill-treatment. The evidence in our view shows no more than that they will be questioned, and that if there are any particular concerns arising from their previous activities either in Iran or in the United Kingdom or whichever country they are returned from, then there would be a risk of further questioning, detention and potential ill-treatment. In this regard it is relevant to return to Dr Kakhki's evidence in re-examination where he said that the treatment they would receive would depend on their individual case. If they co-operated and accepted that they left illegally and claimed asylum abroad then there would be no reason for ill-treatment, and questioning would be for a fairly brief period. That seems to us to sum up the position well, and as a consequence we conclude that a person with no history other than that of being a failed asylum seeker who had exited illegally and who could be expected to tell the truth when questioned would not face a real risk of ill-treatment during the period of questioning at the airport. We should add that we see no reason to doubt Dr Kakhki's evidence that there is a special court at or near the airport which considers the cases of returnees but the evidence does not show a real risk of ill-treatment in breach of Article 3 amounting to persecution as a consequence of attending at the court.

Prison/Fine/ill-treatment for Illegal Exit/Asylum Claim

24. The next issue that we have to consider is what would happen after the facts had been established. When Dr Kakhki gave the evidence to which we have referred immediately above, he went on to say, consistent with his evidence earlier, that such a person would face a period of imprisonment for having committed propaganda against the state. This is the Article 500 offence. Therefore on his evidence, even if such a person was not at real risk of facing ill-treatment during the time of questioning, as a consequence of the sentence they would receive for being guilty of propaganda against the state, they would face a serious risk of ill-treatment when in prison.

25. We should say at this point that we have no hesitation in agreeing with the submissions of Mr Mills that the evidence shows a real risk of persecution/ill-treatment in breach of Article 3 for a person who is imprisoned in Iran. This appears to be common ground. In his skeleton, Mr Mills quotes from paragraph 3.17.13 of the respondent's Operational Guidance Note: "As conditions in prisons and detention facilities are harsh and potentially life-threatening in Iran, they are likely to reach the Article 3 threshold".

26. We need to consider the various examples given by Dr Kakhki which he says point to a real risk on account of being a failed asylum seeker who exited Iran illegally. Dr

Kakhki accepted that there was a difference between people who were activists or protestors on the one hand and people on the other hand such as these appellants with no history. He considered that nevertheless the examples he had given were helpful because they showed that there was separate punishment for illegal exit. He placed some weight on the example of Mr Rostami to which we have referred above. He made the point that Mr Rostami would only have been 16 when he went to Norway and therefore it was unlikely that he would have been an activist whether student or otherwise while in Iran.

27. Ms Busch QC suggested that the evidence showed that Mr Rostami was an activist of some sort and referred to an item posted by an organisation called ULIMUC on 27 January 2013, quoting the Iran human rights website posting on 23 March 2011 which among other things referred to the fact that according to a Norwegian NGO People Peace, Mr Rostami appeared in a documentary on Norwegian television. She suggested that this might have been an aggravating factor. That detail does not appear for example in the report from Amnesty International which is quoted in the Austrian Red Cross COI compilation of September 2013, nor in the Landinfo document. There is little information in any of these reports about Mr Rostami and in our view it remains unclear whether his case can be regarded as one of a person who was no more than a failed asylum seeker who exited illegally or whether there were any other factors which might have caused the authorities to react more adversely than if he had been a person exhibiting only those two characteristics.

28. At page 6 of his report in SH's case, Dr Kakhki stated his belief that there is a correlation between leaving the country illegally and seeking asylum abroad, in that being accused of both would exacerbate the severity of the punishment an individual might face on return to Iran. The former would involve a violation of the country's exit regulations, the latter would risk a charge under Article 500 of spreading propaganda against the state. To support his argument Dr Kakhki referred at page 7 of the report to remarks by Amnesty International about provisions such as Article 500 and their vagueness and expressed his view that given that the key terms of "propaganda" and "security" remain undefined, they are capable of being attached to a vast range of conduct. He considered that the mere allegation that the appellant had been prosecuted and at risk of persecution at the hands of the Iranian authorities would amount to propaganda against the state and expose him to punishment as mentioned by the former Supreme Court Judge.

29. The problem with this argument, and it is equally the case too in the context of the four cases to which we have referred above of people who are said to have been detained and ill-treated on return to Iran, that there is on the one hand an absence of sufficient information about the individual case and on the other hand a significant lack of examples subsequent to that. One might expect that if the retired Supreme Court Judge was making an expression of something akin to policy that would be applied in future to people who had been deemed to have insulted the state by claiming to have been ill-treated when they had not been, then there would have been express examples of this as a way of showing that the authorities meant what they said. We note what Dr Kakhki said about the ways in which he obtains information about the situation in Iran, which include him being in regular contact with Iranian lawyers, and it seems to us highly unlikely that if there had been cases

of people being prosecuted under Article 500 on the basis that they had made false asylum claims abroad that there would not have been mention of such cases in the media and/or within the legal profession. Again in this regard we note what is quoted at page 9 of the report, being remarks made by Iran's Prosecutor General in 2011 that Iranians who have committed a crime outside the country while abroad and take action against their national security could be prosecuted. We accept that there is little tolerance of persons perceived as acting against national security, and that national security is broadly defined (Operational Guidance Note para 3.12.7). But if it were the case that the notion of a person acting against national security included people who had made false asylum claims abroad, it could be expected that details of such prosecutions would have emerged, bearing in mind the numbers of people returned from the United Kingdom alone in recent years and the lack of any evidence to show that there is such a degree of state control over the Iranian media and/or legal profession as to prevent such information emerging. Indeed, one might expect that the Iranian authorities would wish there to be publicity about such cases in order to deter others from acting in this way.

30. The context for the Prosecutor General's remarks would seem rather to be as he says people who are now working with America and Britain against their own people rather than a person who has invented an asylum claim in order to obtain leave to remain in another country. We can understand the sensitivity that the Iranian authorities may have towards perceived slights against their own state in the form of untruthful allegations about the conduct of the state, but equally one can expect a degree of reality on their part in relation to people who in the interests of advancing their economic circumstances would make up a story in order to secure economic betterment in a wealthier country. We consider that the suggestion by Dr Kakhki that the use of the term "national security" extends as broadly as to encompass people who have made failed asylum claims abroad is excessively speculative and has no evidential foundation to it.

31. Elsewhere in Dr Kakhki's report there are a number of examples given of people who were prosecuted for other offences and also for illegal departure. It seems to us that these cases establish no more than that people may be prosecuted and indeed imprisoned, as some of these cases show, for the separate offence of illegal exit, but they are clearly to be distinguished from cases where there is no history and where the person is no more than a failed asylum seeker who exited Iran illegally. Cases such as Mr Jazari who was a corrupt businessman, Ms Bayazidi who was convicted of an offence of disinformation and other examples of people who were clearly political dissidents or at least perceived as being political dissidents, are different again. We do not consider it to have been shown that somebody who has made a failed asylum claim would simply as a consequence of that be regarded as a political dissident. These cases where people were imprisoned show much more by way of specific activity than a simple imputation. The description of the case of Mr Hadi Keikhosravi, referred to at page 13 of the report, which refers to a conviction of six months' imprisonment for illegal departure, says nothing about the surrounding circumstances and as such cannot be an example of any materiality. The examples given show that people found guilty of another offence may in addition receive a prison sentence for illegal exit, but they do not show that people are sentenced to

imprisonment for illegal exit per se. Indeed, the evidence suggests that there is no appetite to prosecute for illegal exit alone, but if there is another offence, illegal exit will be added on.

32. Dr Kakhki placed some weight on what he said were material differences since SB, being in particular the statement of the Supreme Court Judge and the example of Mr Rostami. These seem to us however to fall well short of showing a change of any significance since the evidence that was assessed in SB. If the logic behind the cases set out in the Landinfo Report is as is argued, the heart of the argument, we consider that it falls significantly short of showing a real risk for the reasons given. In sum, we conclude that it has not been shown that there is a real risk that a person who has no history other than being a failed asylum seeker who exited Iran illegally would face a real risk of persecution. There are minimal examples of cases which even were they to be taken at their highest could be said to be cases of ill-treatment on that basis and cannot be said, given the numbers returned, to give rise to a real risk. In any event as we have stated above, so little information is given that it is impossible to conclude that it was the fact of illegal exit or having made a failed asylum claim, taken either alone or together, that triggered adverse interest on return to say with any confidence what the full circumstances in any of those cases were.

33. We summarise our conclusions on the country guidance issues in these appeals as follows:

    (a) An Iranian male whom it is sought to return to Iran, who does not possess a passport, will be returnable on a *laissez passer*, which he can obtain from the Iranian Embassy on proof of identity and nationality.

    (b) An Iranian male in respect of whom no adverse interest has previously been manifested by the Iranian State does not face a real risk of persecution/breach of his Article 3 rights on return to Iran on account of having left Iran illegally and/or being a failed asylum seeker. No such risk exists at the time of questioning on return to Iran nor after the facts (i.e. of illegal exit and being a failed asylum seeker) have been established. In particular, there is not a real risk of prosecution leading to imprisonment.

34. It was not suggested to us that an individual faces risk on return on the sole basis of being Kurdish. It was however agreed that being Kurdish was relevant to how a returnee would be treated by the authorities. For example, the Operational Guidance Note refers at 3.12.14 to the government disproportionally targeting minority groups, including Kurds, for arbitrary arrest, prolonged detention and physical abuse. No examples however have been provided of ill-treatment of returnees with no relevant adverse interest factors other than their Kurdish ethnicity, and we conclude that the evidence does not show risk of ill-treatment to such returnees, though we accept that it might be an exacerbating factor for a returnee otherwise of interest. Accordingly we conclude that it has not been shown that a person in the position of these appellants faces a real risk on return to Iran either on the basis of what would happen to them when questioned at the airport or subsequently if they were convicted of an offence of illegal exit. With regard to HR specifically, it does not appear to be disputed that he is Kurdish and that he is undocumented: hence we see

no reason for remittal. Prosecution for illegal exit is an outcome not generally experienced by such returnees, and where it does occur, the most likely sentence in relation to the illegal exit charge would be a fine. It has not been shown that there would be a real risk of prosecution under Article 500 for propaganda against the state on the basis of having made an asylum claim which was found to be false. Accordingly these appeals are dismissed.

Notice of Decision

34. The appeals are dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their families. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Upper Tribunal Judge Allen

APPENDIX 1

HR AND SSH v SSHD

Expert Evidence

Expert's experience and expertise

1. Written and oral expert evidence was given in these cases by Dr Mohammad Kakhki. Dr Kakhki also gave written evidence before the Tribunal in SB (risk on return – illegal exit) Iran CG [2009] UKAIT 00053 ("SB"). His relevant experience and expertise are dealt with at [11] of the decision in that case.

2. Dr Kakhki practised as an Attorney-at-law in Iran from 1997 until 2002 when he came to the UK. Since 2003, he has worked closely on Iranian issues, particularly those relating to the legal system as part of the Research Centre for Iranian Studies at Durham University where he also serves as a Committee Member. He carries out research on this topic on a daily basis. His research is not confined to immigration cases but covers other legal and social issues. He is also the co-founder of the Islam, Law and Modernity research centre in Birmingham which focuses on Islamic countries including Iran and looks at mainly legal and judicial issues. He is the Associate Director of that centre and is also a special adviser involved in Iranian affairs. He has not visited Iran since 2011 but as a result of his research, he keeps up to date with Iranian judicial affairs. He also maintains contact with fellow lawyers in Iran with whom he qualified.

3. In 2008, Dr Kakhki was appointed as a member of the Centre for Iranian Studies to produce a commentary on the Iranian Country of Information Report ("COIR"). He was again approached by the advisory panel on an individual basis in 2011 and 2013 to provide evidence to the panel. He was selected from among other experts in this field.

4. Dr Kakhki produced a report in relation to both of the Appellants. Both are in broadly similar form, certainly in relation to the general issues on which country guidance is to be given. The Respondent also put a number of questions to Dr Kakhki in written form to which Dr Kakhki provided written answers. Again, those are in substantially the same form in both cases. Dr Kakhki gave his oral evidence on the general issues as they relate to both cases.

Returning to Iran following illegal exit

5. As Dr Kakhki identifies in his report, the issue of illegal exit from Iran as a relevant risk factor was dealt with as one of a number of factors in SB. Dr Kakhki identifies

the decision in SB as a useful starting point. As is set out at [21] of that decision, leaving Iran without a valid passport or similar travel documents is illegal by virtue of Article 34 of the Iranian Passport Law. His evidence was that that offence attracts a "Taaziri" punishment of between one and three years' imprisonment or a fine of between 500,000 and 3 million Tomans.

6. Although Dr Kakhki accepted that SB remains a useful foundation, he says that the decision in that case must be read against the background of Iran's changing political environment and the risk which he says is faced by asylum seekers returned to Iran. In oral evidence he said that although the election of President Rouhani and restoration of diplomatic links between the UK and Iran might suggest an improving position, there remains a conflict between the hardliners of the judiciary and Supreme Leaders on the one hand and the executive on the other.

7. Dr Kakhki refers to there being a special court at the airport (branch number 1610) and it is his evidence that anyone who arrives in Iran without documentation which would demonstrate unlawful exit from Iran would be arrested and taken before this court. Depending on the outcome of the court's investigation and in the discretion of the Judge, the individual would be punished within the parameters above.

8. If an individual does not have a valid passport or travel document, he is required to obtain a "Barge Obour" (also known as a "laissez passer") which is a temporary travel document issued by the Iranian Embassy in the country of departure and valid only for twenty days and for a single entry. Dr Kakhki produced a template of the application form for a Barge Obour but admitted in oral evidence that he had not seen a copy of the Barge Obour which results. It was however his evidence that, either as a result of a note on the Barge Obour itself or by virtue of an internal communication between the Embassy abroad and the Iranian authorities at the airport, those latter authorities would be alerted to the fact that the person travelling on that Barge Obour has exited illegally. This is because the form contains a section requiring completion and giving details of the passport on which the person left Iran.

9. A Barge Obour is issued also to a person who has lost his passport or had it stolen. However, a person who has left Iran illegally would be unable to provide details of the passport on which he left and would not be able to state truthfully that he had lost his passport. This would lead to the inevitable conclusion by the Embassy that the person left Iran illegally. It is Dr Kakhki's evidence that this would then be communicated to the authorities at the airport. HR and SSH would therefore come to the attention of the authorities at the airport on their return. They would be questioned about their illegal departure.

10. Dr Kakhki confirmed that a security check would be carried out by the Embassy when an application is made for a Barge Obour. There may be some investigation of the activities of the individual outside Iran particularly those of interest to officials. Dr Kakhki gave the example of a person accepting bribes which would be of interest since Iranian officials are sensitive about economic matters.

11. In relation to HR and SSH, Dr Kakhki said that their political activities were likely to be of interest – whether they supported a political party, their family associations, their opinions about Kurdish organisations. Embassy officials may also have obtained information from informants or other intelligence. He gave the example of a person arrested by the UK authorities and the fact that Iranian Embassy officials would be told about this. Those officials would visit the individual to obtain information about the crime and decide whether the police in Iran should be informed. Dr Kakhki's information in this regard is based on research. He was aware for example of the cultural section of the Iranian Embassy having links with the security service in Iran and of Iranians being invited to conferences arranged by that section to find out how individuals intended to vote at elections.

12. Dr Kakhki confirmed though that the Embassy would not refuse a Barge Obour if there were security concerns about an individual. The obligation on the Embassy is to issue a travel document if the individual can establish Iranian nationality. In relation to the investigation of security concerns, the Embassy acts as an arm of the Iranian authorities to gather basic information which would be passed on for further investigation in Iran.

13. Dr Kakhki also gave evidence that the Iranian authorities at the airport hold a "wanted list" which is checked on arrival. His evidence is that the names of those who are required to obtain a Barge Obour would appear on that list. Dr Kakhki accepted however under cross-examination that he could not point to evidence of this. The list is a confidential document belonging to the Iranian authorities. He pointed however to the evidence on which he relies of those detained on return. He also accepted however that, since he has no access to the list, he could not say with any certainty that names of failed asylum seekers would appear on this list. He could not say either that they did not.

14. Dr Kakhki gave several examples of individuals who had been detained at the airport on arrival. He accepted under cross-examination that the circumstances of individuals on whose cases he relies are different to those of the Appellants; nonetheless he relies on those as showing the high level of scrutiny of arrivals by the authorities at the airport.

15. Dr Kakhki also pointed to evidence that the Iranian authorities are able to impose travel bans on individuals by virtue of article 19 of the Iranian penal code. He accepted that the extract from the International Campaign for Human Rights in Iran report of January 2014 cited in his report does not refer to a travel ban for offences of illegal exit but he relied on this as evidence that the authorities can impose a travel ban on those who are of security concern. He says that the case of an asylum seeker falls within the category of those whose "travel abroad has been classed as against the Islamic Republic of Iran's best interest by the judiciary". This was therefore relevant to whether an individual would be at risk by reason of his failed asylum claim.

Treatment of returned failed asylum seekers in Iran

16. Dr Kakhki's evidence in this regard relates to Article 500 of the Islamic Penal Code. Article 500 states that "Anyone who undertakes any form of propaganda against the state …will be sentenced to between three months and one year in prison". His evidence is that the terms "propaganda" and "security" are undefined and are capable of including the situation where a person has claimed a risk of persecution by the Iranian regime, whether or not that has been found to be genuine or false. The mere allegation would amount to propaganda against the state and expose him to punishment.

17. Dr Kakhki relies in this regard firstly on background evidence. He points to the views expressed by Amnesty International relating to the vague wording of various provisions including Article 500 and concern that in practice this and other articles of the penal code are used against journalists, intellectuals and other social commentators for expressing their views in writing or public statements.

18. Dr Kakhki also relies on extracts from the COI compilation report prepared by the Austrian Centre for Country of Origin and Asylum Research and Documentation which contains the following potentially relevant material:-

- An article by the International Campaign for Human Rights in Iran dated April 2010 quoting the Iranian Justice Minister, Morteza Bakhtiari as saying that the authorities' policy towards those who had no political cases within Iran and "merely introduced themselves as political activists to foreign countries in order to receive residency" would be reviewed. Bakhtiari indicated that the basis of the policy was to provide a basis for return of Iranians to Iran. However, the COI report points out that the purpose of this is not stated nor is it said how their cases would be reviewed or what guarantees would be provided for their security;
- A quotation from a report by the Norway-based human rights organisation Iran Human Rights of 23 March 2011 to the effect that Iranian authorities have signalled that Iranians who have applied for asylum abroad should be charged for dissemination of false propaganda;
- A report of February 2011 by the state broadcasting corporation Islamic Republic of Iran Broadcasting citing the Iran prosecutor general as saying that Iranians who have committed crimes outside Iran or who take action against Iranian national security could be prosecuted. This would include those working with America and Britain against the Iranian people.

19. In addition, Dr Kakhki relies also on a report of Amnesty International dated May 2011 which refers to an article written by a former Supreme Court judge in a daily newspaper published by the Iranian government. In that article, the judge is said to have commented that failed asylum seekers could be prosecuted for making up accounts of alleged persecution. It is reported that this view was expressed in the context of comment on the laws allowing Iran's judiciary to bring charges for

violations of Iranian law committed by individuals whilst they are outside Iran. Dr Kakhki confirms in his written answers to the Respondent's questions that he is not aware of the identity of the judge and was unable to locate the article in question. However the article is referred to by a number of sources so that its veracity is not in doubt.

20. Dr Kakhki also refers to a number of examples of those whose cases show, he says, that the Iranian authorities will investigate those who return having exited illegally and will prosecute for other offences including illegal exit.

21. Dr Kakhki accepted under cross-examination that, in the cases to which he refers, there were factors in addition to the illegal exit or previous asylum claim which might explain the interest by the Iranian authorities in those persons on return. For example, in the case of Arash Fakhravan who was reported to have been arrested in May 2011 on return from France where he had claimed asylum, he faced arrest for his participation in the December 2009 protests.

22. Although Dr Kakhki did not accept that his examples are of no relevance to the Appellants' cases, he accepted that they are of more limited assistance. His evidence was however that the profile of an individual who is prosecuted may be relevant to the punishment meted out by the Judge when sentencing. Absence of such a profile does not mean that a person would not be punished at all. He also did not accept that the examples are of no relevance as he said that he did not know the precise nature of the other factors asserted and why the individuals were convicted as he has no access to the court records. His evidence is, however, that illegal exit is a basis for prosecution. Whether there would be a prosecution for such offences would be in the discretion of the Judge.

23. In support of his evidence that Article 500 (or other articles of the penal code relating to national security) is used by the Iranian authorities to prosecute failed asylum seekers on return, Dr Kakhki relied on the following examples.

24. The first example is that of Rahim Rostami, who was returned to Iran from Norway. He arrived in Norway as an unaccompanied minor, aged about fifteen or sixteen years. As Dr Kakhki pointed out under cross-examination, therefore, he could not have been a student activist before he left Iran as he would have been too young.

25. Dr Kakhki was asked about the report of Mr Rostami being "extradited" to Iran and reference to him being accompanied by two policemen on return. He was asked whether this might indicate that there were additional factors in Mr Rostami's case which would explain the interest of the authorities. Dr Kakhki did not accept this. The word "extradited" has specific connotations denoting a removal in accordance with international treaties or a request from Interpol. He considered that the word used in this context was meant to refer to "deportation". He accepted however that the report dated 27 January 2013 which reported on the treatment of Arash Fakhravan and Mr Rostami showed that Mr Rostami had appeared in a documentary on Norwegian television. He pointed out however that the nature of the television

appearance is not clear from the report. However, he also accepted that he does not have details of Mr Rostami's conviction.

26. In addition to the case of Mr Rahim Rostami, Dr Kakhki referred to three other cases in the course of his evidence as showing that individuals face possible detention and interrogation on account of their asylum claim. Those are contained in a section of the Norwegian LandInfo report dated 19 April 2011 under a heading "The Return of Asylum Seekers from Norway to Iran". That report records the return from Norway of an asylum seeker, Danial Hadi Khanlo who was forcibly returned in 2006 and who was said to have been imprisoned and subjected to brutal abuse. The second example is of a man sent back in 2008 with an ID card which the Iranians claimed was false. He is reported to have been mistreated by the authorities at the airport before being put on an Austrian flight out of Iran from where he returned to Norway. The final example is of a woman returned in 2006 who was alleged to have been imprisoned and subjected to extreme violence.

27. Dr Kakhki accepted under cross-examination that he had no details of those three cases and could not provide further detail. He assumed that all were failed asylum seekers. Two cases are also cited in his report in the extract from the Austrian COI report of September 2013 although it is not clear if those are the same as those referred to in the LandInfo report.

28. Dr Kakhki accepted that media attention is likely to be drawn to an individual by their profile. A "simple failed asylum seeker" would be unlikely to be the subject of media reporting. He also accepted that the authorities would be less concerned about a person who has not been the subject of media attention but he did not accept that the authorities would have no concern in such individuals.

29. Dr Kakhki reiterated in his oral evidence the point that "propaganda" and "national security" are vague and general terms. A claim for asylum is propaganda against the state and therefore a matter of national security and a crime. Such a claim amounts to a condemnation of Iran's human rights record and an assertion that the Iranian regime persecutes its people. That may lead to a resolution against Iran by, for example, the UN Special Rapporteur. In Dr Kakhki's opinion, it is not possible to differentiate between those who form groups in London opposed to the regime and other crimes which could amount to propaganda.

Prosecution for illegal exit/failed asylum claim

30. Dr Kakhki's evidence does not go so far as to indicate that every failed asylum seeker who exited Iran illegally would be prosecuted and detained for an offence of illegal exit and under Article 500.

31. Dr Kakhki pointed out that an offence of illegal exit could be punished by a term of imprisonment rather than a fine and that the level of punishment lies in the discretion of the judge. He accepted that a number of the examples on which he relied included other offences for which a further sentence was passed. He also

accepted that the offence of illegal exit itself may be different in nature. For example, in one of the examples, the individual left Iran illegally having escaped detention for another offence. Dr Kakhki's evidence though was that the different nature of the offence would be reflected in the punishment rather than whether a prosecution would follow. He relies on the examples which he gives to show that the offence of illegal exit may act as a trigger for prosecutions for other offences and may aggravate the other offence and therefore lead to a more severe sentence.

32. Dr Kakhki pointed to the example of Mr Hadi Keikhosravi who was convicted to six months' imprisonment for illegal departure, which conviction was upheld by the Supreme Court on appeal. There is nothing in the report of Mr Keikhosravi's case which suggests that there was a conviction for any other offence. There was some elaboration of Dr Kakhki's evidence in relation to this example in re-examination by Mr Mills. This was based on the source document on which Dr Kakhki relies for information about this case. It was suggested that Mr Keikhosravi may be the same person as is referred to, earlier in the report, as having been convicted of working with a Kurd party. However, Dr Kakhki clarified that these were two different individuals and that the first names were in fact different in the Farsi version (although apparently inaccurately translated).

33. In any event, Dr Kakhki's evidence was that the failed claim for asylum would aggravate the offence of illegal exit (or vice versa) so that it is more likely that the resulting punishment would be a term of imprisonment and not simply a fine. Dr Kakhki accepted that because he did not have access to court records in relation to the convictions on which he relied he is unable to show that having made a failed asylum claim would aggravate the punishment. He said that it should nonetheless be considered as a factor by the Tribunal. As an expert, he sees his role as providing information; it is for the Tribunal to decide whether this amounts to a risk factor.

Detention pending investigation

34. Dr Kakhki also pointed out in his evidence that the risk of ill-treatment to those who have left Iran illegally and made an unsuccessful claim for asylum arises not only from detention following conviction but also detention during the investigation stage. He also points to the possibility of imprisonment if an individual is unable to pay a fine imposed for illegal exit.

35. Dr Kakhki's evidence is that the Appellants would face questioning not simply about the manner of their illegal exit from Iran but also about their failed asylum claim. Indeed, his evidence is also that, even without illegal exit, a person who has made a failed asylum claim would face questioning if they are returned on a Barge Obour.

36. Dr Kakhki asserts that in the context of that investigation, an individual would either be released on bail or remanded in custody at a detention centre. He asserts that in circumstances where an individual has illegally left the country, it is more likely, applying Article 132 of the Iranian Penal Procedure Code, that the individual would be detained in custody whilst the investigation continues.

37. Ms Busch QC pointed Dr Kakhki to the report of the Immigration and Refugee Board Canada dated 10 March 2015. That in turn reports the International Organization for Migration as stating that those who returned on a laissez-passer (Barge Obour) would only be questioned and that no-one had been arrested when returned in that manner. As Dr Kakhki pointed out, though, that related to those who had left the country on their passports and were returned on a Barge Obour. Although a Barge Obour was issued in the case of those who did not have a passport as well as those who left Iran illegally, Dr Kakhki said that the two cases would be treated differently. It would only be the latter who would be investigated.

38. In relation to the treatment of an individual detained in Iran, Dr Kakhki deals in his report with the techniques used during investigations, some of which amount to torture, and to the harsh prison conditions. That part of his report was not explored in cross-examination as it is the Respondent's case that the Appellants would not face imprisonment.

39. Dr Kakhki did deal briefly with this aspect of his evidence however in oral examination by Mr Drabble QC on the basis of Dr Kakhki's opinion that the Appellants would be detained in the course of the investigation.

40. The extent to which the Appellants may face mistreatment depended in Dr Kakhki's view on the individual and the level of cooperation. An investigation would usually begin with a "soft interview". If an individual responded to questions honestly and was perceived to be cooperating, the file would be completed and passed to the court. He pointed out that the police must carry out their initial investigation within 24 hours following arrest and send the file to the judiciary for authorisation to continue with the investigation.

41. If an individual does not cooperate or is perceived not to be cooperating, in Dr Kakhki's opinion, the individual would then face a harsher form of interrogation. Techniques would then range from beating to worse torture and might include psychological torture and threats to the individual's family. The courts and judiciary turn a blind eye to such mistreatment. He indicated however that it is not the case that every person facing a criminal accusation would face torture in the initial stages.

42. Dr Kakhki also pointed out that it is the court which leads the investigation and not the police. The question of how long an investigation might take would vary according to the case. He appeared to accept that if an individual admitted that they had left Iran illegally and that they had made a claim for asylum and if the authorities believed that the individual was cooperating, the investigation may come to an end quite quickly (although it is his evidence that this would then result in a sentence of a few years in prison).

43. Dr Kakhki said that an individual's age, circumstances and family background would be considered. The police would also check whether there was any previous conviction. Depending on the nature of the case, the investigation might be taken

away from the police and passed to the security forces which are part of the Ministry of Information.

44. Dr Kakhki also pointed out that an investigation would be required even if the only offence was one of illegal exit. The issue of bail would not arise until the middle of the investigation and for the reasons he gives in his report, it is his view that the Appellants would not be bailed because of their illegal exit.

Treatment of Kurds

45. Section three of Dr Kakhki's report deals with the general human rights of Kurds within Iran. This was not the subject of any oral evidence before the Tribunal and the position of the Appellants as ethnic Kurds is not the central focus of the Appellants' case. They rely on it as an additional risk factor.

46. In summary of Dr Kakhki's evidence on this aspect, he points to the societal disadvantage of the Kurdish community in Iran and the discriminatory treatment of them by the authorities. That is not challenged by the Respondent whose position is however that this does not amount to persecution.

47. The examples contained in Dr Kakhki's report in relation to imprisonment, torture and execution relate to individuals who are reported to be political or civil activists or who have been convicted of other offences including national security offences. The inference which Dr Kakhki seeks to draw from those is that being a Kurd does not in itself result in prosecution but when combined with other criminal suspicions, persecution "is likely to surface".

APPENDIX 2

SUMMARY OF CLOSING SUBMISSIONS

LISA BUSCH QC

1. It is the Respondent's case that the position has not moved on since SB. The main document on which the Appellants rely which post-dates that case is the Norwegian LandInfo report dated 19 April 2011 [HR/EEB/13]. That refers to the comments of former Supreme Court Judge Mallahzadeh. It is a single document which does not give notable examples of persons who have fallen victim to increased interest of the authorities on account of their claims for asylum.

2. Dr Kakhki accepted in evidence that he relies on four specific examples. In the case of Rahim Rostami, Dr Kakhki accepted that he was not aware of the details of that case. The report of Mr Rostami's case refers to him appearing on Norwegian television. The Respondent invites what she says is the reasonable inference from the report that Mr Rostami falls into the same category as Arash Fakhravan. It is evident from the report that Mr Rostami attracted attention and that is highly pertinent to risk. Dr Kakhki accepted that those who have not attracted media attention would be of less interest.

3. The second example is that of Danial Khanlo who was forcibly returned to Iran in 2006. The Respondent points to the lack of detail about his case. It is not possible to draw any inference from the scant information in the report. The case also pre-dates SB.

4. There is minimal information about the individual who was returned to Iran from Norway in 2008. The Respondent points out that the report does not even show whether he had claimed asylum. It is possible that he did. There is no information about his political activities and it is clear from the report that he lacked the necessary documentation to gain entry to Iran.

5. The same is true of the female who was returned from Norway in 2006. There is minimal information about her case.

6. The Respondent says therefore that there is insufficient evidence to show a general risk. There is an absence of evidence as to the general experience of failed asylum seekers. The Appellants rely on four cases of which, in at least one there is reason to infer that the individual was politically active.

7. The evidence on which the Appellants rely is otherwise speculation. In relation to the examples given by Dr Kakhki, the Respondent submits that the Tribunal cannot draw any conclusions from those who are politically active and/or who have attracted media attention to themselves. These Appellants do not fall into those categories. These Appellants have no profile and the risk to them is said to be on

account of their illegal exit and their asylum claim which they assert would be seen as propaganda. The only basis for that assertion is the comment of the Supreme Court Judge writing in a newspaper and that article is not in evidence.

8. The Respondent's case is therefore that there is no support for the proposition that failed asylum seekers as a category are at risk. In relation to the procedures which would be followed at the airport on return, the evidence is that there would be an initial enquiry by the police and a referral to the Court (although presumably only if there was a need for further investigation). It is not Dr Kakhki's evidence that the individual would only be detained and mistreated if the individual did not cooperate. However, the Respondent's position is that the individual would not be at risk provided he was candid. At best, Dr Kakhki's evidence is that the risk should be addressed on a case by case basis.

9. On the assumption that the Tribunal accepts as the starting point the case of SB, Ms Busch addressed her submissions to what has changed since that case by reference to the headnote. SB was heard against the backdrop of the period after the 2009 elections and the Government crackdown on those opposed to the regime. Things have moved on. Dr Kakhki's evidence refers to increased tension leading up to the February 2016 elections but even that would by now have diffused. There is no upcoming event such as elections in play. The general political situation has improved as demonstrated by the resumption of diplomatic relations between the UK and Iran. At the time of SB, the UK was perceived as a threat by Iran and so it was unsurprising that association with the protests against the election results would at that time have created a risk.

10. The lack of general risk to those facing enforced return remains the same. Dr Kakhki agreed that an offence of illegal exit when coupled with an evasion of arrest at the time of exit or another substantive crime is different from an offence of illegal exit alone. The examples show that illegal exit is treated seriously where an individual is evading the law but it cannot be inferred from those examples that mere illegal exit leads to a risk.

11. The court at the airport existed at the time of SB and the Tribunal's observations at [48-49] of that decision holds good. There is scant information about any risk arising from that. If asylum seekers were at risk or had been ill treated at the airport that would have come to the attention of the fact finding missions. The comment about the consequences of being taken before that court as referred to at [50] of SB remains unchanged by Dr Kakhki's evidence in these cases. It is plain that failed asylum seekers in 2009 and now are not at risk as a category. There is a paucity of evidence in that regard. Dr Kakhki's evidence is consonant with the evidence in SB and the findings in that decision hold good.

12. Ms Busch referred to a number of documents in the background material as follows:-

1. IRB Canada report 10 March 2015 [HR/OB/8]: those who return on a laissez-passer have not been arrested. It was accepted by Dr Kakhki that those travelling on a laissez-passer could be doing so because they had lost their passport or because they have no passport. Dr Kakhki refers to a watchlist but he has not seen this evidence and he does not know if a person travelling on a laissez-passer would be on that list or not. It is the Respondent's case that unless an individual attracted media attention, he would not come to the attention of the authorities and it is Dr Kakhki's evidence that the individual would not be of interest if he cooperated. The examples show that illegal exit and a failed asylum claim would be insufficient to give rise to risk – a high profile is relevant. In the examples where the profile of the individual case relied upon is not clear, it would be unsafe to assume that they were merely failed asylum seekers. Dr Kakhki could not give evidence about the detail of the cases relied upon. The bulk of the evidence is directed at the coupling of illegal exit and some form of political activity.
2. Refugee Documentation Centre, Ireland 17 October 2014 [SSH/OB/P168]: the passage relied upon is consistent with Dr Kakhki's evidence about those who have attracted media attention. The extract does not say that the Iranian authorities impute political opinion based merely on an asylum claim.
3. Evidence cited at [38] of the Respondent's skeleton bears out the summary in the COI report dated January 2016 [summary cited at [37] of the skeleton].

13. Ms Busch also pointed to the letter dated 25 February 2016 containing information received from the FCO [RB/14]. According to that letter, there have been 39 enforced returns and 228 voluntary departures to Iran from the UK since 2013. The summary from FCO which in turn relies on information received from the Iranian government is consistent with the background evidence.

14. Dr Kakhki acknowledges that the LandInfo report is the high point of the Appellants' case and his position reflects the observations in that report. Even in that document, however, there are only four examples given, two of which date from 2006. No other document comes close to showing the risk relied on. The report includes a general expression of concern by Dr Kakhki but there is no evidence to support it. If failed asylum seekers were mistreated on return, human rights organisations would find out about it. There is no basis for treating failed asylum seekers per se as at risk. Any risk would depend on the individual case.

RICHARD DRABBLE QC

15. The Appellants' case is not whether a failed asylum seeker or person who has exited illegally would face a prison sentence following conviction but that there is a pinchpoint where the risk would arise (see AB).

16. The Appellants say that the risk arises from a combination of factors. Hard information from monitoring shows that there would be a period of detention whilst the authorities investigate. The techniques used by the authorities and prison conditions would then combine to give rise to a real risk of treatment contrary to

Article 3. The critical issue is not the length of detention (beyond a minimal period) or whether there would be a prosecution.

17. The factors on which the Appellant rely are:-

    1. Return on a Barge Obour/laissez passer where the fact of illegal exit will be revealed. That is accepted.
    2. The surfacing of the fact that the individual is a failed asylum seeker.
    3. The possibility of a prison sentence for illegal exit under Article 34
    4. The need to investigate to determine the appropriate sentence – whether illegal exit is an aggravating factor
    5. The wide terms in Article 500 and the discretion given to the Judge to decide whether an offence has been committed which would involve consideration whether an offence has been committed under Article 500.

18. It is accepted that illegal exit amounts to an offence under Article 34. The issue whether a person would be sentenced to a prison term for that offence depends on the Judge's view of the role of Article 500. In any event, the background material suggests that in some cases the illegal exit would involve days of investigations which would lead to a breach of Article 3 ([39] and [59] of skeleton).

19. In the examples relied upon where the detail of the case is unclear but there have been adverse consequences for failed asylum seekers, the lack of detail does not mean there is no risk. If a prison sentence is imposed there is clearly a risk. The Respondent seeks to show that the risk of that occurring depends on the high political profile. The issue is however whether an individual would be subject to harsh treatment or conditions during interrogation. If there is a risk this would occur, there is a real risk.

20. Mr Drabble QC sought to distinguish the case of SB on a number of grounds:-

    1. SB does not deal with failed asylum seekers.
    2. As a result it does not deal with the risk arising from the combination of illegal exit and failed asylum claim
    3. Although Dr Kakhki did give evidence about Article 500 in SB he did not do so in relation to the risk that the authorities would perceive a false asylum claim as propaganda. SB deals only therefore with a mere returnee who has left Iran illegally
    4. SB also does not deal with the investigation phase. If an individual is not seen as having a political profile, he may be released but the authorities have to investigate to reach that stage. The thought process underlying the situation at [63] of SB is therefore the same for an individual who has made an asylum claim.

21. In relation to the case of BA the same point arises. The Tribunal needs to consider the factors triggering inquiry as set out at [4(iii)] of the headnote in that case.

However, the findings in BA do not consider the trigger factors relied upon by these Appellants.

22. The decided cases do therefore show that mere illegal exit is not sufficient by itself as a risk factor and that more is needed but do not deal with Article 500 and a failed asylum claim in that context.

23. Mr Drabble QC sought to rely on AB. He accepted that this was not a country guidance case. He submitted that it was nonetheless instructive as there is no country guidance on the issue on which the Appellants rely. He pointed to the Respondent's argument in that case that the background material did not show evidence of arrests when a person is returned on a laissez-passer. However, the IOM information relied upon arose in the case of legal exit and does not deal with illegal exit. Relying upon [457] of the decision in that case, Mr Drabble submitted that a returnee who has left Iran illegally and is a failed asylum seeker will be interrogated about their departure and the nature of their claim in the same way as a blogger. The point made at [470-471] about a pinchpoint arising applies equally in these cases.

24. Mr Drabble QC referred to the background material as follows:-

1. COI report January 2016 [RB/1]: The passage at p7 does not deal with departures. At 5.1.1-5.1.3 the report does not cover the combination of illegal exit and a failed asylum claim.
2. IRB Canada 21 October 2013 [RB/6]: the reference to a watchlist is a red herring; the authorities will know the returnee to be a failed asylum seeker anyway. The reference to sentences for charges including illegal exit (p190) does not take matters any further.
3. Danish Refugee Council fact finding mission report 24 August – 2 September 2008: The passage relating to illegal exit (7.4) does not deal with the combination of illegal exit and a failed asylum claim. The passage at (7.7) does not answer the question whether there is a period of exposure and detention consequent on an individual being a failed asylum seeker and travelling on a laissez-passer. That passage showed that there might be a period of 1-2 days to check background. That might include investigation of the asylum claim.
4. AI report Feb 2012 (as reported in COI 16 January 2013 [SSH/OB/p105]: the passage relied upon (Judges' comments) is consistent with the risk asserted by the Appellants (p169 quotation relied upon is the same). Passage relied upon is as follows:-

> "[32.27] AI's report, "We are ordered to crush you" Expanding repression of dissent in Iran, published February 2012 reported:
>
> > 'Failed asylum seekers …risk arrest if they return to Iran, particularly if forcibly returned, where their asylum application is known to the authorities. A report issued by a Swiss refugee agency quotes an unnamed judge as saying:

"Asylum seekers are interrogated on return, whether or not they have been political activists in Iran or abroad. If they have tried to conduct propaganda against Iran, then they are culpable and are detained until a judge decides the sentence. In recent years many people have tried to destroy the reputation of Iran and this must be stopped. Such people help the opposition groups and their culpability is plain. Returnees will therefore be held for a few days until it is clear to the police, that they have not been involved in political activity. If the police can prove that the person was not active and has not done or said anything that could damage the reputation of the Islamic Republic, then they are released. If the person was either politically active in Iran before leaving, or has been active abroad, they must be tried and receive a punishment appropriate to their activities."

"This report followed an article written by a former Supreme Court judge which appeared in Iran newspaper, a daily paper published by the Iranian government, on 17 February 2011. Referring to existing laws that enable Iran's judiciary to bring charges against Iranians for alleged violations of Iranian law committed while outside Iran, the article stated that failed asylum-seekers could be prosecuted for making up accounts of alleged persecution. On 26 April 2011, Kayhan newspaper, which is controlled by the Office of Supreme Leader, also reported that Iranians are seeking asylum "on the pretext of supporting the opposition." [9x] (p56)".

5. AI report 11 February 2016 [SSH/OB/p196]: comments on vagueness of Article 500 and similar provisions of the penal code.

6. COI on prison conditions February 2016: there is no monitoring of prison conditions.

7. LandInfo report [HR/EEB/13].

8. AI report March 2013 [SSH/OB/P115]: heightened risk for kurds. Passage includes examples of those with no history of activism or dissent.

9. AI report March 2013 [SSH/OB/P122] – can't rely on the answer in Respondent's letter at [RB/14] in relation to third question. There is no reference to investigation in relation to an asylum claim.

25. The Appellants accept that they are not at risk per se because they are Kurdish but rely on it as extra factor.

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26. Mr Mills submits that the risk to the Appellants is a dual one – during the investigation and as a result of conviction. The focus of the Appellants' cases is on the first. The risk arises of questioning involving persecutory methods and imprisonment.

27. If an individual confesses all, the risk of prosecution under Article 500 may increase and/or a conviction under Article 34 may lead to imprisonment. As a person who has illegally exited Iran and is a failed asylum seeker, the individual will be questioned on return. If the individual does not confess or is perceived as not having confessed this might lead to persecutory treatment. The individual concerned would in either event be in prison in Iran and face persecutory methods of investigation.

28. Mr Mills put forward four propositions:-

    1. The threshold for treatment as a dissenter is not high
    2. Dissenters and prisoners are subject to torture
    3. There is impunity and corruption in the Iranian system
    4. Prison conditions are appalling.

    1. Mr Mills placed reliance on OGN October 2012 [3.12.7] and [22] of Dr Kakhki's report in HR that an asylum claim can fall within the ambit of national security.
    2. Mr Mills relied on section 2 of Dr Kakhki's report and the AI 2012 report [RB/2 – p28]
    3. Mr Mills relied on USDS report 2014 [HR/OB/6 – p71] and COI 2015 [HR/OB/21 – p306]
    4. Mr Mills relied on Freedom From Torture report March 2013 [SSH/OB/ - P129(f)]. He relied also on USDS 2014 [RB/5/p147] as showing that 25% of the prison population is comprised of pre-trial detainees.

29. Mr Mills also pointed out that in HR's case the First-tier decision lacks findings which may be relevant to certain important points and he invites remittal of that appeal.