Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/03118/2018

THE IMMIGRATION ACTS

Heard at North Shields	**Decision and Reasons Promulgated**
On 8 February 2019	**On 14 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

S. S.
(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Brakaj, Iris Law Firm
For the Respondent: Mr Bates, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a citizen of Iran, entered the United Kingdom illegally, and on 3 August 2007 made a protection claim. That claim was refused, and his appeal was dismissed by decision of Immigration Judge Dennis promulgated on 22 January 2010. In the course of that decision, Judge Dennis rejected as a fiction the Appellant's account of why he had left Iran, his account of the arrest of his father, and the consequential discovery of political

material at the family home. He was found to be of no interest to the authorities.

2. Undaunted, the Appellant submitted a series of further representations to the Respondent over the following years which were eventually accepted as amounting to a fresh protection claim, but this too was refused on 8 February 2018.
3. The Appellant's appeal against the refusal of this new protection claim was heard and allowed by First Tier Tribunal Judge Gumsley in a decision promulgated on 14 August 2018. It was accepted that the Appellant's sur place act of acquiring a tattoo whilst living in the UK, of a KDPI emblem, however cynically undertaken, had placed him at real risk of harm as one who would be likely to be perceived as engaged in Kurdish political activities, or, a supporter of Kurdish rights.
4. The Respondent's unduly lengthy and repetitive application for permission to appeal was granted by First tier Tribunal Judge Birrell on 18 September 2018 on the basis the Judge had given inadequate reasons for concluding that the tattoo in question would come to the attention of the Iranian authorities.
5. No Rule 24 Notice has been lodged in response to the grant of permission to appeal. Neither party has applied pursuant to Rule 15(2A) for permission to rely upon further evidence.
6. There is no cross-appeal by the Appellant.
7. Thus the matter came before me.

The grant of permission

8. The grant of permission was made on the basis of the reasons challenge that the Judge who granted permission had distilled from what are conceded before me to be extremely poorly drafted grounds; namely an arguable failure by the Judge to give adequate reasons as to why he had concluded that the Appellant's tattoo would ever come to the attention of the Iranian authorities.
9. I should say at the outset that in my judgement there is absolutely no merit in the complaint identified in the grant of permission. So much was tacitly conceded before me by Mr Bates' decision to decline to advance this complaint in argument. In the circumstances I can deal with it briefly.
10. The Judge accepted that the Appellant's tattoo, although both multi-coloured and of significant size, would not be ordinarily visible in the course of daily life because it would be hidden by his clothing. He accepted that the tattoo comprised an emblem of the KDPI, entitled as such with the letters KDPI in block capitals placed below the emblem. He concluded that if the tattoo did come to the attention of the Iranian authorities then it would be likely to give rise to the perception on their part that

the Appellant embraced both that organisation, and its political aims. Thus it would give rise to an adverse interest in the Appellant, and indeed the perception of him as one who held political views opposed to the Iranian regime, because he would be perceived to be involved in Kurdish politics and to support the movement for Kurdish rights.

11. There is no suggestion that these findings were not open to the Judge on the evidence before him. In my judgement they were not only adequately reasoned, but they were entirely consistent with the recent country guidance of HB (Kurds) Iran CG [2018] UKUT 430, albeit that decision was not then available to the Judge.

12. Those findings therefore raised the issue of how, if at all, the Appellant demonstrated the existence of a real risk that the tattoo would come to the attention of anyone outside those members of his intimate family circle who might see him sufficiently undressed so as to render the tattoo visible, since they, being both Kurds and members of his intimate family circle might be thought to be unlikely to report the tattoo's existence to the Iranian authorities. The Judge posed and answered that question, noting that the Appellant had not yet undertaken the compulsory military service required of adult male citizens of Iran, and that since there was no obvious reason to conclude that he already held, or, that he was entitled to obtain, a valid exemption from such military service - there was a real risk that upon return to Iran he would be identified as one who was obliged to undertake his military service, and in addition, that he would be compelled to do so.

13. It is not suggested before me that there is any error in that line of reasoning, or, that the relevant findings of primary fact were not open to the Judge upon the evidence before him. Indeed when pressed Mr Bates accepted that if the Appellant were indeed required to undertake military service that he would be unable to keep the tattoo in its current form concealed.

14. In consequence, the Judge correctly concluded that if the Appellant were required to undertake military service in Iran, he would be unable to keep his tattoo concealed. Not only would it be seen, but the sight of it in that context would bring him to the adverse attention of the Iranian authorities. I reject any suggestion that these conclusions are inadequately reasoned.

The challenge advanced at the hearing

15. The argument advanced by Mr Bates was quite different. His argument rested upon the Judge's adverse finding that the Appellant, although a Kurd, had purchased and acquired the

tattoo as a cynical act, motivated not by any genuinely held political belief or faithfulness to Kurdish politics, but simply in an effort to create a claim to asylum where none otherwise existed [45]. Since the tattoo did not reflect any genuinely held political view, it represented no core belief. Thus, it was argued, the Appellant could reasonably be expected to either have it removed entirely, or, concealed by undertaking further tattooing so that it held a form that would no longer be recognisable as a KDPI emblem, and thus attract no adverse attention. No doubt the tattoist's equivalent of turning a sword into a ploughshare.

16. Given the Appellant would attract no adverse attention without the tattoo in the form that it held at the date of the hearing, and given that the Iranian authorities did not yet know of its existence, then should his appeal fail, it was argued that the only sensible inference open to the Judge was that the Appellant would be bound to have the tattoo removed or altered before returning to Iran, so that at the date of his actual return he would face no risk of harm. Since a tattoo could in principle be removed, or, overinked, and thus its appearance was in principle capable of a complete change, it was argued that a tattoo did not and could not constitute an immutable characteristic of the bearer.

17. The difficulty with this argument, as the Judge noted, is that the Respondent had conspicuously failed to offer any evidence to discharge any evidential burden that lay upon him to establish that such steps were possible in relation to this tattoo. Even if it was a theoretical possibility that this tattoo could be removed or over-inked, there was no evidence as to what treatment would be required to effect this, its cost, or its duration. Mr Bates accepted that such evidence was not placed before the Judge, but he invited me to take the view that the Judge ought to have taken judicial notice of the fact that in general a tattoo might be removed without injury (with the luxury of time and funding), or, that it might be successfully overinked, so that its original form, colouring, and outlines could no longer be discerned so that the viewed could no longer identify the original.

18. I am not persuaded that this was an appropriate approach, any more than was the Judge. There was no evidence that the Appellant could afford to pay for any available alternative works that would successfully remove or disguise the tattoo. There was also no evidence that the Respondent would delay his removal whilst such works were undertaken. Self evidently they had not been undertaken at the date of the hearing. Moreover Mr Bates accepted that neither the Tribunal nor the Respondent had any power to force the Appellant to have his

tattoo removed, or, overinked. Unless voluntarily undertaken by the Appellant such an act would constitute an assault. Nevertheless he pressed the point that to permit a claimant to succeed in circumstances such as this was to simply invite every failed asylum seeker, or would be refugee without a meritorious claim, to make a very modest investment in a cheap tattoo of some political or religious symbol (the Appellant had said he paid £80 for his).

19. In my judgement the answer, as the Judge identified, lay in the Tribunal's obligation to assess the position at the date of the hearing. As at the date of the hearing the Appellant undoubtedly bore a tattoo of the emblem identified by the Judge. As Mr Bates accepted, there was no error in his conclusion that if that tattoo came to the attention of the authorities upon the Appellant's return to Iran it would be likely to give rise to an adverse (and potentially extreme) reaction that would give rise to a real risk of harm, sufficient to amount to persecution and a breach of his Article 3 rights. Thus he was entitled to succeed in his protection appeal.

20. In my judgement the answer is not to be found in any resort to a floodgates argument, but it is to be found (as in my judgement the Judge clearly recognised) in the jurisprudence concerning the proper approach to sur place acts cynically and deliberately undertaken to found a protection claim where none would otherwise exist. Thus, Danian [2000] ImmAr 96, and YB (Eritrea) [2008] EWCA Civ 360, and in particular the comments of SedleyLJ;

> "13. A relevant difference is thus recognised between activities in this country which, while not necessary, are legitimately pursued by a political dissident against his or her own government and may expose him or her to a risk of ill-treatment on return, and activities which are pursued with the motive not of expressing dissent but of creating or aggravating such a risk. But the difference, while relevant, is not critical, because all three formulations recognise that opportunistic activity *sur place* is not an automatic bar to asylum. The difficulty is in knowing when the bar can eventually come down. To postulate, as in *Danian*, that the consequence of a finding that the claimant's activity in the UK has been entirely opportunistic is that 'his credibility is likely to be low' is, with respect, to beg the question: credibility about what?. He has ex-hypothesi already been believed about his activity and (probably) disbelieved about his motive. Whether his consequent fear of persecution or ill-treatment is well-founded is then an objective question. And if it *is* well-founded, then to disbelieve him when he says it is a fear he now entertains may verge on the perverse"

21. Mr Bates confirmed that he sought to advance no other argument that might be capable of distillation from the grounds.

22. It follows that in my judgement the Respondent has failed to establish any error of law in the approach taken by the Judge to the sur place claim that requires his decision to be set aside and remade. In consequence I dismiss the appeal.

DECISION

The Determination of the First Tier Tribunal which was promulgated on 14 August 2018 contained no material error of law in the decision to dismiss the Appellant's appeal which requires that decision to be set aside and remade, and it is accordingly confirmed.

Direction regarding anonymity – Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until the Tribunal directs otherwise the Appellant is granted anonymity throughout these proceedings. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.

Signed
Deputy Upper Tribunal Judge JM Holmes
Dated 8 February 2018