



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA035022016

THE IMMIGRATION ACTS

Heard at Stoke on Trent
On 21 June 2017

Decision & Reasons Promulgated
On 03 July 2017

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

MD
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Howard, instructed by Fountain Solicitors
For the Respondent: Mr Bates, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have made this decision following a resumed hearing in the Upper Tribunal at Stoke on Trent on 21 June 2017. I found that the First-tier Tribunal had erred in law

such that the decision fell to be set aside. My error of law decision is dated 13 March 2017 and reads as follows:

“1. The appellant, MD, was born in 1989 and is a male citizen of Iran. He claimed asylum in the United Kingdom but his claim was rejected by a decision of the respondent dated 29 March 2016. He appealed to the First-tier Tribunal (Judge O’Rourke) which, in a decision promulgated on 26 September 2016, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. Granting permission in the Upper Tribunal, Judge Lindsley found that it was arguable that

The First-tier Tribunal did not consider material and the submissions put forward by the appellant ... that the appellant would be at risk on return as a Kurdish failed asylum seeker. Likewise it is clearly the case that the skeleton argument made a case that the applicant was entitled to succeed under paragraph 276ADE of the Immigration Rules so it was arguably inaccurate to say at paragraph 28 of the decision that no submissions were made regarding the appellant’s private life

3. In a Rule 24 response, which is dated 20 December 2016, the Secretary of State indicates that she does not oppose the appeal. Further, Judge Lindsley refused permission on the ground of appeal challenging the judge’s finding that the appellant would not face persecution on return as a failed asylum seeker or on the basis that he illegally exited Iran. Likewise permission was not granted in respect of the appellant’s sur place activities in the United Kingdom (which had been found by the judge not to expose him to the likelihood of real risk on return to Iran). In consequence, those sur place activities and circumstances in which the appellant came to leave Iran shall not be revisited at the resumed hearing nor will the judge’s findings at [24] that the appellant is not a member of the KDPI and the judge’s findings that the appellant had given an untruthful account of past events in Iran. For the avoidance of any doubt, those findings of the First-tier Tribunal Judge shall stand and the Upper Tribunal at the resumed hearing will only consider (i) whether the appellant would be at real risk on return to Iran as a Kurdish failed asylum seeker and (ii) whether the appellant is entitled to a grant of leave under paragraph 276ADE of HC 395 (as amended).

Notice of Decision

4. The decision of the First-tier Tribunal promulgated on 26 September 2016 is set aside. I have indicated at paragraph [3] above those findings of the First-tier Tribunal shall which stand and which shall not. The decision will be remade following a resumed hearing at Stoke-on-Trent before Upper Tribunal Judge Clive Lane on a date to be fixed. At that hearing, the Tribunal shall only consider the matters detailed in paragraph [3] above.”

2. I did not hear evidence from the appellant at the resumed hearing which proceeded by way of submissions only. I reserved my decision following the hearing.

3. The only issues which remain to be determined by the Upper Tribunal are those set out in my error of law decision at [3], namely (i) whether the appellant would be at risk on return to Iran as a Kurdish failed asylum and (ii) whether the appellant is entitled to a grant of leave under paragraph 276ADE of HC 395 (as amended). As regards the second issue, Mr Howard submitted that this fell entirely within the ambit of the asylum/ Article 3 ECHR appeal; he submitted that there was little to add beyond the submission that the appellant would face “significant obstacles” to his reintegration in Iran for the reasons advanced in support of his asylum protection claim.
4. In terms of evidence, there had been two developments since the previous hearing. First, the Tribunal has the benefit of a report prepared by Dr Emil Joffé who is currently a lecturer in the Department of Politics and International Studies at the University of Cambridge. Secondly, the appellant produced a “certificate” which purports to have been issued by the Democratic Party of Iranian Kurdistan (KDPI) from its Paris office on 12 March 2017 which “certifies that [the appellant] is a member of our party and that, because of the oppression exercised by the Islamic Republic of Iran against him, he is restrained to leave Iran. If he is returned to the country it would put his life in danger.” This item of evidence is in stark contrast to the finding (which has been preserved – see my error of law decision [3]) of the First-tier Tribunal that the appellant is not a member of the KDPI as he claimed. Considering the certificate in the light of the previous findings of the First-tier Tribunal I agree with Mr Bates’ submission that the certificate, whilst it may indicate that the appellant had become a member of the KDPI, he has done so since the promulgation of the error of law decision and entirely cynically, that is with a view to bolstering his asylum claim.
5. In the light of that finding, I have considered the submission made by Mr Howard relying upon the authority of *HJ (Iran) [2010] UKSC 31*). Mr Howard submitted that it would be likely that the appellant would be asked if he is a member of the KDPI upon return to Iran, that he could not be expected to lie under interrogation and that, by explaining that he was a member, he would expose himself to a risk of persecution. In response to that submission, I observe that, first, given that the appellant has not previously been known to the Iranian authorities for any reason, it is not reasonably likely that he will be asked if he is a member of the KDPI in the United Kingdom or elsewhere in Europe. Secondly, if he is asked, then the appellant should be expected to tell the truth, which is that he had very recently joined a branch of the KDPI with which he has had no previous active involvement whatever solely for the purely cynical reason than that he wished to bolster his asylum claim. I am aware from the background material that the Iranian authorities operate a highly sophisticated security service and I do not consider it reasonably likely that the appellant would be regarded by security officers, in the light of such an answer, as a threat to the Iranian state warranting prosecution or persecution. In conclusion, I find that the “certificate” from the KDPI does not, read with the findings of the First-tier Tribunal Judge which have been preserved, require me to find that the appellant faces a real risk of persecution either at the point of his return to Iran or subsequently whilst living in his home area of that country.

6. The remaining issue concerns Dr Joffé's report. Dr Joffé's report follows the most recent country guidance from the Upper Tribunal in respect of Iran, *SSH and HR (Legal exit: failed asylum seeker) Iran CG [2016] UKUT 00308 (IAC)* that the head note of which reads as follows:

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

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

As regards the approach to the expert evidence taken by the Tribunal in *SSH*, I note the Tribunal's observations at [29]:

"The problem with this argument, and it is equally the case too in the context of the four cases to which we have referred above of people who are said to have been detained and ill-treated on return to Iran, that there is on the one hand an absence of sufficient information about the individual case and on the other hand a significant lack of examples subsequent to that. One might expect that if the retired Supreme Court Judge was making an expression of something akin to policy that would be applied in future to people who had been deemed to have insulted the state by claiming to have been ill-treated when they had not been, then there would have been express examples of this as a way of showing that the authorities meant what they said. We note what Dr Kakhki said about the ways in which he obtains information about the situation in Iran, which include him being in regular contact with Iranian lawyers, and it seems to us highly unlikely that if there had been cases of people being prosecuted under Article 500 on the basis that they had made false asylum claims abroad that there would not have been mention of such cases in the media and/or within the legal profession. Again in this regard we note what is quoted at page 9 of the report, being remarks made by Iran's Prosecutor General in 2011 that Iranians who have committed a crime outside the country while abroad and take action against their national security could be prosecuted. We accept that there is little tolerance of persons perceived as acting against national security, and that national security is broadly defined (Operational Guidance Note para 3.12.7). But if it were the case that the notion of a person acting against national security included people who had made false asylum claims abroad, it could be expected that details of such prosecutions would have emerged, bearing in mind the numbers of people returned from the United Kingdom alone in recent years and the lack of any evidence to show that there is such a degree of state control over the Iranian media and/or legal profession as to prevent such information emerging. Indeed, one might expect that the Iranian authorities would wish there to be publicity about such cases in order to deter others from acting in this way."

7. As Mr Bates pointed out, Dr Joffé's report suffers from a similar paucity of hard examples of individuals facing persecution in Iran either on account of having legally

exited the country or on account of their Kurdish ethnicity. The Tribunal in *SSH* touched upon Kurdish ethnicity in its conclusions at [34]:

“It was not suggested to us that an individual faces risk on return on the sole basis of being Kurdish. It was however agreed that being Kurdish was relevant to how a returnee would be treated by the authorities. For example, the Operational Guidance Note refers at 3.12.14 to the government disproportionately targeting minority groups, including Kurds, for arbitrary arrest, prolonged detention and physical abuse. No examples however have been provided of ill-treatment of returnees with no relevant adverse interest factors other than their Kurdish ethnicity, and we conclude that the evidence does not show risk of ill-treatment to such returnees, though we accept that it might be an exacerbating factor for a returnee otherwise of interest. Accordingly we conclude that it has not been shown that a person in the position of these appellants faces a real risk on return to Iran either on the basis of what would happen to them when questioned at the airport or subsequently if they were convicted of an offence of illegal exit. With regard to HR specifically, it does not appear to be disputed that he is Kurdish and that he is undocumented: hence we see no reason for remittal. Prosecution for illegal exit is an outcome not generally experienced by such returnees, and where it does occur, the most likely sentence in relation to the illegal exit charge would be a fine. It has not been shown that there would be a real risk of prosecution under Article 500 for propaganda against the state on the basis of having made an asylum claim which was found to be false. Accordingly these appeals are dismissed.”

8. As regards the appellant’s Kurdish ethnicity as a risk factor, Dr Joffé in his report at 112(iv) states:

“In view of the worsening situation inside Iranian Kurdistan in recent months and the strong official prejudices that exist concerning Kurdish loyalties to the Islamic Republic, I maintain the view, mentioned above, that failed Kurdish asylum seekers if returned to Iran are more likely to face an enhanced risk of persecution than other failed Iranian asylum seekers and their situation has been exacerbated by concomitant official suspicion of involvement in political activity construed to be opposed to the Islamic Republic or of engagement in criminal activity. I also consider this risk to have been significantly enhanced since March 2016 because of the renewal of hostile military action both by the KDPI and the PJAK – the latter movement being the one with which [the appellant] was probably involved as a sympathiser, despite the confusion over its actual title. The risk has also, I submit, been enhanced by the new law on political crime adopted in January 2016 and coming into force the following June (see para) 10 above).”

9. In a footnote, Dr Joffé states that the new law provides a definition of “political offences” for the first time and notes that it excludes insults to minor officials and the spreading rumours but criminalises violent crime in attempts to overthrow the state as political offences. In the light of that legislative development, I am at a loss to understand why this should have increased the risk to an individual such as this appellant who is not known to the authorities and has (until very recently) had no political involvement in opposition politics whatever. Secondly, I note that the risk identified by Dr Joffé has, according to him, been “significantly enhanced” since March 2016 because of hostile militant action by the KDPI. I note that the country guidance of *SSH* was promulgated following a hearing in London in May 2016. If

the risks had “significantly enhanced” at the time of the country guidance hearing, it is not clear why the Tribunal has placed little weight upon it. One may only conclude that the Tribunal did not share Dr Joffé’s opinion of the significant enhancement of risk.

10. Thirdly, neither in the sub-paragraph which I have quoted or earlier in the report, does Dr Joffé give any examples of individuals of Kurdish ethnicity having been persecuted upon return to Iran on account of their ethnicity only. The absence in the report of such examples was a reason, according to Mr Bates, for the Tribunal to refrain going behind or beyond the guidance of *SSH*. I agree. As I have noted above, the Tribunal in *SSH* did not find at risk where there were no concrete examples to indicate its existence. I consider that to be a sound methodology and I adopt it. I do not consider Dr Joffé’s report as providing sufficient reason for me to find that the appellant’s Kurdish ethnicity alone would expose him, in the absence of any other risk factors, to persecution at the point of return to Iran. For the avoidance of doubt, I do not accept that the appellant’s Kurdish ethnicity coupled with the fact of his illegal exit would be sufficient to lead to his persecution.
11. I am also concerned by some of the forms of expression used by Dr Joffé in his report. At [108], Dr Joffé wrote:

“I have sought to amass evidence above that the Iranian regime does severely discriminate against its Kurdish minority, collectively and individually, simply because they are Kurdish. I have also sought to show that such discrimination is so severe that it amounts to persecution.”
12. This passage casts some doubt upon Dr Joffé’s methodology. Instead of considering all available evidence and drawing conclusions from it, he has, instead, “sought to amass evidence” in order to prove a particular thesis. First, this suggests that he might omit or ignore evidence which did not support his thesis. Secondly, it indicates, as Mr Bates submitted, a crossing of the border between expert testimony and advocacy. Thirdly, it is not clear why Dr Joffé considers it appropriate to “amass evidence” to support the thesis that Kurdish returnees are at risk on account of their ethnicity; equally, he could have amassed evidence to support the proposition that they are not at risk. I acknowledge Mr Howard’s submission that Dr Joffé may have simply have chosen his words poorly but the passage from which I have quoted does not inspire confidence in the impartiality of the evidence. Having said that, my primary reason for attaching limited weight to the report is the failure of Dr Joffé to provide examples to support his conclusions.
13. In the light of all the evidence, I find that it is not reasonably likely this appellant having particular characteristics as identified by myself and by the First-tier Tribunal, would face a real risk of persecution or ill-treatment in Iran either at the point of his return to that country or subsequently whilst living in his home area. Accordingly, the appeal is dismissed.

Notice of Decision

14. This appeal is dismissed.

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

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

Signed

Date 23 June 2017

Upper Tribunal Judge Clive Lane

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date 23 June 2017

Upper Tribunal Judge Clive Lane