



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/00475/2018

THE IMMIGRATION ACTS

**Heard at Newport
On 30th November 2018**

**Decision & Reasons Promulgated
On 21st December 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

**HR
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss L Gardner of Counsel, instructed by Migrant Legal Project (Cardiff)

For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge O'Hagan (the judge) of the First-tier Tribunal (the FTT) promulgated on 16th February 2018.
2. The Appellant born in May 1983 is an Iranian citizen of Kurdish ethnicity. He left Iran on 1st December 2015 and arrived clandestinely in the UK on 18th January 2016 and claimed asylum.

3. The Appellant claimed that he would be at risk of persecution if returned to Iran as he is a supporter of the Kurdish Democratic Party of Iran (KDPI). He claimed that for a period of about six months he would carry letters and other material for the KDPI. He also stored KDPI material at his family home which was subsequently raided by the Iranian security forces. This caused the Appellant to flee with the assistance of an agent.
4. The application for international protection was refused on 20th December 2017 and the appeal heard by the FTT on 8th February 2018.
5. The judge heard evidence from the Appellant and a witness and dismissed the appeal on all grounds. The judge found the Appellant to be an incredible witness, and did not place weight on the evidence given by the witness. The judge did not accept the Appellant's claim to have been working for the KDPI in Iran, and did not accept that he had undertaken any activities in the UK that would bring him to the adverse attention of the Iranian authorities if he was returned.
6. The judge accepted that the Appellant had made posts on Facebook which opposed the Iranian regime, but took the view that the Iranian authorities would view the Appellant's Facebook activities as opportunistic and carried out to bolster a fabricated asylum claim.
7. Following dismissal of the appeal the Appellant applied for permission to appeal to the Upper Tribunal relying upon three grounds which are summarised below.
8. Firstly it was submitted that the judge had made irrational or unreasonable findings with respect to the Appellant's internet activities in the UK and risk on return. The judge had accepted that the Appellant had made posts that would be viewed as being opposed to the Iranian government. It was submitted that the judge had erred in concluding that the Iranian authorities would simply view these posts as opportunistic in support of a fabricated asylum claim.
9. It was pointed out that the Facebook posts included photographs of the Appellant at KDPI events in the UK, and there were pictures insulting the Supreme Leader in Iran, and it was submitted that the judge had not provided adequate reasons for concluding that the Iranian authorities would simply view the posts to be opportunistic.
10. The second ground submits that the judge speculated regarding the role of agents. The judge at paragraph 40 noted that the Appellant had passed through no fewer than four safe countries and failed to claim asylum. The judge found it was unlikely that an agent would have insisted on bringing the Appellant to the UK, rather than permitting him to claim asylum in any of the safe countries through which they passed. The judge found that from the perspective of an agent working for profit, it might be supposed that "dropping him off sooner rather than going all the way to the United Kingdom would be more cost effective". It was submitted that the judge

had provided no source or background evidence to support the assertion as to how the agent would act.

11. The third ground contends that the judge made a material misdirection of law at paragraph 38 by speculating that it was not credible that the Appellant was able to amass a large sum of money very quickly in order to pay an agent. The Appellant had claimed he had raised additional funds by selling his mother's jewellery, and the judge agreed with a submission made by the Presenting Officer that it was difficult to accept that he would have been able to arrange the sale of jewellery in such a short period of time. The judge also found that "it is remarkably convenient that his uncle should happen to know just the person to get him out of the country at such short notice". The judge went on to accept that coincidences can happen, and if that was an isolated point he would accept it, but looking at the context of the account as a whole, it was appropriate to make an adverse credibility finding.
12. Permission to appeal was initially refused but subsequently granted by Deputy Upper Tribunal Judge McGinty on 24th July 2018, and I set out below, in part, the grant of permission;
 - "3. It is arguable, as asserted within the grounds of appeal that the First-tier Tribunal Judge has not adequately and sufficiently explained why the Appellant's Facebook postings, which he accepts may have been seen by the Iranian authorities, will be considered to be opportunistic by them and not place the Appellant at a real risk of persecution upon return. Such postings in that regard have to be seen through the eyes of the Iranian authorities, rather than the eyes of an Immigration Judge in the UK. It is further arguable as argued that the judge has speculated regarding the actions that were likely to be taken by an agent as to whether or not an agent would have brought the Appellant all the way to the UK rather than dropping him off earlier. All of the grounds may be argued."
13. Following the grant of permission the Respondent did not provide a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008.
14. Directions were subsequently issued that there should be an oral hearing before the Upper Tribunal to ascertain whether the FTT had erred in law such that the decision must be set aside.

The Upper Tribunal Hearing

15. Miss Gardner in making oral submissions relied upon the grounds contained within the application for permission to appeal. It was argued in relation to the first ground, that if the judge had not made an irrational finding in relation to the internet activity, he had erred in law by providing inadequate reasoning for concluding that the Iranian authorities would view the Facebook posts as opportunistic, such that the Appellant would not be at risk of persecution.

16. Miss Gardner pointed out that the Appellant is of Kurdish ethnicity, a Sunni Muslim, and that combined with his anti-regime postings, meant that the regime would regard him as a KDPI sympathiser.
17. Miss Gardner pointed out that there was relevant guidance on internet activity in AB and Others (Internet activity – state of evidence) Iran [2015] UKUT 0257 (IAC).
18. Examples of the Facebook posts were before the FTT in section F of the Appellant’s bundle. Miss Gardner pointed out that the posts are without doubt public as opposed to private, and this was accepted by Mr Howells.
19. With reference to the second ground of appeal, Miss Gardner relied upon the written ground, submitting that the judge had speculated without making reference to objective background evidence.
20. The same point was made in relation to the third ground.
21. Miss Gardner submitted that the errors are material, referring to paragraph 26 of the FTT decision in which the judge states that he does not consider any one of the matters as being determinative, but views the individual matters on which he has found facts, to form part of the jigsaw of evidence before him. The judge goes on to explain that it is the cumulative impact of all those matters, considered in the round, which caused him to conclude that the account was incredible. Miss Gardner’s submission was that if at least one of those matters fell away, it was relevant to the cumulative effect, and meant that the decision was unsafe and should be heard afresh.
22. Mr Howells in making oral submissions submitted that the decision of the FTT contained no material error of law. Although it was submitted to the judge that the Facebook posts may not have been public, Mr Howells acknowledged that it was clear from the documentary evidence that the posts were public. Mr Howells submitted that it was open to the judge to make a finding that the Iranian authorities would accept that the anti-government posts were an opportunistic attempt by the Appellant to bolster a fabricated asylum claim and those posts would not put him at risk.
23. With reference to the second ground it was accepted that the judge had speculated at paragraph 40, but Mr Howells submitted that this error was not material given the other credibility findings made by the judge.
24. With reference to the third ground, Mr Howells submitted that it was open to the judge to make a finding that the Appellant’s account of how funds were accrued so quickly was incredible and implausible.

My Conclusions and Reasons

25. The decision of the FTT is comprehensive and prepared with care, but I am persuaded the decision contains a material error of law for the following reasons.
26. I find that the judge erred in considering the internet activity of the Appellant. The judge accepted that the Appellant had placed posts on Facebook, and found that the posts may have been seen by the Iranian authorities.
27. It is clear, as accepted by both representatives who appeared before me, that the posts are public as opposed to private. In my view the judge has not made an irrational finding, but has erred in law by not providing adequate reasons to explain why the posts would not put the Appellant at risk.
28. It appears to be accepted that the Appellant left Iran illegally. This without more would not put him at risk. It is also accepted that he is of Kurdish ethnicity. There was considerable background evidence before the FTT to indicate that the Iranian government disproportionately target minority groups including Kurds. This information is included in the United States Department of State Country Report on Human Rights Practices in Iran at page B41 of the Appellant's bundle. The Respondent's Country Information and Guidance on Kurds and Kurdish political groups in Iran published in July 2016 is included in the Appellant's bundle. At paragraph 2.3.3 the guidance states that the Iranian authorities have no tolerance for any activities connected to Kurdish political groups and those involved are targeted for arbitrary arrests, prolonged detention and physical abuse. Even those who express peaceful dissent are at risk of being accused of being a member of a banned Kurdish political group.
29. There is no doubt that the Facebook posts express support for the Kurdish minority, and opposition to the Iranian government. What was not before the judge was any reference to AB Iran which although not a country guidance decision, is a comprehensive decision of the Upper Tribunal running to 472 paragraphs over 78 pages. At paragraph 457 the Upper Tribunal accepted that some returned Iranians would be questioned and confirmed that such a person could not be expected to lie and found;

“We find that the act of returning someone creates a ‘pinch point’ so that returnees are brought into direct contact with the authorities in Iran who have both the time and inclination to interrogate them. We think it likely that they will be asked about their internet activity and likely if they have any internet activity for that to be exposed and if it is less than flattering of the government to lead to a real risk of persecution.”
30. In view of the guidance in AB Iran, which was not brought to the attention of the judge, and the fact that it is accepted that the Appellant is an Iranian Kurd who left Iran illegally and who has made anti-regime postings on Facebook, indicating strong support for the Kurdish minority, it is my view that the judge erred in law by not adequately explaining why this

would not put him at risk, and why the authorities would simply regard the posts as opportunistic and an attempt to bolster a fabricated asylum claim.

31. In my view this error suffices to make the decision unsafe. So far as the second ground is concerned, the Respondent accepts that the judge speculated without making reference to background evidence. With reference to the third ground of appeal, my view is that the judge was entitled to make the findings that he did in paragraph 38 of his decision.
32. However as I conclude that the first two grounds contained within the application for permission to appeal do display a material error of law, I find that the decision of the FTT must be set aside with no findings preserved. Both representatives submitted that if an error of law was found as contended by the Appellant, the appropriate course would be to set aside the decision in its entirety and remit the appeal back to the FTT to be heard afresh. Having considered paragraph 7 of the Senior President's Practice Statements, I find that it is appropriate to remit the appeal back to the FTT, because of the nature and extent of judicial fact-finding that will be necessary in order for this decision to be remade. No findings of fact are preserved.
33. The parties will be advised of the time and date of the hearing in due course. The appeal is to be heard by an FTT Judge other than Judge O'Hagan.

Notice of Decision

The decision of the FTT involved the making of an error of law such that it is set aside. The appeal is allowed to the extent that it is remitted to the FTT with no findings of fact preserved.

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 his 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 3rd December 2018

Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT
FEE AWARD**

The Upper Tribunal makes no fee award. The issue of any fee award will need to be considered by the FTT.

Signed

Date 3rd December 2018

Deputy Upper Tribunal Judge M A Hall