



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/10615/2019

THE IMMIGRATION ACTS

Remote hearing held
at Field House on
29 July 2020 (V)

Decision & Reasons Promulgated

On 27 August 2020

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

D M
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

Anonymity was granted at an earlier stage of the proceedings because the case involves protection issues. I find that it is appropriate to continue the 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 him or any member of his family. This direction applies both to the appellant and to the respondent.

Representation:

For the appellant:

Mr B. Bradshaw, instructed by IAS Lawyers

For the respondent:

Mr T. Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 18 October 2019 to refuse a protection and human rights claim.
2. First-tier Tribunal Judge R. O'Hagan ("the judge") dismissed the appeal in a decision promulgated on 22 January 2020. The judge set out the relevant legal framework and stated that he had considered the respondent's CPIN reports and the country guidance decision in *HB (Kurds) Iran CG* [2018] UKUT 00430 [32-37]. He accepted that the appellant's broad account as "*of a kind that could possibly happen in Iran*" but then immediately qualified this finding by stating: "*it is my experience that fabricated claims are usually shrouded in truth. By that, I mean that people seeking to present a fabricated claim usually base their falsehoods on the kinds of things that do happen within the country from which they come.*" [38]. The judge reminded himself that the appellant was a minor at the dates when the events occurred and that the appellant is also illiterate [39]. He noted that there was no documentary evidence from family members in Iran but placed no weight on this one way or the other [40].
3. The judge accepted that it was not "*inherently incredible*" that a 16-year-old Kurdish boy might be sympathetic to the aims of the KDPI, particularly if he had family members with KDPI links. He found it less credible that the KDPI would permit him to assist the organisation. He appeared to come to this conclusion because the background evidence indicated that the KDPI does not permit people who were under 18 years old to join [41]. The judge went on to make observations as to whether it was plausible that the KDPI would allow the appellant to undertake the kind of low-level activities he described (delivering leaflets). He repeated his conclusion that it was unlikely because the KDPI restricted membership to those that were 18 years old or over [42].
4. The judge found an inconsistency in the appellant's evidence as to whether he questioned the KDPI about the content of the leaflets [43]. At [44] the judge accepted that an idealistic young person might want to assist the KDPI despite the risks involved, but did not find it credible that the appellant would not want to know the content of the leaflets if he was going to take that risk. The judge concluded: "*Even if his lack of literacy meant that he could not personally read the leaflets, I would have expected him to want a better answer than the one he says he received from his friend when he asked him.*" [emphasis added]. The judge placed little weight on the fact that the appellant was imprecise about the date of his arrest given that he is illiterate and is unlikely to attach as much weight to dates as a literate person [45]. The judge did not agree with the respondent's assertion that it was not credible that the Iranian authorities would have released him in light of the evidence to show that the authorities are "*suspicious of Kurdish political activities aligned to their tendency to react in extreme ways where such activity is identified*". His reasons for disagreeing are somewhat unclear, but he noted that the objective evidence showed that the authorities had a "*tendency to behave in ways that are arbitrary and unpredictable. In the context of a regime that behaves in such a way, it is difficult to say that either random acts of brutality or of clemency lie outside the parameters of what is credible.*" [46].

5. The judge went on to find that the *"main difficulty"* with the appellant's core account of arrest and detention was that he had been inconsistent as to whether he was mistreated in detention or not. The Home Office Presenting Officer pointed out that he did not mention being ill-treated during his interview. He said that he was not asked about the details of his detention, but the judge found that this was a weak explanation given that he did not highlight any ill-treatment in his witness statement either. He did not find it credible that such an important detail would not have been mentioned if his account was true [47].
6. The judge rejected the appellant's claim that he resumed activities some months after his release from detention on the ground that it was not plausible that he, or the KDPI, would let him take further risks. The judge found that *"to return to leafleting after those experience goes beyond what might be described as the usual impetuosity of youth, and it requires a greater level of explanation"* [48]. He also found it *"lacking in credibility that the KDPI and [his uncle J] would have allowed him to resume, and that [his uncle J] would not have discussed the matter with his [uncle A] given the potential risk not only to the appellant but to other family members."* [49].
7. The judge found it implausible that the appellant would be active on Facebook if he was illiterate and/or that *"a genuine activist would expose himself in such a way."* [50-52]. He considered the evidence relating to the appellant's attendance at demonstrations outside the Iranian embassy but concluded that there was only evidence to show that he might have attended one demonstration [53-54]. The judge went on to consider whether, even if his activities in the UK were undertaken in a cynical way, he would be at risk on return to Iran. He asked himself whether there was a *"realistic possibility"* of the appellant's activities coming to the attention of the Iranian authorities. The judge accepted that there is a *"real possibility"* that the Iranian authorities might monitor such activity and proceeded to assess risk on return on the basis that those activities would become known to the authorities [61(i)]. In considering whether the appellant should be expected to lie to the Iranian authorities about his activities if returned, he found that it was *"sensible to suppose that he would lie and dissemble as freely in Iran as he has in this country."* He concluded that it would be reasonable to expect him to do so because his political convictions were not genuine [61(iii)]. He went on to say *"I think it likely that the opportunistic nature of those activities would be apparent in Iran. ... His activity in this country has been recent and limited, and amounts to no more than that which was done to bolster a claim."* [61(iv)].
8. Only having made those findings did the First-tier Tribunal go on to quote the headnote from the country guidance in *HB (Kurds)*. The judge then concluded: *"Applying that guidance to the facts of this case, as I have found that to be, I do not consider that the appellant would be at risk on return by virtue of his Kurdish ethnicity, or because of the very low level and opportunistic activity in which he has engaged."* [63].

9. The appellant appealed the First-tier Tribunal decision. The original grounds were not particularised clearly, but Mr Bradshaw drew the following points from his colleague's pleadings.
- (i) The judge placed undue reliance on his own view of the plausibility of the appellant's account and failed to take into account relevant considerations.
 - (ii) The judge erred in assessing the credibility of the appellant's Facebook activities based on the unsupported assertion that an email address is necessary to set up an account.
 - (iii) The judge erred in assessment of risk on return.
10. A face to face hearing was not held because it was not practicable due to public health measures put in place to control the spread of Covid-19. The appeal was heard by way of a remote hearing by Skype for Business with the parties' consent. All issues could be determined in a remote hearing. The documents before the Upper Tribunal include those that were before the First-tier Tribunal:
- (i) The respondent's bundle before the First-tier Tribunal;
 - (ii) The appellant's bundle before the First-tier Tribunal;
 - (iii) The First-tier Tribunal decision;
 - (iv) The appellant's grounds of appeal to the Upper Tribunal;
 - (v) The respondent's rule 24 response.

Decision and reasons

11. Having considered the written arguments, and having heard submissions from both parties, I am satisfied that the First-tier Tribunal decision involved the making of an error of law and must be set aside.
12. Although some of the judge's findings and observations were likely to be open to him to make, I find that there is some force in the appellant's submission that the judge gave undue weight to his own view of the plausibility of certain aspects of the appellant's account and failed to take into account relevant considerations with reference to the evidence and relevant country guidance.
13. Even though he found that the appellant's account was generally consistent with the evidence relating to the activities of the KDPI and the treatment of such activists by the Iranian authorities, and that it was plausible that a young Kurdish man might seek to support the cause for idealistic reasons even if he was illiterate, the judge appeared to place no weight on this as a matter that might support the appellant's claim because, in his experience, "*fabricated claims are usually shrouded in truth*". Such an approach leaves no room for appropriate weight to be given to the consistency of the account with the background in the country of origin and was inconsistent with the approach that should be taken under Article 4 of the Qualification Directive (2004/83/EC).

14. Even if the judge was entitled to take into account the possibility that a claim might be broadly consistent with the background evidence but could still be fabricated, the other reasons given for rejecting the appellant's account were either heavily reliant on the judge's own view of how he would expect certain parties to act or failed to take into account relevant evidence.
15. For example, at [41-42] the judge rejected the appellant's account of low-level activities for the KDPI based on an inference drawn from the fact that a person cannot become a member until they are 18 years old. First, the judge failed to engage adequately with the appellant's assertion that he was a supporter and not a member. Second, if he was going to base his finding on the inference that it was unlikely that the KDPI would ask teenagers to carry out the kind of low level activities described by the appellant, the judge needed to consider the other evidence before him, which he summarised at 7(ii), that the KDPI has a youth wing. This information appears to have been drawn from a Danish Refugee Council and Danish Immigration Service Fact-finding mission in 2013, which was quoted in the CPIN report dated July 2016 at [7.2.1] and at paragraph 21 of the Home Office decision letter. The report also stated that there was a third category of people who were "friends" of the party who are encouraged to participate in activities and demonstrations. This evidence undermines the central proposition the judge relied upon to make his finding because it indicates that the KDPI is willing to encourage those who under 18 years of age and non-members to engage in political activities.
16. Other findings appear to have been given undue weight based on the judge's view of how he considered the appellant or other parties would act in the circumstances rather than by reference to the background evidence and country guidance. In *Y v SSHD* [2006] EWCA Civ 1223 Lord Justice Keene emphasised that a judge "*must look through the spectacles provided by the information he has about conditions in the country in question*": see also *HK v SSHD* [2006] EWCA Civ 1037.
17. At several points in the decision the judge rejected the plausibility of the appellant's account based on his view that a person would not be willing to take such risks: see [41] [44] [48] and [49]. Very few asylum seekers would be able to demonstrate a genuine claim if this was a legitimate reason for rejecting the credibility of a person's account. Nor does such an approach take into account the background evidence, which shows that many people indeed take risks in order to assert their political and cultural identity as Kurds in Iran. Having accepted that the appellant might take the risk to agree to help the KDPI, it does not follow that it is incredible that he would do so again despite claiming to have been detained. The judge's finding at [49] unduly speculates about how he considered the KDPI and the appellant's family members would act in the circumstances without reference to the evidence. There was nothing in the evidence to suggest that the KDPI or his uncles would not be willing to take such risks to further their cause. The fact that one of his uncles is said to be a member of the Peshmerga indicates that he is willing to face substantial risks to fight for Kurdish rights.

18. Other findings made by the judge failed to take into account relevant evidence. The judge appeared to place significant weight on the alleged failure of the appellant to raise the issue of ill-treatment in detention at an earlier stage [47]. Both the Home Office Presenting Officer and the judge proceeded on the incorrect assumption that the appellant had not raised the issue in interview. However, at question 14 of the interview the appellant is recorded as saying: "*In 2017 I was arrested for one week they tortured me during that week.*" [emphasis added].
19. Although it is correct to say that the appellant did not elaborate when asked what happened when he was questioned in detention (question 42) and did not mention ill-treatment during detention in his subsequent witness statement, it is at this point that the appellant's age might have been relevant to the assessment. At the date when he was interviewed the appellant had only just turned 18 years old. The respondent has a shared duty to assist a young asylum seeker to present the relevant facts. Having indicated that he was ill-treated in detention the interviewing officer did not ask any questions to elicit the nature or extent of his ill-treatment. The appellant was reliant on his legal representatives to assist him to prepare a statement in support of the appeal. The statement they prepared was of the unhelpful kind that merely responds to the reasons for refusal rather than setting out a detailed chronological account of events. Although it might have been open to the judge to expect the appellant to mention such an important issue in his statement, it needed to at least be considered in context of the appellant's young age and the fact that he is illiterate and was reliant on others to prepare a written statement.
20. It was open to the judge to find that the appellant's activities on Facebook were likely to have been undertaken in a cynical manner given that he is illiterate and needed the assistance of friends to open and run the account. The points made on behalf of the appellant about the practicalities of setting up an account are immaterial given that the judge appeared to accept that there was some level of activity albeit it was carried out in a cynical way to produce evidence to support the protection claim.
21. In addition to the above, I also have concerns about the way in which the judge assessed risk on return. His findings are somewhat confused and contradictory. Although the judge quoted the headnote from *HB (Kurds)* he failed to engage with the substance of the country guidance in any meaningful way either as part of a holistic assessment of the credibility of the appellant's account or when assessing the potential risk on return.
22. The judge accepted that the Iranian regime had "*a tendency to behave in ways that are arbitrary and unpredictable*" [46]. In *HB (Kurds)* the Upper Tribunal made clear that the Iranian authorities were increasingly suspicious of Kurdish political activity and Kurds were likely to be subject to heightened scrutiny on return to Iran. Even low-level activity such as possession of leaflets in support of Kurdish rights could attract a real risk of persecution. The Upper Tribunal concluded that the Iranian authorities took a 'hair-trigger' approach to those perceived to support Kurdish

rights whereby *“the threshold for suspicion is low and the reaction of the authorities is reasonable likely to be extreme”*.

23. At [61(i)] the judge appeared to assess the case on the basis that the Iranian authorities are likely to monitor activities on Facebook and political activity in the UK. Having made those findings it is difficult to see how the judge could rationally conclude at [61(iv)] that the Iranian authorities were likely to dismiss the appellant’s activities in the UK as “opportunistic”. The evidence relating to Iran indicates a high level of suspicion and intolerance of even low-level activities on behalf of the Kurdish cause. Nothing in the evidence or country guidance supported the judge’s conclusion, and in fact pointed in the opposite direction. In my assessment the judge failed to engage adequately with the substance of the country guidance in light of his apparent acceptance that the appellant had been active on Facebook and had attended at least one demonstration in the UK even if those activities were found to be cynical. It was insufficient to say that he had applied the guidance when his findings did not in fact engage with the substance and his overall conclusion contradicted it.
24. For the reasons given above, I conclude that the First-tier Tribunal decision involved the making of an error on a point of law. The decision is set aside. The usual course of action would be for the Upper Tribunal to remake the decision. If the only error had been in the First-tier Tribunal’s assessment of risk on return I would have retained the case in the Upper Tribunal. However, the nature and extent of the fact finding necessary is extensive. The parties accepted that if the First-tier Tribunal’s credibility findings could not stand, then it would be appropriate for the case to be remitted to the First-tier Tribunal for a fresh decision to be made.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The case is remitted to the First-tier Tribunal for a fresh hearing

Signed *M. Canavan*

Date 24 August 2020

Upper Tribunal Judge Canavan



