FF (Single woman – Illegal exit – Iran) Iran [2004] UKIAT 00191

IMMIGRATION APPEAL TRIBUNAL

Date of hearing: 21 May 2004

Date Determination notified

...13th July 2004...

Before:

Mr D K Allen (Vice President)
Mr L V Waumsley (Vice President)
Mr G F Sandall

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

DETERMINATION AND REASONS

1. The appellant is a citizen of Iran who appeals to the Tribunal with permission against the determination of an Adjudicator, Mrs J.E. Nichols, in which she dismissed her appeal against the respondent's decision of 1 December 2000 issuing directions for her removal from the United Kingdom and refusing asylum.

2. The hearing before us took place on 21 May 2004. Mr R. Khubber for Switalski's solicitors appeared on behalf of the appellant, and Mr M. Blundell appeared on behalf of the Secretary of State.

3. This appeal has a somewhat complicated history. Mrs Nichols heard the appeal in February 2001 and, finding the appellant to lack credibility, dismissed her appeal and also upheld the Secretary of State's certification of the claim under paragraph 9(6)(c) of Schedule 4 to the Immigration Act 1999. The appellant was apparently granted permission to appeal to the Court of Appeal with regard to the certification issue. The outcome of this was that the human rights issues remained before the Tribunal and permission was granted by the

Tribunal. The grounds for leave to appeal in that regard noted the Adjudicator's rejection of the applicant's credibility and went on to contend that even if her findings on credibility were correct, she was in error with regard to her findings on the Human Rights Convention. This was premised, as set out at paragraph 2.1 and thereafter in those grounds of appeal, on the basis that she would return as an Iranian woman who had left the country illegally, or as somebody who did not prescribe to the Hijab (modest dress code) and that she would be questioned as to the reasons for her departure from Iran and there was a real possibility that she would be discovered to be a failed asylum seeker. These three points were amplified thereafter in the grounds of appeal. Initially the Tribunal refused to consider an application for leave to appeal but that refusal was quashed by Order of the High Court and permission was subsequently granted by the Deputy President on 4 June 2003.

4. The appeal came before Mr Rapinet and Mr Thursby on 21 November 2003. It became necessary to adjourn as further evidence had been put in later and the Home Office had had no opportunity to consider it. Mr Rapinet's record of proceedings notes that he had made it clear to counsel who was Mr Khubber then as now, that the appeal was limited to human rights issues and to the extent that it was sought to overturn the Adjudicator's findings of fact and was not prepared to consider such submissions. It seems that at that time there was put before Mr Rapinet a document headed 'Outline Submissions of the appellant' which essentially reiterates the grounds of appeal in respect of which permission has been granted and also raises issues concerning credibility. As we say, Mr Rapinet was not prepared to entertain these points. We also note that at no stage was a variation of the grounds of appeal sought but rather that the issue of credibility was raised in the outline submissions before the Tribunal on that date.

5. The matter was listed for hearing before us on 21 May 2004. Additional grounds of appeal dated 17 May 2004 were provided by Mr Khubber in which for the first time he formally sought to vary his grounds so as to include a challenge to the Adjudicator's credibility findings.

6. Before us, Mr Khubber argued that the original grounds were drafted when the other proceedings were ongoing and awaiting resolution. He referred to the expert report of Ms Enayat which had been put in with the grounds which dealt with the Adjudicator's points concerning credibility. He argued that the critical point of relevance was that the appellant argued that the Adjudicator's findings on asylum and human rights were significantly undermined by her appreciation of the evidence. It was clear from the nature of the original grounds and the

context of the report that it was relevant to these issues and should be considered. He drew our attention to the recent decision of the Court of Appeal in E and R [2003] EWCA Civ 49, where the issue of relevant evidence was not being ignored if it was only raised in the Court of Appeal. He accepted that evidence had not been specifically referred to in the grounds of appeal but argued that it was now and that it was an issue of fairness. It was not a matter of fresh evidence but of fresh grounds. The Adjudicator had relied mainly on the Country Assessment concerning the appellant's circumstances. He also referred us to the decision of the Court of Appeal in Haile [2001] EWCA Civ 663 concerning fresh evidence.

7. Mr Blundell noted that the challenge to credibility had been made just four days previously. It had been made clear by Mr Rapinet that credibility points would not be entertained by a subsequent tribunal. While it might be the case that the expert report was annexed to the original grounds, there was no explicit mention of the challenge to credibility then and the Tribunal was entitled to act upon the premise that those findings were correct. It was very late to pursue the matter now on the basis of evidence that had existed for two years. He also argued, with reference to the decision of the Court of Appeal in the instant case [2002] EWCA Civ 1535 that the findings could have been challenged at that stage also. Mr Blundell also made the point that the outline submissions which contained the first challenge to the Adjudicator's findings and the only formal application before the Tribunal had arrived four days ago and was grossly inadequate in providing no detail at all as to the nature of the challenge and this was sufficient by itself to justify in rejecting variation. The outline submission was not a formal application to vary the grounds and even if sustainable it was a challenge to but one facet of a number of adverse credibility findings. On the basis as in E and R i.e. whether the new evidence would make any difference to the Adjudicator's findings, Mr Blundell argued that it still did not go near affecting the cumulative effects of the Adjudicator's credibility findings and the only challenge to her other findings was the general challenge of 17 May 2004.

8. By way of reply, Mr Khubber argued that Mr Blundell's submissions were essentially artificial, and it was not a matter of fresh evidence. He reminded us of the history of the application challenging the Adjudicator's decision which had initially been ruled to be out of time but this had been settled on a judicial review application. It was at that stage that the expert report had been put in, and permission had been granted by the Deputy President. That was the history of the document that was with the Tribunal and was also with the bundle before Mr Rapinet.

9. The issue in the Court of Appeal had been a narrow issue of construction of certification and was not concerned with issues of credibility and the two issues were separate. The point concerning credibility had been made at the previous hearing and not initially four days before this hearing. He had told Mr Rapinet that he took issue with his conclusions and Mr Rapinet had said that if that was his view it was up to him whether he raised it again.

10. It was necessary to see within the global perspective taken by the courts as to whether it was relevant evidence to the extent that it should be considered and the relevance was the essential point. This case was stronger in its circumstances than those in Haile. It was not late evidence, but an articulation of the argument arising out of the evidence and the issues that so arose could not be ignored and it would be unfair if this were done.

11. As regards the other point raised in his grounds of appeal, that concerning the relationship between the human rights and Refugee Convention issue in the case, Mr Khubber accepted that this was a human rights appeal and that the Tribunal was a creature of statute, but argued that in this case it was clear that the Article 3 and Article 8 aspects overlapped with the asylum issue. It was suggested that the Tribunal could give guidance as to the impact of its decision on the asylum point albeit that that had already been dealt with. Alternatively, if the appeal were remitted then a fresh claim could be made. The matter had been considered in Dube [2003] EWCA Civ 114.

12. In response to this point Mr Blundell argued that in Dube Simon Brown LJ had gone no further than to say that it would be rather convenient for the Tribunal in such a case if minded to allow a human rights appeal to be able also to allow an appeal against the refusal of asylum, but that was a long way from concluding that there was any real need for such a power. Paragraph 29 of Dube was clear. The certificate could not be withdrawn after the Adjudicator had upheld it.

13. By way of reply Mr Khubber stated that the situation was delicate for the Tribunal. It could not say that it could not hear the relevant points on the asylum claim. Simon Brown LJ had not said that the issue could not be considered by a tribunal. It was implicit that the two claims overlapped.

14. We considered first the question of whether Mr Khubber should be permitted to vary his grounds of appeal. Rule 20 of the Immigration and Asylum Appeals (Procedure) Rules 2003 states as follows:

'20(1) A party may vary his grounds of appeal only with the permission of the Tribunal.

(2) Where the Tribunal has refused permission to appeal on any ground, it must not grant permission to vary the grounds of appeal to include that ground unless it is satisfied that, because of special circumstances, it would be unjust not to allow the variation.'

15. As can be seen, the Rule provides no guidance for the exercise of the Tribunal's discretion to grant permission to a party to vary his grounds of appeal save in the circumstances of sub-paragraph (2), which is not the issue before us, since the Tribunal did not refuse permission to appeal the credibility findings as there was no such application before it.

16. In considering this issue we bear in mind the overriding objective of the Rules, as described in paragraph 4 of those Rules to secure the just, timely and effective disposal of appeals and applications in the interests of the parties to the proceedings and in the wider public interest.

17. We stated at the hearing that we did not give Mr Khubber permission to vary his grounds of appeal, and though we gave brief reasons then we said that we would amplify these in a written determination which we now do. The original grounds of appeal in this case are dated 4 April 2002. Those grounds clearly acknowledge the rejection by the Adjudicator of the applicant's credibility and there is no challenge to those findings in those grounds, as we have stated above. Though there was a sense in which, as Mr Khubber contended, those grounds were holding grounds since at the time concentration was being focused on the certification issue which ultimately went to the Court of Appeal, there is a degree of detail in those grounds concerning the claimed risk on return to Iran for the applicant, as she was then, on the basis of having left the country illegally, being somebody who does not subscribe to the Hijab and being at risk of being found to be a failed asylum seeker. The opportunity clearly existed for the credibility findings to be challenged. As it is, anything that could be at all regarded as a challenge to those findings is not to be found until the outline submissions that were before Mr Rapinet at the hearing on 21 November 2003 and which are dated 20 November 2003. Clearly those arguments would have been likely to have placed the Presenting Officer at that hearing in some difficulty, and we have already quoted Mr Rapinet's record of proceedings in this regard. He made it entirely clear that he was not prepared to consider submissions seeking to

overturn the Adjudicator's findings of fact. The challenge in that regard, referring as it did to Ms Enayat's report, argued that the Adjudicator had concentrated on conceding that the appellant's account was not believable because her punishment did not accord with the expected punishment she should have suffered as set out in the CIPU Report. It does not appear at that stage to have been an application to vary the grounds of appeal. Without wishing to appear excessively formalistic, we consider that it if it was sought to vary the grounds at that stage, then it should have been done in a document which purported to do so, and in fact as we have seen, no effort appears to have been made to do so until Mr Khubber's additional grounds of appeal, as they are described, dated 17 May 2004. Again, these were provided very soon before the hearing and it is not a matter of irrelevance that again Mr Blundell would have been placed in significant difficulty, we do not doubt, at the hearing and it seems unlikely, though we did not canvass the matter with him, that the hearing would have been able to proceed on the day if we had granted Mr Khubber's application. That is in no sense conclusive or determinative but it is a factor of relevance, bearing in mind the overriding objective of the Rules which we have quoted above at paragraph 16. We consider that there is also force to the point made by Mr Blundell that in the additional grounds of appeal dated 17 May 2004 all that is contained in this regard is objective of the Rules, which we have quoted above, a general challenge to credibility without in any sense particularising the nature of that challenge. There is no statement in this document that it is to be read in conjunction with the outline submissions previously rejected by Mr Rapinet.

18. Mr Khubber has suggested that by analogy we should consider the reasoning of the Court of Appeal in E and R and also in Haile. In the latter case the evidence necessary to prove the mistake of the Adjudicator was first produced at the Court of Appeal although it could and should have been detected by the claimant's advisers before the IAT decision or at least before the judicial review hearing. It was nevertheless admitted by the Court of Appeal. Simon Brown LJ accepted that under the Ladd v Marshall test it would have fallen at the first hurdle but did not consider that these principles applied strictly to public law and judicial review cases.

19. This case was considered by the Court of Appeal in E and R. The court did not agree that Ladd v Marshall principles had no place in public law but rather that they were the starting point but there was discretion to depart from them in exceptional circumstances and that Haile had been held to be such a case on its particular and unusual facts.

20. Here we are of course concerned with a fresh issue rather than fresh evidence. We remind ourselves of the fact that there was no formal application to vary the grounds of appeal before Mr Rapinet and that such formal variation was sought only four days prior to the hearing before us. As we have noted also, the point made to us by Mr Blundell, there is but the most generalised challenge to the credibility findings in the application for variation. It may perhaps be inferred that one is supposed to read that in connection with the outline submissions before Mr Rapinet, though that was not done in the additional grounds of appeal document. This is not a case of new evidence but evidence which was submitted at the time when the Deputy President formally granted permission after the judicial review proceedings, without his attention being drawn to Ms Enayat's report. It is not trial by ambush, but it comes sufficiently close to it to be unattractive and again we consider that that is not an irrelevant factor.

21. Clearly, our discretion as to whether or not to permit a party to vary his grounds is not an absolute one. The reasons for the variation and the timing of the application for variation and in connection with that the implications for the other party at the hearing are all factors that must be taken into account, and each case is likely very much to depend upon its own facts. In this case we do not consider that it would be right to allow the proposed variation, given the opportunity to make the application for that variation at a much earlier stage, including a renewed application if it could be said to be renewed, after the rejection of the outline submission by Mr Rapinet, at some time well before the hearing before us.

22. We also bear in mind the point made by Mr Blundell by analogy to E and R concerning whether any new evidence would have made any difference to the Adjudicator's findings. As we have stated above, the outline submissions challenge the Adjudicator's findings on the basis that they were flawed because she concluded that the appellant's account was not believable because her punishment did not accord with the expected punishment she should have suffered as set out in the CIPU Report. We note in passing that that report has not been shown to be flawed, but rather that Ms Enayat disagrees with that particular point. Quite apart from that, it is far from the case, as Mr Blundell contended, that the Adjudicator found the appellant to lack credibility purely because her evidence did not accord with the CIPU Report. For example, the Adjudicator noted changes in her evidence concerning the dates which she gave, as set out at paragraph 22, though she did not consider this was necessarily weighty given the other problems with her credibility. There is also the point at paragraph 21 concerning the very late mention of a family friend who was said to be a major or a general whose existence had not been

mentioned previously and the explanation for the failure to do so was found to be implausible by the Adjudicator. She also noted at paragraph 23 that the appellant's explanation as to how the police came to know that she was engaged in a homosexual act completely lacked credibility since her claim was that the police might have been keeping an eye on her since 1991, and it was inconceivable that the police would not have discovered that she had a girlfriend, given the relatively long duration of that relationship. She also found it to lack credibility that the police had found out about the visit made by her friend to her as this entailed the police keeping a constant watch on her. Also at paragraph 24 the Adjudicator disbelieved the account as to the incident in the surgery when she claimed to have been discovered, given the change in her evidence as to the day of the week when that occurred in relation to the day when the cleaner normally came and the transformation in her evidence on that point and the fact that it had occurred relatively recently. Further, the Adjudicator at paragraph 25 of her determination found it lacking credibility that the appellant's uncle would at such a degree of short notice have been able to make arrangements for her and her sister to leave and find an agent within a period of about two weeks from the date she claimed to have been arrested. She also found it lacking in credibility that the appellant's girlfriend did not leave for Turkey with her.

23. Taken as a whole, therefore, we consider that the Adjudicator had ample reasons to disbelieve the appellant, quite apart from the matters which are specifically challenged in the outline submissions. There is no articulated challenge to those other findings to be found anywhere in the appellant's grounds of appeal. It is true that we have not heard submissions on the point, but we set these points out as we do in relation to the issue of whether the challenge would have made any difference in any event and on the face of it we consider that it would not have done so. That is but part of our overall reasoning that has led us to conclude that it would not be a proper exercise of our discretion to permit the grounds of appeal to be varied in this case, and we have accordingly refused to do so.

24. Having made our ruling in this regard, we went on to consider the further point made by Mr Khubber concerning the Refugee Convention. We are quite unable to accept that we have any jurisdiction to say anything on this point at all. The issue is not before us. The Secretary of State certified the asylum claim as we have seen, under paragraph 9(6)(c) of Schedule 4 to the Immigration and Asylum Act 1999 (as amended) and the Court of Appeal dismissed an appeal against the refusal by Keith J on 14 February 2002 to grant judicial review of the appellant's challenge to the Adjudicator's upholding of the certificate. As a consequence we have no jurisdiction to come to any

conclusions on the asylum claim and we do not consider that it would be proper for us to provide any guidance in that respect either.

25. Thereafter Mr Khubber made the point that the Adjudicator's findings did not mean that the appellant was not a lesbian, since she had concluded that she did not believe she had ever had a homosexual relationship with another woman but did not specifically find that she was not a lesbian.

26. The Tribunal was asked to look at the Article 3 issue holistically. The appellant had left Iran in violation of the exit regulations and did not conform to the Hijab and was a woman and cumulatively she would be at risk. The Tribunal was referred to Ms Enayat's expert report from page 87 onwards concerning the situation of failed asylum seekers.

27. Thereafter we heard evidence from Ms Enayat. Since 1983 she has been a Senior Associate Member of St Anthony's College Oxford, attached to the Middle East Centre there. Since 1998 she has been an independent consultant on Iranian affairs and an independent editor and producer of books on the Middle East. Iran appears to be her speciality. Pages 87 onwards of her report are relevant. We were referred to the penultimate paragraph on page 87 and also to page 88. We were also referred to pages 89 and 90. As regards the consequences for failed asylum seekers, Ms Enayat said that anyone who had left Iran illegally and stayed away for quite some time was at risk of interrogation and carried quite a high risk of torture or maltreatment. If it was known to the authorities that she was a lesbian it would carry additional risks.

28. She was asked whether it would be relevant if the authorities knew that members of her family had escaped from Iran. She said that if the family had a political background and perhaps criminal records and had asylum abroad it would add to the authorities' interest in interrogating her. There was quite good cumulative evidence over the last two or three years that the Iranian authorities exercised quite a lot of surveillance over the exile community and this was evidence that had been available since 2000. Mr Khubber put to her that the appellant's sister has asylum status in the United Kingdom, and the appellant said that her other sisters had asylum in Sweden. Ms Enayat said that it depended on the reasons for asylum status, and it would increase the risk.

29. We asked Ms Enayat how the authorities would know and she said that she would be questioned and also if they had political activities.

30. Mr Khubber told Ms Enayat that the appellant's sister in the United Kingdom had fled because of committing adultery in Iran and asked

her whether she saw that as relevant to the appellant. Ms Enayat did not consider that in itself to be relevant unless there was a case outstanding against her. She made the point that married women used their maiden names for legal matters.

31. She was asked what would be the risk on return on the basis of what she knew and she said that it would be for two reasons that she might face extra scrutiny beyond any other illegal leaver. The first was the length of her stay abroad and the second was the position of the family. Another risk factor would be the awareness of the authorities if they were aware that she was a lesbian.

32. She was asked what the appellant's treatment would be and she said that nobody could say anything very specific. There was no concrete evidence, but scraps of evidence only. A general assessment was very difficult indeed. The duration of detention was impossible to predict. She could go home and be called to court. She would have to answer challenges of illegal exit. Being undocumented and using an illegal border crossing were both problems.

33. She was asked what she could say from her knowledge of the relevant aspects concerning the appellant as to what the consequences for her would be. Ms Enayat said that if the appellant was a lesbian, and was interrogated and treated roughly, as could happen with the security forces, and was accused of being immoral, purely on account of being abroad as a single woman in suspicious circumstances, then she might confess to her sexuality which would lead to other consequences. As to why she would admit, it was very difficult if one were in prison in Iran and there was a high level of rape in prison in Iran. It was an unpredictable factor. As she was unmarried she was likely to be more vulnerable. There was a risk of ill-treatment on the facts as found. It was not a crime to be a lesbian, but it was to engage in the relevant act. It depended upon the outlook and attitude of the captors. She could be exposed to extrajudicial treatment on that basis.

34. She was asked whether on return, as the appellant was an illegal leaver, who did not respect the Hijab, she would be at risk and also as a single woman. She said that with regard to the Hijab, if she was politically opposed and vocal, even quite small acts of past defiance, there was a degree of vulnerability. Not wearing the Hijab abroad would not be a problem. As a single woman violating exit regulations with a risk of being held in detention for a while there was a risk of assault and sexual harassment. Ms Enayat could not say how great the risk was. There was a lot of literature on the rape of women in prison. If detained and charged she would have to be brought to court as it was very like the French judicial system, if there was a complaint that

she had committed an offence then the court would investigate. The court would be the normal court although the branch of the judiciary sitting at the airport had a reputation, having been assigned specific duties often overlapping with the Revolutionary Court and the judge there was a well known radical rightist judge.

35. She was asked whether the appellant would be charged about the exit regulation breach only and said that it was likely that it would be a charge about illegal exit but because of the way the penal code was drawn up there was a chance of other factors being drawn in. Three articles of the Code of Islamic Punishment concerned Iranians who committed crimes while abroad, and the third was not specific, concerning crimes against the law of Iran and the acts were not specified.

36. We asked Ms Enayat whether she knew of any cases where additional charges had been brought and she said no, there was so little documentation. She knew of three or four cases over the years where the people had returned and been killed and she knew of one person to whom it had occurred in 1988. There were very scattered cases. She could not quantify the risk.

37. When cross-examined by Mr Blundell Ms Enayat said that she had most recently reread her report in November 2003. She appreciated that the Adjudicator had found that there had been no previous interest in the appellant in Iran. She was referred to page 7 of her report and the final paragraph. It remained the case that there was no systematic evidence. As regards what was said in the last document stating that fines only were applied, she criticised this on the basis of the age of the report and that the text of the Canadian document was unclear and there was no documentation on the application of penalties. She accepted that if there were an infringement it was more likely to come to the attention of the authorities.

38. She was referred also the second of the two cases referred to at page 8 of her report from the Australian paper 'The Age' and she was asked whether she had made any further enquiries about the criticisms said to have been made by the second person mentioned there of the Islamic regime whilst seeking asylum in Australia. She said that she would not be able to find out as they would be tried in camera. She had not made any further enquiries.

39. She was also referred to paragraph 5 of her report at page 7, when Mr Blundell put it to her that there was an omission in the text of her report from the fuller detail of the documents set out at page 96 in that the words 'Though their arrest may have been politically motivated'

had been omitted from the body of her report. Ms Enayat said that that was unintentional. Political motivation was not of great significance. Amnesty International might or might not have had further documentation.

40. Mr Blundell put to Ms Enayat that the overall question was that she did not cite instances of failed asylum seekers being physically ill-treated. Ms Enayat agreed with that and said that there was no information, but nor was there any that there was a lack of problems. She had made quite extensive enquiries.

41. On re-examination Mr Khubber suggested to Ms Enayat that it may be that post-September 11, 2001 there might be an additional impact and she said that she would not put that at the dividing line, but if you looked at the UN Special Rapporteur's report for 2003 to 2004 concerning visits in 2003, that reflected quite a sharp deterioration in human rights treatment in Iran.

42. We asked Ms Enayat if she knew of any failed asylum seeker being ill-treated and she said that there was the case she had referred to earlier of the brother of a friend of hers, in 1988.

43. In his submissions Mr Khubber argued that the cumulative effect of the various elements was what placed the appellant at risk. She was aged thirty-six or thirty-seven and a single woman who had left Iran without lawful permission. She had two sisters with refugee status in Sweden and the sister who had fled with her from Iran had refugee status in the United Kingdom. The Tribunal could allow the appeal and remit it in the light of the expert evidence that the Adjudicator had not had before her, but otherwise could allow the appeal.

44. It was hard to say in concrete terms what the situation was on the ground in Iran. The Tribunal should see what could be accepted and what followed from the objective evidence. It was clear that if the Adjudicator had had this information she could have concluded that there would be a breach of Article 3 on return. Iran was a theocratic totalitarian state. It was clear from Ms Enayat's evidence that there would be a risk of adverse treatment. She would be questioned as to why she had been away for so long and there was also a risk on account of association with her sisters who had claimed asylum. There would be a combined effect via their names as four people with her surname had left Iran. Mr Khubber accepted that it was unclear why the two sisters in Sweden had claimed asylum. There would be interest in the details of her background and a reasonable inference of suspicion into what she had been doing outside Iran and she was at risk of detention and it could be that she would be required to attend court. It was necessary to look at what could be inferred. There were

no fair trial processes in Iran and she was at risk of sexual assault if detained. This was not a general but a specific argument.

45. In the alternative, the case fell within Article 8. There was the question of whether her sexuality arose and there was an overlap with Article 3 on that. If she were a lesbian and was questioned as to why she went and that emerged, it was a very serious issue to consider. If her sexuality was not in issue, then it was accepted as a consequence of Ullah and Razgar, the point was limited. A detailed consideration of the issues was needed.

46. In his submissions Mr Blundell opposed remittal on the basis that the Tribunal could deal with the appeal. The Tribunal should consider the evidence concerning failed asylum seekers generally and then go on to consider the particular circumstances of the appellant. There was no suggestion that bodies such as Amnesty International or Human Rights Watch or the UNHCR argued that failed asylum seekers could not or should not be returned to Iran and that was of significance relevance to a claim of being at risk as a failed asylum seeker per se.

47. It was a fair point that there was no systematic evidence about the problems arising for returnees who had been found to be in breach of the exit regulations. Ms Enayat was aware of no more than three or four cases scattered over the years and no evidence of them or their circumstances. There was only one case she knew of personally, in 1988. There was no evidence that failed asylum seekers per se were at risk. The two examples cited were different from this case and from people returned as failed asylum seekers per se. The former Australian case involved a Christian and the latter had criticised the regime while in Australia allegedly. There was the point as regards the Amnesty case that the detention could be politically motivated. This was of relevance to the weight to be attached to Ms Enayat's report since the body of the report had misquoted the Amnesty International report.

48. In light of the Adjudicator's credibility findings the appellant had not been found to be a lesbian and there was no record of lesbian activity. She would return with no record of any interest in her including lesbianism. That was not reasonably likely to come to light but in any event being a lesbian was not a crime. It would be very odd if she admitted it and indeed odd if she was questioned about it also.

49. It was unclear how the authorities would know about her sisters in Sweden or her sister in the United Kingdom. There was no information as to why the sisters in Sweden had been granted refugee status so no adverse connotations could be made. The situation of the sister in the United Kingdom was not a particularly important

consideration. The fact that she had come on the basis of adultery did not make it likely that anyone would hold this against the appellant. As regard the Hijab point, Ms Enayat had said that this would not be a problem while done in the west. As regards whether she adopted the same attitude on return, there was no sufficient evidential basis to make that a factor, alone or cumulatively, and it was not by itself a persecutory requirement. So, even if she returned and would not wear the Hijab she would not be at risk.

50. By way of reply, Mr Khubber argued that the Tribunal could draw a reasonable inference by way of speculation as to what could be seen to happen. There was little concrete evidence about the situation in Iran. Neutral investigators regarded it as a closed society. Reasoned speculation was what was needed and concrete examples were not required. It was a matter of reasonable inference. Difficulties in collating information did not preclude the claim being made out. It was clear that Iran violated its human rights obligations. The Hijab was not critical but was part of the cumulative effect. The point concerning her sister was the risk of association with her and the other absent sisters. Investigation would reveal absence. Her lesbianism could be exposed on return. It was part of the overall context. The decision of the Tribunal in Rasti [2002] UKIAT 02598 should be borne in mind.

51. In the light of our previous findings, the issue before us essentially is as set out in the grounds of appeal, as to whether the appellant faces a risk on return to Iran as a woman who has left the country illegally, as someone who does not prescribe to the Hijab, and is at risk on account also of her relationship to her three sisters, all of whom have been granted refugee status, one in the United Kingdom and two in Sweden, and therefore as a failed asylum seeker together with these additional factors, she is at risk on return.

52. We have had the benefit of reading Ms Enayat's report together with her evidence in connection with the relevant matters arising from that report. We bear in mind the fact that the appellant has been in the United Kingdom since 23 October 2000, having left Iran it seems on 11 October 2000, and in this regard as a further risk factor as contended by Ms Enayat is the fact that she has been out of Iran for over 3½ years.

53. In her report Ms Enayat deals with the penalties a failed asylum seeker might face and first of all considers the situation where there has been a violation of exit regulations which we think is common ground is the situation in this case. She notes the absence of any systematic evidence on the applications of the laws concerning the violations of exit regulations. The Canadian Immigration and Refugee Board documents suggest that fines only are applied. Ms Enayat criticises that document

on the basis that it provides generalisations offered orally by two specialists on Iran, one based in England and one in France, however, and contends that it is unclear whether the specialists refer to announced government policy concerning those who leave the country illegally, the formal statutory penalties for this kind of violation or documentation that they do not cite. It has been suggested that the age of this document is a relevant factor also.

54. We would find it surprising if two people described as specialists would simply have repeated announced government policy or formal statutory penalties but would rather, as indeed Ms Enayat has, be expected to give their opinion on what actually happens. We do not consider that this evidence is properly subject to the criticisms that Ms Enayat makes. Otherwise, Ms Enayat cites a recent Amnesty International Urgent Action Notice which is annexed to her report concerning thirteen men arrested at Tehran Airport in June 1992 who were 'reportedly held in connection with passport and visa violations'. The annexed report makes it clear that their arrests may have been political motivated, though as Mr Blundell pointed out, for whatever reason, this clause was omitted from the main body of Ms Enayat's report. We accept that this is most likely to have arisen as a consequence simply as a mistake on the part of Ms Enayat, but it is a salutary reminder of the extreme care that has to be exercised in preparing expert reports in order that the full picture is provided. Given the suggestion that the arrests may have been politically motivated, is not the case with regard to the appellant before us, we see this as being a point of limited relevance.

55. Ms Enayat also draws attention to an item which recently appeared 'The Age' an Australian newspaper, in April 2002. This concerned two people who had failed to be granted asylum in Australia and were returned to Iran. The former, a Christian convert, said that since returning home he had been exiled by his family and his phone had been tapped and his movements monitored and he had been prevented from obtaining work or a passport. Although there is clearly therefore a differential factor between his case and the appellant's, in any event, what happened to him appears to fall some way short of amounting to a breach of his human rights. The other man interrogated was interrogated for six hours at the airport on arrival, and was ordered to appear before a Revolutionary Tribunal which meets in secret. He said that he had been asked to justify a criticism he had made of the Islamic regime while seeking asylum in Australia as well as facing charges of leaving the country illegally. Clearly the former factor is different from the case before us, and of course it is not known what happened subsequently to this person.

56. Ms Enayat considered that anyone who had been away from Iran, having left illegally for some time, was at risk of interrogation with quite a high risk of torture or maltreatment. On the Adjudicator's findings it is clear that the appellant was not known to the authorities to be a lesbian and therefore that risk factor disappears. Ms Enayat considers that it was also the case that if the appellant's family had a political background and perhaps criminal records, and had obtained asylum abroad, it could add to the authorities' interest in the appellant.

57. It is the case, however, that as regards the appellant's sister in the United Kingdom, she appears to have left Iran on account of fears of reprisal as a consequence of committing adultery, and that we consider can only properly be regarded as involving an interest specific to her and not carrying any implications for other members of her family. As regards the two sisters in Sweden, nothing is known of the basis upon which they left Iran. As a consequence, we can see no evidence to indicate that the appellant would face any additional risk factor on account of her relationship with her sisters. The most that might be known is that four people with the same surname have all left Iran, although we have not been shown evidence to indicate that the authorities would be aware of that, but even if they were, we do not consider in the light of the lack of evidence concerning the activities of the sisters while in Iran other than the sister who committed adultery, that she faces risk on that account. We should add that we see it as entirely speculative that the appellant might admit to being a lesbian even if she is a lesbian. It is true that the Adjudicator did not specifically find that she was not a lesbian but rather made findings concerning what she claimed had happened to her on account of being a lesbian. We accept that no finding was made on this point, but we consider it, as we say, that it is speculative to suggest that she might at some stage if questioned reveal that she is a lesbian.

58. As regards what treatment she might face, Ms Enayat very candidly stated that nothing very specific could be said but there was no concrete evidence. She had become aware over the years of three or four cases where people had returned to Iran and been killed. She knew of one case from her personal experience, being the brother of a friend, in 1988. We know nothing about the histories of these people. It is therefore impossible for us to conclude from these few cases over a number of years that any real risk to the appellant of similar treatment can be identified.

59. Ms Enayat did not go into any detail as to the ways in which risk to the appellant might be augmented by the duration of her absence from Iran. We consider that that has to be seen in the light of the other evidence concerning risk rather than being a factor that per se gives rise to any real risk. Equally is the situation of her reluctance to wear

the Hijab. That by itself cannot properly be said to be a risk factor but again this is a matter to be placed cumulatively in the balance, as Mr Khubber invited us to do.

60. Ms Enayat also candidly said that she could not say how great the risk was to the appellant as a single woman who had violated the exit regulations which she seems to have regarded as the essential matter giving rise to risk. She could not quantify the degree of risk. There is documentary evidence about Iranian prisons and their poor quality and treatment of detainees. Of course it is far from the case in our view that it has been shown that the appellant would be subjected to imprisonment. It may well be that she would be stopped and questioned as a consequence of her having been out of Iran for several years and having left in breach of her exit violations, the latter point which would on its own, we consider, be more likely than anything else to result in a fine. A period of questioning can no doubt not be ruled out, but we consider that the evidence that she would be ill-treated in such a manner as to give rise to an Article 3 breach of her human rights is excessively speculative. We do not consider that it can properly be extrapolated from the general poor reputation of the Iranian state for human rights protection that there is a specific risk to this person with her history as found by the Adjudicator on return to Iran. No doubt Mr Khubber is right to contend that reasoned speculation is necessary in a case of this kind, but at the same time we remind ourselves that what has to be shown in such a case is a real risk of breach of the appellant's human rights rather than fanciful speculation arising from generalisations about the poor human rights record of the Iranian state.

61. Taken as a whole, we consider that the case is not made out. Specifically we do not consider that the appellant as the sister of three women who have obtained asylum elsewhere, who has been out of Iran herself for over 3½ years, who left Iran in breach of regulations and is reluctant to wear the Hijab, is a person who faces a real risk of ill-treatment giving rise to a breach of her human rights on return to Iran. In this regard we should add that we do not consider there to be a real risk of breach of her Article 8 rights. The Adjudicator found that she had not established that she has ever had a lesbian relationship. No arguable risk on that account therefore arises.

62. This appeal is dismissed.