Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/13125/2016**

THE IMMIGRATION ACTS

Heard at Liverpool	**Decision & Reasons Promulgated**
On 27 March 2018	**On 11 April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

OS (IRAN)
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L Santamera, Counsel instructed by
Barnes Harrild & Dyer Solicitors
For the Respondent: Mr David Mills, Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to Rule 14(1) of the Upper Tribunal Procedure Rules, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. Failure to comply with this direction could lead to contempt of Court proceedings.

2. The appellant appeals from the decision of the First-tier Tribunal dismissing his appeal against the decision of the Secretary of State to refuse his protection and human rights claims which he had pursued on the ground that he had become of adverse interest to the Iranian authorities as the result of being caught smuggling

goods over the border for the Kurdish Democratic Party of Iran (KDPI). At the hearing in the First-tier Tribunal, the appellant's case (Counsel's skeleton argument, paragraph 3).was that "*due to being Kurdish and smuggling for the KDPI he would be at risk and he may also be considered a blogger due to his Facebook account.*"

The Reasons for the Grant of Permission to Appeal

3. On 2 November 2017, First-tier Tribunal Judge Doyle granted permission to appeal for the following reasons:

> 4. The grounds of appeal argue that the Judge failed to take account of relevant case law and that the Judge's treatment of expert evidence is flawed.
>
> 5. The Judge does not take guidance from BA (Demonstrators in Britain - risk on return) Iran CG [2011] UKUT 36 (IAC). It is arguable that he should have. At [31] the Judge considers three expert reports. No analysis of the reports is carried out. It is arguable that the Judge should have explained in more detail why he did not find those reports to be either helpful or persuasive.

Relevant Background

4. The appellant is a national of Iran, whose date of birth is 11 November 1992. He arrived in the United Kingdom on 18 May 2016 and claimed asylum on the same day. He was interviewed about his asylum claim on 4 November 2016.

5. He said that from the age of 16 he started work as a Kolbar, transporting goods over the border as a means of earning money. He used to pay a bribe to a person, "AC", who worked for Etelaat, in order that the authorities did not confiscate the goods that he transported. Members of the KDPI became aware of this, and accused him of being involved with the Government. However, they accepted the appellant's explanation and he agreed to transport goods for the KDPI. He did not join the KDPI - he just helped them by transporting goods such as clothes, shoes, pliers and other tools. He helped them out of fear.

6. One night he was taking goods to the KDPI, but he came across an ambush. He left his horse and ran away. He did not return to his home village, but he went to another village where he had a friend. When he got there, his friend contacted AC who wanted to arrest him (the appellant). It was within a few hours of his arrival at his friend's house that he embarked upon his journey out of the country, beginning with him travelling over the border into Turkey.

7. On 8 November 2016, the respondent gave her reasons for refusing to recognise the appellant as a refugee. His account of having problems with the Iranian authorities was rejected as there were inconsistencies in his account, and it ran counter to the background evidence. He had not provided an account of transporting any KDPI-related materials. It was unclear how the Iranian authorities could have found that he was working for the KDPI merely because he had left behind his horse, clothes and nail clippers when the Iranian authorities had ambushed his smuggling trip. Additionally, it was unclear why he had run away from the Iranian authorities

before illegally exiting the country when he was transporting goods that were not illegal.

The Hearing Before, and the Decision of, the First-tier Tribunal

8. The appellant's appeal came before Judge Parker sitting at Stoke on 10 July 2017. Both parties were legally represented. The Judge received oral evidence from the appellant. He adopted as his evidence in chief his witness statement, in which he said (at paragraph 10) that since arriving in the UK he had continued to associate himself with the KDPI. He had set up a Facebook page on which he pledged support for the KDPI and their activities in Iran. He also posted information calling for an end to executions of Iranian opposition political prisoners.

9. At P1-P15, there were exhibited a series of posts – 15 in total - on the appellant's Facebook page between 31 May 2016 and 16 December 2016. In these posts, the appellant uploaded or shared photographs, and occasionally videos, with short commentaries.

10. For example, on 2 December 2016, the appellant shared a photograph and wrote the following comment (as translated): "*The falcon which always flies on Kurdistan's sky of freedom. Salutes to the soul of the leader Ghassmlou.*" Another example is that, on 19 November 2016, the appellant added 8 new photographs and wrote the following comment (in translation): "*On 19/11/2016 Trafalgar Square in London condemning the Iranian Government which executed 30,000 people since 1988.*"

11. In the Appellant's Bundle B there were three generic expert reports from Professor Joffe on the topic of whether Kurds in Iran are routinely persecuted by the Iranian authorities. Professor Joffe has consistently maintained that this is the case.

12. The first two reports were dated 15 October 2014 and March 2016 respectively, and they preceded the Country Guidance case of **SSH & HR (Illegal exit: failed asylum seeker) Iran CG [2016] UKUT 00308 (IAC)** which was heard at Field House on 10 May 2016.

13. The third report was dated 26 August 2016. In this report, Professor Joffe acknowledged that the Upper Tribunal had taken a different view from him in their recent Country Guidance decision. But in his opinion the Upper Tribunal was wrong.

14. In his subsequent decision, the Judge gave his reasons for rejecting the appellant's core claim at paragraphs [14]-[25]. His reasons included the fact that the appellant had a lack of basic knowledge regarding the KDPI, as revealed by his asylum and screening interviews.

15. At paragraphs [26]-[31], the Judge addressed the issue of the appellant's Facebook activities. He began by referring to the Country Guidance in **BA**. He then considered the guidance given by the Tribunal in **SB (Risk on return - illegal exit) Iran CG [2009] UKAIT 0053**. At paragraph [30], the Judge said: "*The appellant is not*

known to be politically active. He has been found not credible regarding his claims. The mere posting of anti-Government act on a Facebook page does not give him a risk profile."

16. At paragraph [31], the Judge addressed the three reports from Professor Joffe. He noted the expert's conclusion, at paragraph 46 of his 2014 report, that there was a risk of persecution "*merely because you are Kurdish on return.*" He noted that Professor Joffe had provided a report dated 26 August 2016 which attempted to deal with the Country Guidance case of **SSH & HR**, and its conclusion regarding illegal exit and the risk of persecution for being Kurdish. The Judge continued: "*However at paragraph 47 of **SSH & HR (Illegal exit: failed asylum seeker) Iran CG** [2016] UKUT 00308 (IAC) it quotes from another expert, Dr Khakhi [that] merely being a Kurdish citizen does not of itself result in persecution but can, combined with other factors such as criminality."*

17. At paragraph [32], the Judge cited the Headnote Guidance given in **SSH & HR** that an Iranian male who it was sought to return to Iran, and 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*".

18. The Judge held, at paragraph [33], that the mere fact that the appellant had left illegally and would have to obtain documentation from the Iranian authorities, did not mean that there was a risk profile for him on return. The Judge held, at paragraph [34], that the appellant would return as a person who had no problems with the authorities, and so he did not have a risk profile.

The Hearing in the Upper Tribunal

19. At the hearing before me to determine whether an error of law was made out, Ms Santamera (who did not appear below) expanded upon the arguments advanced in the application for permission to appeal. She acknowledged that **AB** was not a Country Guidance case, and that at least one of the appellants in **AB** had a higher internet profile than this appellant. However, she submitted that the Judge had not given adequate reasons for holding that the postings on the appellant's Facebook page could not have come to the notice of the Iranian authorities, or would not have engendered a risk for him at the pinch point of return.

20. With respect to the expert evidence of Professor Joffe, she submitted that the Judge had erred in not engaging with Professor Joffe's reasons for opining that the Upper Tribunal in the Country Guidance case had wrongly discounted an enhanced risk for failed asylum seekers who were Kurdish.

21. In reply, Mr Mills submitted that the reasoning of the Judge was adequate, given the highly skeletal nature of the case which had been put forward in Counsel's skeleton argument for the hearing in the First-tier Tribunal.

Discussion

22. There are two grounds of appeal. The first is that the Judge failed to take into account "*the more relevant case*" of **AB & Others (Internet activity - state of evidence)**

Iran [2015] UKUT 00257 when addressing the issue of the appellant's Facebook activities. The second ground is that the Judge failed to give sufficient reasons for departing from Professor Joffe's expert opinion.

23. Judge Doyle granted permission on the first ground on an erroneous basis. He granted permission on the ground that the Judge had failed to consider the Country Guidance case of **BA**. This is plainly wrong.

24. The actual complaint in Ground 1 is not that the Judge failed to consider relevant Country Guidance cases, but that he also ought to have considered "*the more relevant case*" of **AB & Others** – although, which the permission application fails to acknowledge, this is not a Country Guidance case.

25. The headnote of **AB** reads as follows:

> "The material put before the Tribunal did not disclose a sufficient evidential basis for giving Country or other Guidance upon what, reliably, can be expected in terms of reception in Iran for those returning otherwise than with a "regular" passport in relation to whom interest may be excited from the authorities into internet activity as might be revealed by an examination of blogging activity or a Facebook account."

26. At paragraph [453], the Tribunal accepted that some monitoring of activities outside Iran is possible and that it occurs. But they were not able to say what circumstances, if any, enhanced or diluted that risk. At paragraph [460], the Tribunal said:

> "Overall, it is very difficult to make any sensible findings about anything that converts a technical possibility of something being discovered into a real risk of it being discovered…We find that our main concern is the pinch point of return."

27. At paragraph [461], the Tribunal held that the more active the person has been on the internet, the more likely the authorities would become interested and pursue their investigations at the pinch point of return.

28. The Judge was not apparently provided with a copy of **AB**. In addition, Counsel for the appellant did not advance a case, by reference to specific passages in **AB**, that either (a) the nature and extent of the appellant's political activity on his Facebook page was such as to engender a real risk that he would have come to the attention of the Iranian authorities as a political activist in the UK; or (b) a case that there was a real risk of the authorities finding anti-Government material on his Facebook page at the pinch point of return.

29. Moreover, insofar as **AB** can be treated as providing some general guidance on the potential risk generated by online political activities, on analysis its guidance is not materially different from that given in the headnote guidance of **BA**, which is cited at paragraph [28] of the Judge's decision. Although the guidance given in **BA** is not directed at bloggers, it covers political activists whose participation in demonstrations is publicised on the internet - for example on Facebook.

30. On the evidence available to the Judge, the appellant's postings were transient and often oblique in terms of their support for the KDPI or criticism of the Iranian

Government. There was also no specific evidence of the appellant continuing to post photographs with anti-Government comments on his Facebook page in the six to seven months leading up to the appeal hearing.

31. Against this background, it was open to the Judge to find that the appellant had not shown substantial grounds for believing that he had acquired a risk profile on account of the postings which he had made on his Facebook page. Accordingly, Ground 1 falls away.

32. Turing to Ground 2, the error of law challenge advanced in the permission application proceeds on the premise that **SSH & HR** did not specifically address the risk on return for failed asylum seekers who had exited Iran illegally and who were also of Kurdish ethnicity. This premise is incorrect.

33. The guidance given in **SSH and HR** in the headnote and at paragraph [33] is as follows:

> "(a) An Iranian male who 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 no a real risk of prosecution leading to imprisonment."

34. The two claimants in the Country Guidance case were Kurds. As is apparent from paragraph [45] of Appendix 1 to the decision, their legal representatives relied on their Kurdish ethnicity as an additional risk factor. At paragraph [47] of Appendix 1, the Tribunal summarised the thrust of the expert evidence as follows:

> "The examples contained in Dr Kakhki's report in relation to imprisonment, torture and execution relate to individuals who are reported to be political or civil activists or who have been convicted of other offences including national security offences. The inference which Dr Kakhiki seeks to draw from those is that being a Kurd does not in itself does not result in prosecution but when combined with other criminal suspicions, persecution "is likely to surface"."

35. After summarising their conclusions on the country guidance issues in paragraph [33], the Tribunal continued in paragraph [34] of their decision as follows:

> "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 Operation Guidance note refers at 3.12.14 to the Government disproportionately targeting minority groups including Kurds, for arbitrary arrests, 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 of 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."

36. Accordingly, Judge Parker was right to treat the Country Guidance case as applying to the appellant, and he was right to treat the Country Guidance case as authoritative on the issue of the risk on return faced by the appellant, insofar as his appeal (a) related to the country guidance issue in question (which it clearly did) and (b) was dependent upon the same or similar evidence as that considered by the Upper Tribunal.

37. The permission application quotes verbatim from the conclusions of Professor Joffe's report of 15 October 2014. It states that he sought to amass evidence that the Iranian regime severely discriminates against its Kurdish minority, simply because they are Kurdish; and that he has shown that such discrimination is so severe that it amounts to persecution. When they are returned to Iran as failed asylum seekers, "*they face serious and real threats to their personal safety and security as a result, as the Irish Refugee Documentation Centre noted in early January 2012.*"

38. With respect to the case advanced in the permission application, the simply riposte is that, in their subsequent Country Guidance decision, the Upper Tribunal reached a different conclusion on the same evidence up to 2014 - and also on the background evidence in the two years between 2014 and 2016 - and so the Judge did not have to explain why he was following the Country Guidance authority, rather than paying heed to Professor Joffe's contrary opinion.

39. Ms Santamera took a different line in oral submissions, asserting that the Judge's error of law lay not in his failure to address the expert reports of Professor Joffe which preceded **SSH & HR**, but in his failure to engage adequately with the expert report which came afterwards – in particular Professor Joffe's evidence as to why the Upper Tribunal had underestimated the risk for a Kurdish failed asylum seeker in applying for a *laissez passer*.

40. Not only is this case not pleaded in the grounds of appeal to the Upper Tribunal, but it was also not advanced by Counsel at the hearing in the First-tier Tribunal. It appears that the Judge was simply presented with the three expert reports of Professor Joffe and that no attempt was made by Counsel to persuade the Judge, by reference to the third report of Professor Joffe, that the findings in the Upper Tribunal were wrong insofar as they applied to Kurds.

41. I consider that the Judge adequately addressed the (erroneous) case which was put to him, which was that **SSH & HR** did not specifically address the risk faced by failed Kurdish asylum seekers who had exited Iran illegally. In fact it did so, as the Judge held at paragraph [31].

42. There was no error of law in the Judge failing to explain why Professor Joffé's observations about the *laissez passer* did not advance the appellant's case. It is apparent from the Country Guidance case, which the Judge adopts, that the expert's criticism of the Upper Tribunal's findings on this issue does not have any merit. At paragraph [23] the Tribunal found as follows:

> "In this regard, it is relevant return to Dr Kakhki's evidence in re-examination where he said the treatment they would receive would depend on their individual case. If they cooperated and

> accepted that they left illegally and claimed asylum abroad, then there would be no reason for ill-treatment, and questioning would be for a fairly brief period. That seems to us to sum up the position well, and as a consequence we conclude that a person of no history other than that of being a failed asylum seeker who had exited illegally and who could be expected to tell the truth when questioned, would not face a real risk of ill-treatment during the period of questioning at the airport. We should add that we have no reason to doubt Dr Kakhki's evidence that there is a special Court at or near the airport which considers the cases of returnees, but the evidence does not show a real risk of ill-treatment in breach of Article 3 amounting to persecution as a consequence of attending at the Court."

43. The significance of this finding by the Tribunal is that it is irrelevant that one of the requirements for obtaining a *laissez passer* from the Iranian Embassy is a letter from the Home Office confirming that an application for asylum in Britain has been made, or a photocopy of a residence permit, as Professor Joffé says is the case in paragraph 30 of his third report. For the Tribunal's assessment of risk on return assumes that the Iranian authorities will obtain confirmation that the bearer of the *laissez passer* is a failed asylum seeker when the bearer is questioned on arrival. So the bearer of a *laisser-passer* will not be potentially endangered by having to declare to the Iranian embassy in the UK the same information which he can be expected to declare on arrival in Iran, namely that he is a failed asylum seeker.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands.

This appeal to the Upper Tribunal is dismissed.

Signed Date 9 April 2018

Deputy Upper Tribunal Judge Monson