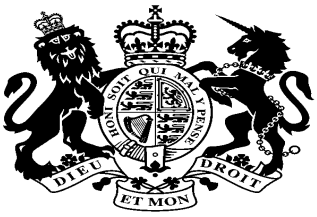

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07424/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 February 2019 and 15 May 2019	**On 31 May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

RAA
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms R Popal (counsel instructed by Barnes Harrild and Dyer)
For the Respondent: Mr Melvin & Ms Cunha (Senior Home Office Presenting Officers)

DECISION AND REASONS

1. This is the appeal of RAA, a citizen of Iran born 4 October 2001, against the decision of the First-tier Tribunal (Judge O'Malley) of 7 December 2018 to dismiss his appeal, itself brought against the Respondent's decision of 29 May 2018 to refuse his application to be recognised as a refugee.

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2. RAA arrived in the UK on 9 May 2017 in the back of a lorry. Although his asylum application was refused, he was granted Discretionary Leave to Remain on the basis of being an unaccompanied minor until 4 April 2019.

3. RAA's asylum claim was that he faced discrimination for being a Kurd and a Sunni Muslim, and the prospect of serious harm due to his father's actions. His father worked as a prison guard. One evening in late February 2017 his father came home and told RAA and the rest of the family that they would have to flee the country; a fuller explanation would be given once they were on their way. His parents packed up clothes and food for the journey, and left the country together.

4. Once in Greece, his mother told the Appellant that his father had been paid by a prisoner's relatives to arrange his release. However, his father failed to secure the prisoner's release, notwithstanding having spent the money. His father was then threatened with serious consequences if he failed to either fulfil his side of the bargain or return the money. He travelled to the UK via Turkey, Greece, and countries unknown, having been separated from his family when entering the lorry. In the course of his account the Appellant referred to having an uncle and aunt remaining in Iran, in Sardasht; social media searches had failed to re-establish contact with them since he left the country.

5. Supporting evidence included a number of reports from Professor Joffe. One report of 30 September 2012 stated that Kurdish failed asylum seekers faced "an enhanced threat of being considered a priori to have defamed the Islamic Republic while abroad … Previously the Iranian authorities required positive evidence of offences that would be considered specifically political in nature … Now that is a basic assumption which an accused person will have to disprove, so that the burden of proof has shifted significantly against an asylum seeker who has been returned … returned Kurds face particular scrutiny and thus the danger of further accusations being laid against them." A further report of 2 March 2016 referred to tensions running high through Iranian Kurdistan, ensuring that official attitudes remained hostile and repressive, and that any Kurdish returnee would have to anticipate serious risk of official discrimination if not persecution, and that they would face "particular scrutiny" given that Kurdish protests were savagely repressed due to fears of external interference and Kurdish activism over the ISIS threat; the Iranian government disproportionately targeted minority groups; legislation was employed against the Kurds for exercising their rights to freedom of expression; Kurds were frequently and disproportionately punished for the "catch-all" offences of "crimes against God"; and the execution rate had accelerated.

6. The First-tier Tribunal concluded that it was not appropriate to make any credibility findings adverse to the Appellant, bearing in mind the limited role he could reasonably be assumed to have had in the decisions behind his family's flight from Iran and his journey to the UK. It accepted that his father was a prison guard, and the country evidence that bribery of such guards was widespread. It

was plausible that the Appellant's father would have taken a bribe, given this was a regular aspect of detention in Iran. However, no guarantee could be given that the bribe would secure the release of its intended beneficiaries, and it was inconsistent that a family with the reach and influence to seriously threaten the Appellant's family would rely on a payment to a prison guard who was discriminated against and held back from promotion (this being a matter of which RAA had heard his father complain).

7. The Judge decided that Professor Joffe's reports were to be given limited weight, being generic in nature, and the opinions therein were not to be preferred to the conclusions in Country Guidelines decisions.

8. The Tribunal went on to find that

(a) Whilst being Kurdish gave a Convention ground of membership of a particular social group, the Appellant would not face persecution on that basis, given that his father's lack of career advancement did not represent serious harm such as reach the persecution threshold and as there was no evidence of persecution of family members, and the Appellant's father's behaviour would not be considered to be out of the ordinary in the context of the expectations on prison officers;

(b) The Appellant was to be presumed to have left Iran illegally, given he would not have had a document to secure his lawful exit: the Judge was not satisfied that he did not have a passport when he left Iran, but accepted he lacked one by the time he reached the UK; the Appellant would not be at risk of serious harm for this reason, citing *SSH and HR*: "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."

(c) The Appellant would not be at risk as a failed asylum seeker as his family were not suggested as being politically active, and he would have family to whom he could return in order to avoid him facing destitution.

9. Grounds of appeal alleged the First-tier Tribunal had erred in law because

(a) There was no valid reason to afford the report of George Joffe limited weight and it was unfair to do so, no challenge having been made to their contents by the Respondent, without giving notice of the possibility – accordingly the First-tier Tribunal had wrongly discounted the risks to Kurds, the growing concerns about Kurdish activism, the general targeting of minority groups and the

continued tension in the area, and wrongly treated the risks faced by the Appellant to be governed only by *SSH and HR* without regard to *HB (Iran)*;

(b) It wrongly treated *SSH and HR* as being Country Guidelines vis-á-vis the risks faced by returnees of Kurdish ethnicity when the Upper Tribunal had expressly confirmed the contrary in *HB (Iran)*;

(c) It made speculative findings without an evidential basis:

- As where it concluded that the payment of a bribe could not guarantee a prisoner's release, thereby inferring that this would be self-evident to anyone seeking to procure such a result who would therefore have no reasonable animus to cause them to pursue the Appellant's father;

- In failing to take account of the possibility that the reason why the family had not suffered serious harm whilst in Iran was the speed of their flight from the country, and

- In determining that the Appellant would have relatives to which to return in Iran without identifying any such extended family.

10. Permission to appeal was granted on 8 January 2019 on the basis of no valid reasons being given for discounting the weight to be afforded the expert reports.

11. A Rule 24 response submitted that the reports of Dr Joffe were justifiably rejected, because they were generic in nature, dated from 2012-2015, not related to this Appellant, not properly disclosable in these proceedings, failed to explain via independent evidence that the opinions expressed therein had been judicially accepted, and did not explain the basis upon which the report might justify depart from the previously extant Country Guidelines.

12. Before me, Ms Popal submitted that the First-tier Tribunal had overlooked material evidence and made conclusions now shown to be untenable in the light of *HB (Iran)*. Mr Melvin submitted that it was not tenable that all Kurds were at risk; this appeal had no merit, and that was effectively recognised by the manner in which the case had been argued today, whose underlying case theory sought to rely upon that very proposition. The new Country Guidelines decision could not undermine a First-tier Tribunal decision which pre-dated it.

Decision and reasons – Error of law hearing

13. The Country Guidelines regime is described in the Practice Directions of the Immigration and Asylum Chambers of the First tier Tribunal and the Upper Tribunal:

> "**12.2** … [a] country guidance case is authoritative in any subsequent appeal, so far as that appeal:
> (a) relates to the country guidance issue in question; and
> (b) depends upon the same or similar evidence. …
> **12.4** Because of the principle that like cases should be treated in like manner, any failure to follow a clear, apparently applicable country guidance case or to show why it does not apply to the case in question is likely to be regarded as grounds for appeal on a point of law."

14. The proper approach to Country Guidelines decisions has been litigated over time. The following propositions have been established.

(a) Stanley Burnton LJ in *SG (Iraq)* [2012] EWCA Civ 940 §47 stated that "decision makers and tribunal judges are required to take Country Guidance determinations into account, and to follow them unless very strong grounds supported by cogent evidence, are adduced justifying their not doing so";

(b) Simon LJ in *ST (Afghanistan)* [2018] EWCA Civ 2382 observed that the headnote to a Country Guidelines decision showed the content that was of general applicability – the relevance of other findings will depend on the particular facts of the case and whether the issue depends on similar evidence;

(c) In *PR (Sri Lanka)* [2017] EWCA Civ 1946, McCombe LJ cautioned against reliance on isolated passages of evidence in a Country Guidelines decision that had been cited for completeness and which appeared to play no part in the final decision;

(d) Wilson LJ (as he then was) at §24-25 of *RK (Algeria)* [2007] EWCA Civ 868 essentially held that the Tribunal remained seized of the case until such time as the determination was promulgated on 16 July 2014:

> "24. [counsel submitted that if] there is in the course of delay in the Tribunal's preparing or promulgating a decision a substantial change for the better in the relevant circumstances which obtain in the foreign country, it is highly undesirable that no cognisance can be taken of itI … [*Ravichandran*] held that judicial determinations made within the immigration appellate structure were to be regarded as an extension of the decision-making process and so in principle should be based upon circumstances as they are at the time of those determinations rather than at any earlier stage. …
> 25. There has to come a time, however, at which the opportunity for judicial survey of up-to-date evidence stops. Under our system, and save in exceptional circumstances, it stops upon promulgation of the Tribunal's determination; and so it has stopped by the time when the case reaches this court."

(e) Flaux LJ in *NA (Libya)* [2017] EWCA Civ 143 [2018] EWCA Civ 2382 concluded that as a general rule, the fact that a determination of the First Tier Tribunal is inconsistent with a Country Guidelines case issued after its promulgation will not amount to an error of law. However this analysis would not apply where the Country Guidelines decision has been promulgated *before* that of the lower Tribunal.

15. It can accordingly be seen that there was no material error of law caused by the First-tier Tribunal failing to take account of the decision in *HB (Iran)*: the Country Guidelines decision was promulgated on 12 December 2018 whereas the decision appealed was promulgated on 7 December 2018. Accordingly the principle identified in *NA (Libya)* governed the case: the Country Guidelines decision post-dated the First-tier Tribunal's decision, and was thus not to be treated as governing similar factual issues.

16. Nevertheless, it seemed to me that there were material errors of law in the decision below. The issues raised in the country evidence before the First-tier Tribunal required careful scrutiny. That evidence included number of reports by Professor Joffe, which Mr Popal informed me (and I have no reason to doubt) were before the Upper Tribunal in *HB (Iran)*. It is clear that the opinion evidence therein demanded close attention. As *HB (Iran)* post-dated the promulgation of the decision now appealed, the conclusions of the Tribunal there are not strictly relevant to the Upper Tribunal's function in this appeal when identifying whether a material "error of law" has been committed.

17. However, the fact that the *HB (Iran)* Tribunal clearly accepted that material of this nature was relevant to its conclusion that the situation for returning Kurds had worsened demonstrated the general force of the material. I accept that the First-tier Tribunal may well come to a different conclusion on the risk faced by the Appellant had it had regard to these reports rather than simply ruling them out of account. I did not consider that the Secretary of State's objections to reliance on these reports were made out. Professor Joffe's opinions have often been given weight in immigration appeals; his expertise speaks for itself. It was unnecessary for the reports to justify the extent to which they invited departure from the pre-existing Country Guidelines, because there were no such relevant Guidelines.

18. The First-tier Tribunal clearly considered that *SSH and HR* provided Country Guidelines for Kurds returning to Iran. However, that was not the case. This should have been clear from the decision itself, without the need for the point to be made in *HB (Iran)*. However, the new Country Guidelines decision makes the point clear (via language strongly indicating that this was self-evident from the text of *SSH and HR* itself) §98(1): "For the avoidance of doubt, that decision is not authority for any proposition in relation to the risk on return for refused Kurdish asylum-seekers on account of their Kurdish ethnicity alone."

19. Accordingly observations on the country evidence on the risks facing Kurdish returnees in *SSH and HR* fell to be treated in line with the reasoning in *PR (Sri Lanka* and *ST (Afghanistan)*: ie as potentially relevant material, but certainly not as a procrustean bed against which the Appellant's claim was to be exclusively measured.

20. The crux of the Appellant's claim was that, whether or not some adverse action might be taken against his family by those who had bribed his father, he would face a disproportionate reaction on a return to Iran as a Kurd whose father had taken a bribe from a powerful family in order to secure the release of a prisoner. If questioned by the authorities on a return, the Appellant's father might well have to explain the fact that he had received a bribe and chosen not to action it; that decision might have consequences for his family members, depending on the authorities' reaction. The proposition that this would simply be discounted by the authorities without further investigation or punishment as run-of-the-mill prison officer behaviour seemed highly unlikely. It was here that the evidence from Professor Joffe referring to an increase in the suspicions of officialdom in relation to Kurds generally demanded express treatment. *HB (Iran)* was to subsequently summarise the Upper Tribunal's own conclusions, driven partly by his opinion evidence, as being that the authorities showed a "hair trigger" attitude in their attitude to Kurdish returnees.

21. I accordingly considered that there was a material error of law in the decision appealed. As the remaining issues were of limited scope, it was appropriate to retain the appeal in the Upper Tribunal. No error of law having been alleged or identified in the acceptance of the Appellant's credibility, those findings would stand for the continuation hearing. However the appropriate inferences to be drawn from those findings must be re-determined.

22. In my error of law decision, I indicated that the Country Guidelines in *HB (Iran)* would be relevant to the final decision on this appeal, albeit that some of the opinion evidence of Professor Joffe on which reliance was placed below was *not* accepted as made out to the relevant standard of proof, for example his opinion that Kurds effectively faced a reverse burden of proof, and his suggestion that all returning Kurds might face a real risk of persecution.

23. At the continuation hearing, the parties agreed that it was appropriate for the appeal to be determined on the basis of submissions only, no factual issue remaining in dispute.

24. Ms Popal submitted that the core facts were that the Appellant's father had conducted himself in a way that the Iranian authorities might well see as having made a stand against the country itself, and in consequence the Appellant had exited Iran illegally. The Iranian regime might well act in a way that would seem perverse to decision makers in a democracy, but that was nevertheless a real possibility. The Country Guidelines showed that the consequences of the sins of

the parents might well be visited on their children, and this was a risk that had to be combined with that of being a failed asylum seeker, and with the evidence that the authorities took a "hair trigger" approach. The Appellant had limited family ties left in Iran, as there was no evidence that he had successfully re-established contact with his uncle and aunt in Iran, and he had lost contact with his father and mother in Greece, which was not untypical of events during the flight of asylum seekers across national borders. The very fact the Secretary of State had granted him leave to remain as a minor showed that it was established that there were no relatives remaining in Iran who would be available to care for him in the future. Iimputed political opinion was central to the Appellant's claim, and the opinions attributed to Kurds were very broad, see eg *HB* (8) capturing "*social welfare and charitable activities on behalf of Kurds.*"

25. Ms Cunha submitted the grant of leave was founded on section 55 Borders, Citizenship and Immigration Act 2009 duties, which had a protective basis and should not carry over into the asylum determination process. It remained the case that he had relatives in Iran who were shopkeepers which suggested that there were no dangers to his father's relatives generally there. Whilst Iranian prison conditions would pose a real risk of Article 3 violations, the evidence did not establish the Appellant would actually face imprisonment on return. *HB* could be distinguished: the illegal exit of a minor per se would not cause problems on a return, and *HB* was the son of KDPI political activists who had been killed by the Iranian authorities, whereas here the father's activities were wholly apolitical, and there had been no UK political activities, so it could not be said that the regime's approach to political dissidence would carry over to his particular circumstances

26. This appeal raises the relatively short point as to whether the son of a Kurdish prison guard who grossly failed in his duties by accepting bribes to secure a prisoner's release would be at risk from the authorities. I join with the First-tier Tribunal in ruling out any real risk from the family whose bribe had failed to procure the intended result: they would be non-state actors and there is no evidence that they would have any reach across the territory of Iran generally or even within the Kurdish areas. However, the potential risk faced from the authorities is a rather different matter.

27. The conclusions in *HB (Iran)* concentrate on the increasing suspicion that attaches to Kurdish political activities of any scale rather than on the possibility that a person's actions, themselves ostensibly politically neutral, may attract punishment (for themselves or their family members) that is aggravated by racially or politically motivated considerations. Nevertheless, the Country Guidance clearly has some value by analogy.

28. The Upper Tribunal in *HB (Kurds) Iran CG* [2018] UKUT 430 (IAC) concluded

> "(1) SSH and HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 308 (IAC) remains valid country guidance in terms of the country guidance

offered in the headnote. For the avoidance of doubt, that decision is not authority for any proposition in relation to the risk on return for refused Kurdish asylum-seekers on account of their Kurdish ethnicity alone.

(2) Kurds in Iran face discrimination. However, the evidence does not support a contention that such discrimination is, in general, at such a level as to amount to persecution or Article 3 ill-treatment.

(3) Since 2016 the Iranian authorities have become increasingly suspicious of, and sensitive to, Kurdish political activity. Those of Kurdish ethnicity are thus regarded with even greater suspicion than hitherto and are reasonably likely to be subjected to heightened scrutiny on return to Iran.

(4) However, the mere fact of being a returnee of Kurdish ethnicity with or without a valid passport, and even if combined with illegal exit, does not create a risk of persecution or Article 3 ill-treatment.

(5) Kurdish ethnicity is nevertheless a risk factor which, when combined with other factors, may create a real risk of persecution or Article 3 ill-treatment. Being a risk factor it means that Kurdish ethnicity is a factor of particular significance when assessing risk. Those "other factors" will include the matters identified in paragraphs (6)-(9) below.

(6) A period of residence in the KRI by a Kurdish returnee is reasonably likely to result in additional questioning by the authorities on return. However, this is a factor that will be highly fact-specific and the degree of interest that such residence will excite will depend, non-exhaustively, on matters such as the length of residence in the KRI, what the person concerned was doing there and why they left.

(7) Kurds involved in Kurdish political groups or activity are at risk of arrest, prolonged detention and physical abuse by the Iranian authorities. Even Kurds expressing peaceful dissent or who speak out about Kurdish rights also face a real risk of persecution or Article 3 ill-treatment.

(8) Activities that can be perceived to be political by the Iranian authorities include social welfare and charitable activities on behalf of Kurds. Indeed, involvement with any organised activity on behalf of or in support of Kurds can be perceived as political and thus involve a risk of adverse attention by the Iranian authorities with the consequent risk of persecution or Article 3 ill-treatment.

(9) Even 'low-level' political activity, or activity that is perceived to be political, such as, by way of example only, mere possession of leaflets espousing or supporting Kurdish rights, if discovered, involves the same risk of persecution or Article 3 ill-treatment. Each case however, depends on its own facts and an assessment will need to be made as to the nature of the material possessed and how it would be likely to be viewed by the Iranian authorities in the context of the foregoing guidance.

(10) The Iranian authorities demonstrate what could be described as a 'hair-trigger' approach to those suspected of or perceived to be involved in Kurdish political activities or support for Kurdish rights. By 'hair-trigger' it means that the threshold for suspicion is low and the reaction of the authorities is reasonably likely to be extreme."

29. The Upper Tribunal also found, in *HB* §93: "In relation to a child whose parents disappeared more than 20 years ago, it is quite possible that a child would be regarded as equally dangerous as the parents. It might be assumed that he would be hostile towards them for that reason alone. The crucial thing is the male line."

30. The Secretary of State has published a Country Policy and Information Note Iran: Illegal exit (Version 5.0 February 2019) which states:

> "6.1.4 The 2018 DFAT report stated: 'According to Article 34 of the Penal Code, the penalty for leaving the country without a valid passport (or similar travel document) is between one and three years' imprisonment, or a fine of between 100,000 and 500,000 rials (AUD4-20). A special court located in Tehran's Mehrabad Airport deals with [cases of people leaving the country without a valid passport or similar travel document] … The court assesses the background of the individual, the date of their departure from the country, the reason for their illegal departure, their connection with any organisations or groups, and any other circumstances. This procedure also applies to people who are deported back to Iran and who are not in possession of a passport containing an exit visa. DFAT understands that illegal departure is often prosecuted in conjunction with other unrelated offences."

31. Another relevant document from the Home Office is the Country Information and Guidance *Iran: Prison conditions* (Version 1.0 February 2016):

> "**2.4 Are prison conditions so poor that prisoners are at real risk of torture or inhuman or degrading treatment or punishment.**
> 2.4.1 Prison conditions in Iran are harsh and often life-threatening with severe overcrowding, poor ventilation, extreme temperatures, poor sanitary conditions including a lack of access to clean drinking water and a lack of sufficient toilet facilities. There is a serious lack of access to the appropriate medical care. In a number of cases sick prisoners have been denied adequate medical care, including medication. Food at some prisons has a low nutrional value and they have been reports of many detainees being malnourished. Authorities mixed violent and nonviolent offender populations. Political prisoners in some prisons are subject to forced labour.
> 2.4.2 Torture and mistreatment are also common within prisons in Iran. Whilst officials claim that no one is subjected to torture detained prisoners often report forced confessions, prolonged solitary confinement, rape, physical and psychological torture and mock executions. There were reports of systematic rape of women prisoners as well as coerced virginity testing of female prisoners.
> 2.4.3 The government does not permit independent monitoring of prison conditions and sometimes prisoners were subjected to threats after they lodged complaints with the authorities. The Iranian authorities have

> frequently failed to conduct independent investigations into allegations of torture and other ill-treatment by officials, which has contributed to a pervasive culture of impunity.
> 2.4.4 Prison conditions in Iran are, in individual cases, likely to create a real risk of torture and/or inhuman or degrading treatment or punishment.
> 2.4.5 Decision makers must consider each case on its facts. For the factors to be considered and further information, see Section 3.4 of the Asylum Instruction on Humanitarian Protection."

32. Professor Joffe has repeatedly stated that "the Iranian authorities assume that all asylum seekers who are returned to Iran have engaged in anti-regime activities whilst abroad, especially in spreading false information about the Islamic republic" (eg §119 of October 2014 report).

33. Drawing the themes together from this evidence, it seems to me that there is a real risk that the Appellant would face serious harm on a return to Iran. He cannot be expected to lie on return, and is likely to have to justify his departure, given that it was presumably via an illegal exit. So it must be assumed that he will give a similar account to the Iranian authorities as to the Home Office here. It is not difficult to envisage that a repressive regime which takes a "hair trigger" attitude to Kurdish returnees will look unkindly on the actions of a prison guard who took a bribe to release someone who was necessarily of interest to the authorities. As the Tribunal once stated in *Suleyman* (16242; 11 February 1998):

> "It is clear to us that a repressive regime ... may well act in ways which defy logical analysis. A person who is genuinely a victim of such a regime may well find that the partial account he is able to give of its activities as they have affected him is not something which will stand up to a strictly logical analysis. The regime may seem to govern by confusion; it may engage in other activities, of which the Appellant knows nothing; it may simply behave in a way which a person sitting in safety in the United Kingdom might regard as almost beyond belief'."

34. In the light of the evidence that almost any conduct can attract adverse attention from the Iranian authorities, I also accept that there is a real chance that their reaction would be motivated by a political opinion being attributed to the Appellant's father. It is clear that any conduct capable of being seen as anti-regime may lead to political suspicions.

35. The more significant concern is whether the Appellant himself would be at risk. Absent any evidence either way, I would probably have inferred that he was not at risk; it would be surprising, in the normal course of events, for a country's authorities to visit the consequences of a parent's behaviour on a child who was not otherwise associated with their activities. However, given the possibility that a Kurdish political activist's child could be persecuted for political reasons solely down to a parent's actions twenty years after the relevant political activity, it

seems to me that there is a real risk that a similar animus would be visited on the child of a delinquent Kurdish prison guard a relatively short time after the original offence took place.

Decision:

The decision of the First-tier Tribunal contained a material error of law and is set aside.
The appeal is allowed.

ANONYMITY ORDER

Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her 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: 24 May 2019

Deputy Upper Tribunal Judge Symes