EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 56
XA83/17

Lady Paton
Lord Drummond Young
Lord Malcolm

OPINION OF THE COURT

delivered by LADY PATON

in the appeal

by

BEHNAM VEISI

Appellant

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Appellant: Irvine; Drummond Miller LLP (for Quinn Martin & Langan Solicitors, Glasgow)
Respondent: Pugh; Office of the Advocate General

22 August 2018

Introduction

[1] The appellant is a citizen of Iran. He was born on 14 April 1989. He is a Sunni Muslim of Kurdish ethnicity. He holds a Higher Diploma in Industrial Electricity and a BA in Power Engineering, both obtained in Iran. He arrived in the UK on 5 November 2015, having travelled through Greece, Croatia, Hungary, Austria, Germany and France. He seeks asylum in the UK on the basis that he is at risk of persecution as a result of his ethnicity, religion, and

political opinion.

[2] The appellant's claim for asylum was refused by the Secretary of State on 4 May 2016. An appeal to the FTT was dismissed by a decision dated 23 August 2016, promulgated on 25 August 2016. An appeal to the UT was also unsuccessful in a decision dated 14 November 2016, issued on 16 November 2016. The appellant now appeals to the Court of Session. Leave to appeal was granted on 28 September 2017.

The First Tier Tribunal (FTT)

[3] Having heard the evidence, including the appellant's evidence that he refrained from frequent worship at the Shia mosque because he was concerned for his safety on the basis that expressing ideas which were different to those of the Shia Imam would result in being questioned and followed up (paragraph 35 of FTT's decision), and also his evidence that he was scared to become involved with Kurdish political parties due to the risk of execution (paragraph 55), the FTT made the following findings-in-fact, paragraph references being to the decision of 23 August 2016:

(i) The appellant is Iranian, a Sunni Muslim, of Kurdish ethnicity (paragraph 31).

(ii) The appellant was not involved in any political or religious activities in Iran which would have brought him to the attention of the Iranian authorities. He had not come to the attention of the Iranian authorities prior to leaving Iran (paragraphs 32 and 57-58).

(iii) Similarly, the appellant was not involved in such activities after coming to the UK (paragraphs 33 and 59).

(iv) The appellant was a practising Muslim and, when in Iran, attended the mosque approximately twice per month (paragraph 35).

(v) The appellant was not prevented from practising his faith on a day-to-day basis in Iran. He was able to pray at home five times a day (paragraph 36).

(vi) Kurds in Iran face institutional discrimination (paragraph 39, based on objective

country information).

(vii) Based on the appellant's Kurdish ethnicity, any discrimination to which he may have been subjected was not sufficient to amount to persecution (paragraphs 39 and 40).

(viii) Those who become or are perceived to be involved in Kurdish political activities in Iran are likely to be at risk of persecution (paragraph 44, based on objective country information).

(ix) The Iranian authorities have little tolerance for anyone promoting the Sunni religion (paragraph 45, based on objective country information).

(x) If the appellant were to involve himself in political activities relating to perceived discrimination against the Kurdish people, or if he was perceived to support separatism, he would be at risk of persecution from the Iranian authorities. Further, if the appellant were to undertake activities relating to the promotion of the Sunni Muslim religion he would be at risk of persecution from the Iranian authorities (paragraphs 46 and 50).

(xi) While the appellant has a political opinion in relation to the Iranian government's treatment of Kurdish people in Iran and is probably a supporter of the Kurdish cause, there is no evidence which suggests that he is a member of any political party, or that he has been involved in any political activities (paragraph 49).

(xii) The appellant did not flee Iran because of a well-founded fear of being persecuted due to his political and religious views (paragraph 54).

(xiii) The appellant passed through safe countries before he reached the UK (paragraphs 61-62).

[4] In paragraphs 48 *et seq*, the FTT took into account the guidance given in *HJ (Iran)* v *Secretary of State for the Home Department* [2011] 1 AC 596, a case concerning homosexuality but accepted as being equally applicable to cases involving religion and political opinion (*RT (Zimbabwe)* v *Secretary of State for the Home Department* [2013] 1 AC 152).

[5] In paragraphs 63 to 69 and in the final paragraph, the FTT concluded:

"63. If the Appellant is returned to Iran, I find that he would continue to live his life in the way that he did prior to leaving Iran. He would continue to practise his faith by attending the mosque occasionally and by praying at home. I do not find that he would undertake any other activities involving the promotion of the Sunni religion of a kind which would bring him to the attention of the Iranian authorities. He may continue to discuss his views occasionally amongst friends.

I also do not find, if the Appellant returned to Iran, that he would involve himself in Kurdish political activities.

64. I do not find that the Appellant would continue to live in this way in Iran as a result of fear that, if he did involve himself in political or religious activities, he would be persecuted. I find that he would continue to live this way as, while he holds political and religious views, these are not so strong that he feels the need to become involved in activities promoting his particular political or religious views.

65. I find that the Appellant would continue to live the way he did in Iran prior to coming to the UK as a matter of his own choice, as opposed to the fact that if he did undertake those activities he would be at real risk of persecution.

66. In SSH and HR (illegal exit: failed asylum seeker (CG) [2016] UKUT 308 (IAC) the Upper Tribunal held that 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 account of having left Iran illegally 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. The Appellant left Iran on his own passport so has not exited Iran illegally. He may be questioned on return to Iran depending on the documentation he has on return e.g. if he was returned on a *laissez passer*. The Appellant was of no interest to the Iranian authorities when he left. Given his lack of sur place activities, he is unlikely to be of any interest to the Iranian authorities should he be returned. The Appellant does not fit the profile of someone who would be reasonably likely to be perceived by the authorities as a dissident or questioned about his political or religious views. While the appellant may be questioned there would be no concerns arising from past activities in Iran or activities in the UK and so he would not be at risk of further questioning, detention or ill-treatment.

67. If the Appellant returned to Iran, he would not be required to conceal his religion, nor would he be required to conceal his ethnicity as a Kurd. As he would be of no interest to the Iranian authorities on return, he would not be likely to be asked about his political opinions and therefore would not require to lie and pretend that he was happy with the lot of the Kurds.

68. For these reasons, I do not find that the Appellant is at a real risk of being persecuted by the Iranian authorities due to his political and religious views. Considering all the evidence in the round, even having regard to the low standard of proof applicable, I do not find that the Appellant has shown that he has a well-founded fear of persecution for a Refugee Convention reason.

69. For the same reasons I do not find that the Appellant would be at risk of death contrary to Article 2 or at a real risk of torture or inhuman or degrading treatment or punishment contrary to Article 3 if he returned to Iran. The appeal

is therefore dismissed under Articles 2 and 3 of the ECHR

Notice of Decision

The appeal is dismissed on asylum grounds.

The appeal is dismissed under Articles 2 and 3 of the ECHR.

I was not asked to make an anonymity direction in this case and I can see no reason for doing so."

[6] The appellant appealed to the UT.

The Upper Tribunal (UT)

[7] On 16 November 2016, the UT refused the appellant's appeal against the FTT's decision. The UT's determination was as follows:

"1. The appellant appeals against a determination by First-tier Tribunal Judge Mays, promulgated on 25 August 2016, dismissing his appeal against refusal of asylum. The submissions on his behalf by Mr Byrne were along the lines of the grounds.

2. Ground one is that the judge stated erroneous and confusing thresholds for the risk of persecution of a Kurdish Sunni Muslim in Iran, suggesting that the threshold might be promotion of religion or of Kurdish rights, whereas risk may arise from mere peaceful expression and association.

3. Ground two is that the judge failed to consider the appellant's explanation that he was scared to take part in political activities in the context of the principle established in *HJ (Iran) and HT (Cameroon) v SSHD* [2010] UKSC 31.

4. Ground three maintains that the judge thought that an individual's manifestation of belief or ethnic identity required to be radical for protection to be engaged, a misconception of the principle in *HJ and HT*.

5. Ground four criticises paragraph 60, where the judge concluded that the fact that the applicant 'had not been involved in any political or religious activities in the UK seriously undermines the credibility of his claim to be someone who wishes to actively express his political and religious dissent'. That finding is said to leave out of account that while in the UK the appellant is not subject to the strictures of the Iranian regime, so that there is no imperative on [him] to challenge the authority of the state, and the tribunal again posits too high a

threshold to give rise to harm, being public activism.

6. The grounds as a whole are said to raise a general point of importance in relation to the threshold at which persecution may arise for Kurds and Sunni Muslims.

7. Mr Byrne referred to paragraph 50 of the decision:

> … someone who is a political activist or who openly espouses the Sunni religion and proselytises against the tenets of Shia Islam would be liable to persecution…

8. He said this showed the threshold being set too high and although the judge did refer elsewhere to a lower standard, in effect he applied the higher one. It was nothing to the point that the appellant was inactive in the UK, there being nothing to oppose. The judge reached his overall conclusion for bad reasons and the case should be reheard, either in the FtT or in the UT.

9. Mr Matthews pointed out that the judge found at paragraph 63 that the appellant in Iran would live as he did previously, attending his mosque occasionally, praying at home, doing nothing to bring himself to the attention of the authorities and not involving himself in Kurdish political activities. Mr Matthews said that the nub of the decision followed at paragraphs 64 and 65:

> I do not find that the appellant would continue to live in this way … as a result of fear that if he did involve himself in political or religious activities he would be persecuted … he would continue to live in this way as while he holds political and religious views these are not so strong that he feels the need to become involved in … promoting his… political or religious views.
>
> I find that the appellant would continue to live the way he did … as a matter of his own choice as opposed to the fact that if he did undertake these activities he would be at real risk…

10. Mr Matthews said those conclusions followed the principles of *HJ and HT* and were justified both by reference to the background evidence and to the facts of the appellant's case.

11. I prefer the submissions for the respondent, and I find no error of law in the decision.

12. The grounds take paragraph 50 out of context, and they do not fairly reflect the decision as a whole. The judge's statement at paragraph 50 is the correct result of examination of the background evidence. It is not a statement of what the appellant must prove to make his case.

13. The judge goes on to conduct an analysis of the appellant's personal situation within the principles of *HJ and HT*; in particular, the approach explained by Lord Rodger at paragraph 82, although not directly cited. The judge's

conclusions at paragraphs 64 and 65 are exemplary in terms of that authority.

14. The determination of the First-tier Tribunal shall stand.

15. No anonymity direction has been requested or made."

The appellant now appeals to the Court of Session. The question of law posed is in the following terms:

> "Whether it is relevant, in assessing future risk on return in the context of a claim of persecution based on concealment of political and religious belief, to have regard to the absence of political and religious activity in the country of refuge, and if it is relevant, what other factors also require to be taken into account."

Appeal to the Court of Session

Submissions for the appellant

[8] Counsel for the appellant submitted that the FTT had erred in law, and that the UT similarly erred by sustaining the decision of the FTT.

[9] The FTT had erred by:

1. Taking into account an irrelevant factor, namely the absence of "domestic activity" (ie activities in the UK connected with the appellant's political opinion and/or religious beliefs).
2. Failing to take into account a relevant factor, namely the risk of surveillance of the appellant in the UK were such an activity to be carried out there.

[10] In relation to the first matter, counsel submitted that there could be a spectrum of conduct. There were many ways in which political opinion and/or religious belief could be manifested, without necessarily taking part in a demonstration or joining a political party. The essential question was the test of "future risk", which was the relevant test in all asylum appeals.

[11] Counsel advanced five propositions. First, the issue in asylum cases was what might

happen in the future (future risk). Secondly, as set out in *HJ (Iran)* v *Secretary of State for the Home Department* [2011] 1 AC 596, it was no answer to say that a person could suppress or conceal the relevant aspect of his identity in order to avoid persecution. Thirdly, the European Convention on Human Rights protected a wide spectrum of conduct, whether public or private. Fourthly, entitlement to protection did not depend on the value placed by the individual in question on the right concerned. Fifthly, the assessment of an asylum claim was an individual one which required the taking into account of all relevant facts as they related to the country of origin. Those propositions were vouched in *HJ (Iran)*, Lord Hope at paragraphs 34 to 36, and Lord Rodger at paragraphs 61 to 63; and *RT (Zimbabwe)* v *Secretary of State for the Home Department* [2013] 1 AC 152, Lord Dyson at paragraphs [45] and [51], Lord Kerr at paragraph [74]. The gradations of conduct were infinite and covered a wide spectrum.

[12] In the present case, the FTT had erred when assessing future risk by having regard to the supposed failure of the appellant to manifest his religious and political beliefs in a public manner (paragraphs 56, 58 and 59). The true issue was not that the appellant was not "speaking out" in the UK or Iran, but the reason underlying his not speaking out. It was accepted that the appellant had to establish that the reason for his not speaking out was a fear of persecution (and not, for example, natural apathy); but public manifestation was not necessary. The overarching question was whether the appellant would be at risk in the future if he returned to his country of origin. As paragraph 44 of the FTT's decision made clear, referring to the Country Guidance, there was a risk that even actings other than demonstrations could give rise to a risk of persecution. It was irrelevant to have regard to the absence of conduct actively promoting ethnicity and religious beliefs in the UK.

[13] As for the second matter, the FTT had left a relevant factor out of account, namely the

fact that there might be surveillance of Iranians while they were in the UK and not subject to the strictures of the regime in Iran.

[14] The appellant's argument did not mean that all Sunni Kurds in Iran were entitled to asylum in the UK. An applicant for asylum had to establish two matters: (i) the existence of opinion and/or belief; and (ii) a fear of persecution being the material reason for not voicing that opinion and/or belief. The reason underlying the asylum claim was not simply being an ethnic Kurd and being a Sunni Muslim: it was the risk attaching to the expression of that ethnicity and/or religion which determined his claim for asylum.

[15] The FTT, having misdirected itself in law, was not entitled to make the findings-in-fact that it did at paragraphs 64 and 66 of its decision.

[16] As a result of the series of errors identified, the FTT's decision could not stand. The decisions of the FTT and the UT should be quashed, and the appellant's case remitted to either the UT or the FTT.

Submissions for the respondent

[17] Counsel for the respondent submitted that the appeal should be refused. Neither the FTT nor the UT had materially erred in law in reaching a decision. It was accepted that the appellant was a Sunni Muslim of Kurdish ethnicity; that he had a political opinion for the purposes of the Refugee Convention; and that he held religious views for the purposes of that Convention. But the question how the appellant would live on his return to Iran was a matter of fact, for the FTT to decide, taking into account the guidance given in *HJ (Iran).* The exercise to be undertaken required the decision-maker to assess why the existence of a status, opinion, or belief would (or would not) create risk. If the status etc were found not to create a risk because it would not become known, then the FTT had to assess the reason for its not

becoming known. The reason might be fear of persecution: that would justify an application for asylum. But if the reason was simply that this was the way in which the individual chose to live, that would not justify a grant of asylum (paragraph 82 of *HJ (Iran)*).

[18] When conducting the exercise outlined above, the FTT had to take objective facts into account, including whether the appellant had engaged in certain conduct before leaving Iran, and/or after leaving Iran. In so doing, the FTT was not assessing past risk, but was assessing the likelihood of future risk. Such an objective fact could not be regarded as irrelevant to the FTT's consideration of the evidence. It was a matter for the decision-maker how much weight to give to an objective fact.

[19] In the present case, the FTT properly weighed the evidence, taking *HJ (Iran)* into account. The FTT assessed how the appellant was likely to live in the future, and why. The appellant's lack of previous political or religious engagement was an objective fact which was central to that assessment. The weight to be given to that objective fact was a matter for the FTT. No error had occurred, either on the part of the FTT or the UT.

[20] In relation to the question of surveillance in the UK, there was nothing in the FTT's decision to suggest that the existence of any surveillance was a factor in the appellant's decision not to participate in political activity. Moreover the extent of judicial knowledge of surveillance in the UK was limited to "attempts to identify persons participating in demonstrations outside the Iranian Embassy in London" (*BA (Demonstrators in Britain – risk of return*) (*Iran CG*) [2011] UKUT 36). The appellant had not participated in any such demonstrations. Again, there had been no error on the part of the FTT or UT.

Discussion

[21] The Supreme Court has acknowledged the difficulties faced by first tier tribunals in

their fact-finding function in immigration and asylum matters. In *HJ (Iran)* v *Secretary of State for the Home Department* [2011] 1 AC 596, Lord Walker of Gestingthorpe observed, at paragraph 98:

> "I respectfully concur in para 82 of Lord Rodger JSC's judgment, setting out the approach to be followed by tribunals in cases of this sort. It involves … an 'essentially individual and fact-specific inquiry'. It will often be a difficult task since much of the relevant evidence will come from the claimant, who has a strong personal interest in its outcome."

[22] In the present case, the FTT had to decide several questions of fact, including *inter alia* (i) the way in which the appellant had lived his life in Iran prior to coming to the UK, and his reason(s) for doing so; (ii) the appellant's motive for leaving Iran; (iii) the way in which the appellant had conducted himself after leaving Iran; (iv) the way in which the appellant would live his life if returned to Iran, and his reason(s) for doing so; (v) whether the appellant had genuine grounds to fear persecution. The FTT heard all the evidence. The tribunal then heard submissions, including references to *HJ (Iran)*. Thereafter the tribunal weighed up the evidence and made findings-in-fact.

[23] The findings-in-fact made by the FTT included the following. The appellant may have been discriminated against in Iran (resulting in, for example, difficulty obtaining employment), but he had not been persecuted there (paragraphs 39 and 40). In fact, he had never come to the notice of the authorities (paragraphs 32, 57-58, and 66). The appellant's departure from Iran had not been the result of a well-founded fear of persecution due to his political and religious views (paragraphs 54 to 62). Rather his primary motive was his desire to find employment (paragraph 62). Once in the UK, the appellant had not taken part in any political or religious activities there. He had done nothing in the UK which would bring him to the attention of the Iranian authorities (paragraph 33). If the appellant were to return to Iran, he would continue by his own choice to live there in the way he had done before his

departure (paragraphs 63 to 65). The appellant had no genuine grounds to fear persecution (paragraphs 53, and 68 to 69).

[24] In making those findings-in-fact, the FTT was in our view entitled to take into account all the circumstances of the case as elicited in the evidence, including how and why the appellant had conducted his past life both within and outside Iran. Past behaviour can be a relevant predictor of future behaviour, and the fact that the appellant had not been involved in religious or political activities after his arrival in the UK was, in our view, a relevant factor (although obviously not a determinative one) when assessing the likelihood of future risk of persecution (cf the approach of the immigration judge noted without criticism by Lord Dyson at paragraph 5 of *RT (Zimbabwe),* and the *dicta* of Lord Walker of Gestingthorpe at paragraph 88 of *HJ (Iran)).* Our view, expressed above, is fortified by the fact that article 4(4) of the Qualification Directive expressly directs the tribunal to look to the past – without any geographical restriction – when assessing future risk ("The fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated".) Further, the FTT was entitled to form a view about the appellant's credibility, and was entitled to accept parts of his evidence but to reject other parts. In this case, the FTT found that the appellant's credibility in stating a wish actively to express his political and religious dissent in Iran, when he had never done so before, had been seriously undermined by the fact that he had not been involved in any political or religious activities after arriving in the UK and finding himself free of the strictures of the Iranian regime (paragraph 60 of the decision). The FTT also considered that his credibility had been damaged by his travelling through several safe countries without seeking asylum at

the first opportunity (paragraph 62). In our opinion the FTT was entitled to take these views. Also it seems to us that the FTT's views on the appellant's credibility must inevitably have affected the tribunal's assessment of the reason why the appellant had lived his life in Iran in the way he had (paragraphs 64 and 65).

[25] Finally, the FTT was also entitled to take into account available objective country information.

[26] The weight to be given to the various factors placed before the FTT was a matter for the tribunal. It is possible that another tribunal might have placed more or less weight on a particular factor than the FTT did in this case, but matters of weight are for the particular tribunal hearing the evidence.

[27] The FTT then referred to, and applied, the authoritative guidance given by the Supreme Court in *HJ (Iran).* Passages in that case of particular relevance include the following:

> *Lord Hope of Craighead*
>
> "17 … in cases where the fear is of persecution for reasons of religion or political opinion, it may be necessary to examine the nature and consequences of any activity that the applicant claims he or she may wish to pursue if returned to the country of nationality … The question is, what will the applicant actually do, and does what he or she will in fact do justify the fear complained of …
>
> 35 … The question is how each applicant, looked at individually, will conduct himself if returned and how others will react to what he does … If this [i.e. how he behaves] will simply be … for cultural or religious reasons of his own choosing … his claim for asylum must be rejected …"
>
> *Lord Rodger of Earlsferry*
>
> "78 … In short, what is protected is the applicant's right to live freely and openly as a gay man. That involves a wide spectrum of conduct …
>
> 82 … If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself *why* he would do so. If

> the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, eg, not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay. If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution …"
>
> *Lord Walker of Gestingthorpe*
>
> [88] The question [whether there is a serious risk that on return the applicant would be persecuted for a Convention reason] is not directed at ascertaining past facts (though findings as to events asserted by the claimant to have happened in the past will always be relevant, and often crucial). Instead the question is directed at predicting what would or might happen in the future if (contrary to his wishes) he is returned to his own country …"

[28] Ultimately, applying the guidance in *HJ (Iran)* to the findings-in-fact made by the FTT, the tribunal was, in our view, entitled to find that:

> " 64 … [the appellant] would continue to live [the way he had] as, while he holds political and religious views, these are not so strong that he feels the need to become involved in activities promoting his particular political or religious views.
> 65 … the appellant would continue to live the way he did in Iran prior to coming to the UK as a matter of his own choice, as opposed to the fact that if he did undertake those activities he would be at real risk of persecution."

[29] As for the issue of possible surveillance in the UK, we agree with counsel for the respondent that, without the benefit of evidence on that matter (and indeed without the benefit of any reference to surveillance by the appellant), the extent of judicial knowledge concerning surveillance in the UK is limited to "attempts to identify persons participating in demonstrations outside the Iranian Embassy in London" (*BA (Demonstrators in Britain – risk on return*) (*Iran CG*) [2011] UKUT 36). The appellant has not participated in any such demonstrations. Nor is there anything in the decision of the FTT to suggest that the existence

of any suspected surveillance was a factor in the appellant's decision not to participate in political activity.

[30] It follows from our conclusions set out above that we have not identified any error of law on the part of either the FTT or the UT. In particular, we do not accept that there was any misdirection in law in the FTT's reasoning, or that irrelevant factors were taken into account, or that relevant factors were left out of account, or that conclusions were reached which no fact-finding tribunal, properly instructed, could have reached. Furthermore we agree with the observation made by the UT that the FTT's statement at paragraph 50 of the decision is "the correct result of examination of the background evidence. It is not a statement of what the appellant must prove to make his case".

Decision

[31] For the reasons given above, we answer the first part of the appellant's question of law (set out in paragraph [7] above) in the affirmative. In relation to the second part, we confirm that each case must be decided on its own facts: cf the *dicta* of Lord Hope in *HJ (Iran)* at paragraphs 17 and 35:

> "17 … The question is what will the applicant actually do, and does what he or she will in fact do justify the fear complained of? …
>
> 35 … This brings me to the test that should be adopted by the fact-finding tribunals in this country. As Lord Walker of Gestingthorpe JSC points out in para 98, this involves what is essentially an individual and fact-specific inquiry … The question is how each applicant, looked at individually, will conduct himself if returned and how others will react to what he does …"

[32] In the result, we refuse the appeal.