Upper Tribunal

(Immigration and Asylum Chamber) Appeal Number: PA/03015/2016

THE IMMIGRATION ACTS

Heard at Manchester, Piccadilly	Decision & Reasons Promulgated
On the 14th September 2017	On 19th September 2017

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MR SAMI SALEHZADA

(Anonymity Direction not made)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Dr Mynott (Counsel)

For the Respondent: Mr McVeety (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Malik promulgated on the 3rd January 2017, in which she dismissed the Appellant's asylum appeal.

2. The full reasons for Judge Malik's decision are a matter of record and are set out within her decision and are therefore not repeated in their entirety here, but in summary, Judge Malik did not accept that the Appellant had been approached by 3 KDPI men wearing traditional Kurdish clothes and who were carrying Kalashnikovs with hand grenades around their belts, during the daytime. Judge Malik did not accept that the Appellant had been asked by them to show them the way to the Al-Watan village, on a route where they would not be seen by anybody. Judge Malik also did not accept that he had then taken them to the Al-Watan village, but on walking back to Mirawa the Appellant was approached by Mala Kiram, who was said to work as a Jash man for the Iranian authorities. Judge Malik also did not accept that if the Appellant's own father had been subjected to ill-treatment by the authorities as claimed for his perceived KDPI involvement and did not accept that if there had been pre-existing animosity between the Appellant and Mala Kiram that the Appellant would have returned to his uncle's home in his home village, or that if he did so, he would not have disclosed immediately to his uncle what had happened to him. The Judge therefore found the Appellant's account to be incredible and did not accept that the Appellant had experienced any difficulties in his home country or that he would be at risk upon return. She found that the Appellant's claim to have left Iran illegally not to be true and did not accept that either as a result of being a failed asylum seeker, irrespective as to whether he had left illegally or not, or as a result of his ethnicity as a Kurd that he would be at any additional risk. She found that he could contact his family in Iran to obtain ID documentation such that a Laissez Passer could be obtained in due course. She therefore rejected the Appellant's asylum appeal and on the same reasoning dismissed the Appellant's appeal on humanitarian protection and Human Rights grounds.

3. The Appellant now seeks to appeal against that decision for the reasons set out within the Grounds of Appeal. This again is a matter of record and is therefore not repeated in its entirety here, but in summary, it is argued that the judge erred in finding that the Appellant was "an incredible witness" and that his account was "incredible". It is argued that the judge has not taken account of the country evidence before her, with reference to Kurdish

opposition in general and the KDPI in particular. It is said that then judge is using "incredible" as a synonym for "implausible", in circumstances where the Respondent's refusal letter alleged no inconsistences within the Appellant's account and the judge did not find any internal inconsistences. It is said that she made no reference to any country or other evidence which could entitle her to draw the inferences made and that following the case of HK v Secretary of State for the Home Department [2006] EWCA Civ 1037, in asylum cases even though an Appellant's story may seem inherently unlikely that does not mean it is untrue and the ingredients of the story, and the story as a whole, have to be considered against the available country evidence and reliable expert evidence and other familiar factors such as the consistency with what the Appellant has said before, and with other factual evidence.

4. In the second ground of appeal it is argued that the judge materially erred by failing to consider material evidence and failing to make a finding on the material fact regarding the alleged past ill-treatment and the subsequent death of the Appellant's father. It is argued that the judge found that the Appellant would not be of interest to the authorities upon return as an undocumented Iranian national of Kurdish ethnicity, but that the judge failed to take account of the country evidence reporting an increased rate of executions, the majority of whom were Kurdish, and the resumption in February 2016 of armed resistance by the KDPI. It is argued that these are material errors.

5. Permission to appeal was originally refused by First-tier Tribunal Judge Froom on the 3rd April 2017, and thereafter, renewed grounds for permission to appeal to the Upper Tribunal were put in on the 19th April 2017, in which it was said that it remained arguable that the judge materially erred in respect of her findings that the Appellant was an incredible witness and that she had not taken account of the specific evidence regarding the Kurdish opposition in general and the KDPI in particular and that the finding that the account was incredible had to be considered against the available country evidence and that in the case of SSH and HR it was said that undocumented returnees "would have to engaged in the same process" and that even a person

returned to Iran on a Laissez Passer would be questioned and that the judge made an error in finding that there was no reasonable evidence to suggest that his ethnicity as a Kurd would place him at additional risk.

6. Permission to appeal was then granted by Upper Tribunal Judge McWilliam on the 11th May 2017 in which he found that it was arguable that the judge did not take into account the background evidence which was before her, as identified in the renewed grounds.

7. It was on that basis that the case came before me in the Upper Tribunal.

8. In reaching my decision I have fully taken account of the oral submissions made by Dr Mynott and by Mr McVeety. In summary, Dr Mynott repeated his submissions that the judge failed to consider the country evidence and erred in finding that the Appellant was an "incredible" witness and that she erred in finding that members of the KDPI would not walk around openly carrying Kalashnikovs and wearing hand grenades. He took me specifically to various paragraphs within the Country Information and Guidance on Iran: Kurds and Kurdish political groups from the 19th July 2016 contained within the Appellant's bundle, and referred me specifically to paragraph 5.2.10 which stated that:

"*Asharq Al-Awsat report in January 2016 that "Kurdish opposition sources in Iran have revealed yesterday that the executions carried out by the Iranian regime against the Kurds and other components are increasing annually, indicating that during the past 9 months, according to the Iranian calendar, Iran executed more than 750 people, the majority of whom were Kurdish*"".

He also referred to paragraph 7.1.4 which stated that:

"*In February 2016, Kurdish 24 reported that the KDPI announced in February that "they will resume armed resistance against Iran". KDPI's official Twitter account quoted the party's general secretary Mustafa Hijri making that announcement. "Last night [February 25th] a successful operation was*

carried out against an Iranian Basij military base in Majid Zan, in the city of Bukan" KDPI tweeted"

and he referred me to page 157 of the Appellant's bundle and the document entitled Refugee Documentation Centre (Legal Aid Board, Ireland), "Iran Treatment of Party Democratic Kurdistan Iran supporters/leaflet distributors" from 18th May 2016, and the penultimate paragraph on that page which read:

"*In May 2016 Business Insider states that: "The KDPI – a left-wing Kurdish nationalist group formed in 1945 – announced on 20th February 2016 that it was restarting its "armed resistance against the Islamic Republic of Iran" and claimed an attack against a Basij base in the village of Majid Khan. The group waged deadly insurgency against Iranian authorities from 1989 to 1996, after which it maintained a peaceful policy until it purportedly engaged Iranian troops in the fall of 2015" (Business Insider (5 May 2016) Iran is facing a "wide-scale armed uprising" as Kurdish insurgents have started targeting the Revolutionary Guard*".

9. He argued that the judge had failed to take specific account of that evidence in reaching her decision which he argued was relevant regarding the Appellant's credibility.

10. In respect of the second ground of appeal he argued that the Appellant would be at a real risk of persecution from the Iranian authorities as an undocumented national of Kurdish ethnicity and is at real risk of questioning in interrogation and the risks have increased over the past year or so. He said he was not questioning the finding of the judge that the Appellant's exit was not illegal, but said that was not determinative and that undocumented returnees face the same process and that the judge had failed to take account of the same paragraphs regarding risk upon return, which he said showed there was an elevated risk of return now for Kurds. However he conceded there was no direct evidence on the question of the treatment of Kurds upon return. He argued that the Country Guidance case of SSH and HR had not dealt specifically with the case of Kurds at paragraph 34 of the

Judgment, but argued that there had been a deterioration in the country conditions.

11. In his closing submissions on behalf of the Respondent, Mr McVeety submitted that the Country Guidance case of SSH did deal with the situation of people who were Kurdish as the lead Appellant there was Kurdish and they would not have returned him had he been at risk and that at paragraph 34 on page 67 of the bundle although the Tribunal had not been asked to consider the position of Kurds, the Tribunal had done so, given that one of the Appellants was a Kurdish national and the Tribunal said that there was no evidence to show that Kurds would be at risk, and that the evidence presented by the Appellant only showed that there had been a resumption of armed hostilities by the KDPI. He argued that this was not a reason to go behind Country Guidance.

12. In respect of the first ground of appeal, Mr McVeety argued that there was nothing in the background evidence sought to be relied upon to show that members of the KDPI would walk around in the open carrying Kalashnikovs or wearing hand grenades, and that if the KDPI wanted to operate under the radar, they would not walk around openly in an area where they were likely to be caught and that the judge's findings in that regard were open to her. He argued that it was open to the judge to find that they would not have been so brazen to walk about with guns, but then ask to take a secretive path so as not to come to the attention of anyone and that the judge was entitled to find there was an inconsistency in that regard. He argued that the judge made findings which were open to her on the evidence and that the evidence sought to be relied upon by the Appellant simply showed the resumption of armed hostilities and did not indicate the Appellant's account was credible.

13. Both parties agreed that if there was a material error of law the case should be remitted back to the First-tier Tribunal for a rehearing.

My Findings on Error of Law and Materiality

14. In his oral submissions, Dr Mynott argued that the judge had not taken account of 3 paragraphs of the background Country Information set out above, namely paragraphs 5.2.10 regarding executions carried out by the Iranian regime against the Kurds having increasing annually, paragraph 7.1.4 regarding the KDPI announcing in February that they would resume armed resistance against Iran and there having been a successful operation carried out in an Iranian Basij military base in Majid Zan, and page 157, in respect of the evidence regarding the restart of the armed resistance by the KDPI and the armed attack on the Basij basis reported by Business Insider.

15. However it is clear that each of those paragraphs contained within the Appellant's bundle have actually been marked with a highlighter within the bundle by Judge Malik, and although therefore she has not set out those paragraphs in her decision, I find that she has clearly considered the same, in reaching her decision. It is not incumbent upon a First-tier Tribunal Judge to set out every piece of evidence to which they have been referred in their decision unless that piece of evidence is specifically relevant to the findings that they are making. Even though that evidence showed that there had been a resumption of armed hostilities by the KDPI and the attack on a Basij base in the village of Majid Khan, and was part of the background, that evidence was not directly relevant to the judge's findings that it was incredible that the KDPI men wearing traditional Kurdish clothes would openly carry Kalashnikovs, with hand grenades around their belts during the daytime, even if they were in a predominantly Kurdish area due to the risk that placed them in if they had been observed by the authorities,. Nor was it directly relevant to her finding that if they did not fear attracting attention that they would have then asked to take a more discreet route from Mirawa to Al-Watan and asked the Appellant to act as their guide. Nor was it directly relevant to the judge's findings that the men who could not have known who the Appellant was when they approached him, such that they would declare their KDPI involvement to him and then when they had not further need of the Appellant's services merely let him return to his home village.

16. Nor was that background evidence directly relevant to the judge's findings at [21] and [22] that the Appellant would not have returned to his uncle's home thereby potential placing his uncle and family in danger and that he would not have told his uncle immediately what had happened. Although part of the background, I do not find that the evidence referred to by Dr Mynott, specifically impacts upon the findings by First-tier Tribunal Judge Malik in those regards. She has therefore clearly taken account of that evidence, but was not duty bound to repeat it, when making those findings.

17. However, even if I am wrong in that regard, I cannot see that Judge Malik would have made any different findings, given her reasoning between [20] and [22], even if she had specifically set out those paragraphs referred to by him in her decision, I find that the decision reached by her on those issues would have been the same, and for the same reasons, as the evidence produced by him did not impact upon that reasoning whatsoever. Even if she was therefore in error, which I do not accept, such error is not material.

18. Nor is there any merit in the Appellant's submission that the judge was wrong to describe the Appellant's account as "incredible". The judge in a well-crafted and clear decision has given adequate and sufficient reasons for her findings. Her findings regarding the Appellant's account being "incredible" in other words not being credible, were open to her on the evidence and she has given clear and adequate and sufficient reasons for those findings. If the judge had found the Appellant credible, she would have allowed the appeal. She did not find him credible, and did not accept his account, and has given clear, adequate and sufficient reasons for her findings. There does not need to be any inconsistency in the Appellant's account before a judge rejects that account as being incredible, as seemingly contended by the Appellant. Although inconsistency is something clearly the Tribunal will take into account, there does not have to be a specific inconsistency in the Appellant's own evidence, in order for the account to be rejected. The first ground of appeal therefore lacks merit.

19. In respect of the second ground of appeal, it is argued that the judge failed to take account of the evidence that being an undocumented Kurd would in fact place him at additional risk. In the case of SSH and HR (illegal exit: failed asylum seekers) Iran CG [2016] UKUT 00308 at [34] it was stated that it was not being suggested that an individual faced risk on return on the sole basis of being Kurdish but it was agreed that being Kurdish was relevant to how a returnee would be treated by the authorities. It was noted that the operational guidance note referred to the government disproportionally targeting minority groups including Kurds for arbitrary arrest, prolonged detention and physical abuse, but it was stated that no examples had been provided of ill-treatment of returnees with no relevant adverse interest factors other than their Kurdish ethnicity. The Upper Tribunal concluded that the evidence did not show risk of ill-treatment to such returnees, although they accepted that it might be an exacerbating factor of a returnee otherwise of interest.

20. The Judgment in SSH and HR, therefore did make reference to Kurdish ethnicity being an exacerbating factor for a returnee otherwise of interest, but not on the evidence before it, giving rise to a risk of ill-treatment in itself. In that regard, the Upper Tribunal's findings were part of the ratio, given that the Appellants in that case were of Kurdish ethnicity. As Mr McVeety correctly pointed out, the Upper Tribunal would not have allowed the Appellants to be returned, if being of Kurdish ethnicity of itself, created a real risk upon return.

21. Although Dr Mynott argued that there had been a deterioration in the condition for Kurds in the previous year, the paragraphs that he referred to in the Country Guidance, above, while indicating that there had been a resumption of hostilities, did not indicate that there had been any increase in the risk faced by a Kurdish failed asylum seeker, who otherwise was not of interest to the authorities. There would not have been an evidential basis for Judge Malik, even if she had fully set out the paragraphs quoted by Dr Mynott, to effectively go behind the Country Guidance case of SSH and HR, and the finding of the Upper Tribunal that "*We conclude that the evidence*

does not show risk of ill-treatment of such returnees, though we accept that it might be an exacerbating factor of a returnee otherwise of interest". There was no evidence before First-tier Tribunal Judge Malik to support the contention from Dr Mynott that Kurdish ethnicity, in itself, irrespective of whether or not they were undocumented or obtained a Laissez Passer would be at a real risk of persecution, upon return.

22. The Grounds of Appeal therefore do not reveal any material error of law and simply amount to a disagreement with the findings of the First-tier Tribunal Judge. I therefore dismiss the Appellant's appeal.

Notice of Decision

The decision of First-tier Tribunal Judge Malik does not reveal any material errors of law and is maintained. I dismiss the Appellant's appeal against that decision.

I make no order in respect of anonymity, no such order having been made by the First-tier Tribunal, and no such order having been sought before me.

Signed

RFMcGinty

Deputy Upper Tribunal Judge McGinty Dated 14th September 2017