Upper Tribunal

(Immigration and Asylum Chamber) **Appeal number: PA/10616/2019 (P)**

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC **Decision & Reasons Promulgated**

On 2 October 2020 **On 07th October 2020**

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

ND

(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the appellant: Mr T Hodson of counsel, instructed by Elder Rahimi Solicitors

For the Respondent: Mr A Tan, Senior Presenting Officer

DECISION AND REASONS (P)

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote

hearing. At the conclusion of the hearing I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. The appellant, who is an Iranian national of Sunni faith and Kurdish ethnicity, with date of birth given as 18.9.93, has appealed to the Upper Tribunal with permission against the decision of the First-tier Tribunal promulgated 18.12.19, dismissing on all grounds his appeal against the decision of the Secretary of State, dated 19.10.19, to refuse his claim for international protection.

2. The appeal was originally listed to be heard at Field House on 28.4.20, a date which had to be vacated because of the COVID-19 pandemic. The Upper Tribunal subsequently issued directions proposing that the appeal should be held remotely, directing the appellant to prepare and lodge an agreed consolidated bundle.

3. Pursuant to directions, submissions have been received from both parties and on 24.7.20 the Upper Tribunal issued further directions for the error of law issue to be determined in a remote hearing.

4. I have carefully considered the decision of the First-tier Tribunal in the light of the oral and written submissions and the grounds of application for permission to appeal to the Upper Tribunal. I have in particular noted the Rule 24 response of 13.5.20 and the appellant's further submissions of 4.5.20.

5. Permission to appeal was refused by the First-tier Tribunal on 21.1.20. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge McWilliam granted permission on 26.2.20, considering it arguable that the First-tier Tribunal Judge should have considered whether what the appellant may divulge when questioned on return to Iran as a failed asylum-seeker about attending demonstrations in the UK would amount to an additional risk factor, along with his Kurdish ethnicity. Permission was granted on all grounds and the appellant continues to pursue all grounds.

6. I have addressed the grounds in order as set out below.

7. It is first argued that the First-tier Tribunal erred in law in finding at [30] of the decision that neither the appellant's attendance at one or two demonstrations nor at a HDK event in London where he was photographed with the party leader "would necessarily come to the attention of the authorities in Iran and place this appellant at risk on return." At [31] the judge did not accept that there would be a real risk when stopped at the airport or that he would necessarily be questioned. It is pointed out that the appellant does not have to demonstrate that he "necessarily" would be questioned or that his attendance at demonstrations or the meetings with the HDK leader would "necessarily" have come to the attention of the authorities in Iran. HB (Kurds) Iran CG [2018] UKUT 430 (IAC) held that a returnee without passport is likely to be questioned on return. Taken together with his Kurdish ethnicity as an additional risk factor, it is argued that the finding is flawed.

8. The second ground argues that the judge erred in failing to give weight to the documentary evidence of a letter from the KDP and an email from a member of the UK Committee of the party. However, at [29] of the decision the judge gave cogent reasons for according little weight to this evidence. Amongst other reasons, the appellant's evidence was contradictory. In the circumstances, there is no merit in this ground.

9. The third ground argues that the judge's rejection of the appellant's account of leafleting in Iran on behalf of the KDP was in error of law. The argument that the judge was not entitled to make an implausibility finding without consideration of country context is no more than a disagreement with the finding and fails to disclose any error of law.

10. The fourth ground arguing that the judge provided inadequate reasons for other adverse credibility findings is also a mere disagreement with the decision. Complaint is made that the judge referred to "numerous discrepancies in the appellant's account which undermine the veracity of the claim," asserting that the judge failed to make clear what those discrepancies were. However, a simple reading of the decision reveals numerous examples cited of such discrepancies, including between the screening interview, his asylum interview, and his oral and written statements. No error of law is disclosed in this ground.

11. The fifth ground argues that the judge made adverse credibility findings based on erroneous assumptions and speculation about the appellant's knowledge of his screening interview before the substantive asylum interview. However, it was open to the judge to consider and reject the appellant's explanation for the discrepancies. Whilst the appellant claimed that he lost his copy of the interview and did not have the opportunity to go through it, the judge disbelieved that account. No error of law is disclosed.

12. The sixth ground argues procedural unfairness in refusing an adjournment request made only at the conclusion of the appellant's re-examination by Mr Hodson, on the basis of the appellant's reference during his evidence to having made a video of him participating in a demonstration outside the Iranian embassy in London in support of Kurdish rights and that he had sent this to a Kurdish online TV channel in Iran where it was shown to a large audience, potentially amounting to 120,000 individuals. However, as the judge concluded, the appellant had had ample time and opportunity to prepare his case for the appeal hearing and there was no evidence that the video he referred to had been sent or seen as claimed. The overriding objectives of the Tribunal are to deal with cases fairly and justly. The appellant has the right to a fair hearing. He had fair notice of the appeal hearing and every opportunity to prepare for it. It was not suggested prior to the hearing that he had not had enough time to prepare or that, for example, he was awaiting important evidence. Even now, many months later, there is no evidence that any such video exists or that it was sent to a television channel or even broadcast on that

channel online. Nothing in the lengthy submissions on this ground demonstrates any procedural unfairness.

13. I am satisfied that the only ground of any merit is the alleged failure of the judge to properly consider the risk on return and whether the appellant would disclose when questioned that he had participated in anti-regime demonstrations in the UK and whether this disclosure would have put him at risk of mistreatment by the Iranian authorities. I heard Mr Hudson's submissions on this ground and then Mr Tan's response before indicating my provisional view that the appeal had to be allowed on this first ground, irrespective of argument about the secondary grounds outlined above. In the circumstances, Mr Hodson agreed that it was unnecessary to pursue the other grounds further.

14. I indicated at the hearing that I proposed to allow the appeal to the Upper Tribunal, set aside the decision of the First-tier Tribunal and remake the decision in the appeal it by allowing it. Although I summarised my reasons orally, I reserved my full reasons, which I now give.

15. In summary, Mr Hudson's submission was that when combined with the Country Guidance, the positive findings of fact of the First-tier Tribunal not only made the dismissal of the appeal in error of law but should have resulted in the appeal being allowed. For his part, Mr Tan accepted that the judge was wrong to refer to "*necessarily*" but relied on the negative findings and in particular that at [31] of the decision the judge found the appellant not credible. Mr Tan suggested that the judge only stated that the appellant "may" have attended one or two demonstrations. However, as I pointed out, the evidential burden was to the lower standard of proof.

16. HB (Kurds) Iran held that:

> "*(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."*

17. At [97] of that decision, the Upper Tribunal noted, "*What is not disputed is that a returnee without a passport is likely to be questioned on return*."

18. The First-tier Tribunal Judge found at [30] that there was no reliable evidence from the KDP in the UK that the appellant had attended demonstrations in the UK, "*though I am willing to accept that the appellant matt have attended one or two demonstrations*." The judge then asked the wrong question, whether the appellant's attendance at these demonstrations would "*necessarily*" have come to the attention of the Iranian authorities so as to put him at risk on return. The correct question is whether this sur place activity might, to the lower standard of proof, come to the attention of the authorities. A similar error arises in the same paragraph as to the HDK event at which the judge accepted the appellant had attended and was photographed with the party leader. In relation to the

HDK event, the judge was not satisfied that these photographs would "*necessarily*" have come to the attention of the Iranian authorities through the appellant's Instagram account.

19. At [31] of the decision the judge considered HB (Kurds) Iran, accepting that Kurdish ethnicity was a risk factor in combination with other factors, and that in certain circumstances even low level political activity might involve the risk of persecution, if discovered. The judge acknowledged that each case depended on its own facts and an assessment should be made as to how the authorities would be likely to view sur place activities, and that the authorities adopted a 'hair-trigger' approach. The judge then stated, "*However, I do not find this appellant's account to be credible and do not accept that he would be at real risk on return. I do not accept there would be a real risk when stopped at the airport on return or that he would necessarily be questioned*."

20. As stated above, Mr Tan relied on this adverse credibility finding. However, it is not clear to me what the judge intended to convey by this sentence, given that the judge accepted that the appellant had participated in one or two demonstrations and at a HDK event where he was photographed with the party leader. I can see from the decision that the judge did not accept that this activity would come to the attention of the authorities from the appellant's Instagram account, for the reasons set out at [30] of the decision, including that it was held in a name different to that of the appellant. However, the judge failed to consider what the appellant may disclose himself when questioned. In any event, once again, the judge has asked the wrong question. It is not whether the appellant would necessarily be questioned; the case law indicates that he is likely to be questioned. As stated, the real issue is what may be disclosed as a result of such questioning.

21. Given that the appellant would be under suspicion on return as a failed asylum-seeker, and particularly because of his Kurdish ethnicity, it can be assumed that the Iranian authorities will question him and, I am satisfied, will likely ask him about any anti-Iranian or pro-Kurdish political activity in the UK and require him to disclose any social media account details. Even if there are no social media accounts to disclose, the judge not being satisfied that they would have come to the attention of the Iranian authorities, the judge did accept and made findings of fact that the appellant attended "*one or two*" pro-KDP demonstrations and a HDK event where he was photographed with the party leader. As is also clear from Country Guidance, the appellant cannot be expected to lie when questioned about this political activity. On the basis of the Country Guidance of HB (Kurds), the threshold for suspicion is low, the reaction reasonably likely to be extreme and, "*… 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.*"

22. It seems to me to be inevitable that on return the appellant will be questioned and it must be taken as likely that he will disclose the sur place activity accepted by the judge to have taken place. Given his Kurdish ethnicity and this, albeit low-level, political activity, HB (Kurds) confirms that the Iranian authorities are likely to take action against the appellant which will at the very least infringe article 3 ECHR. Even if not likely, the risk is more than sufficient to cross the threshold of the lower standard of proof.

23. In the circumstances and for the reasons set out above, I find such material error of law in the decision of the First-tier Tribunal so that it must be set aside and remade. On the findings of fact, the appellant has demonstrated to the lower standard of proof that he will be at risk of persecution or treatment infringing Article 3 ECHR arising out his accepted sur place low-level anti-regime and pro-Kurdish activities.

Decision

The appeal of the appellant to the Upper Tribunal is allowed.

The decision of the First-tier Tribunal is set aside.

I remake the decision in the appeal by allowing it on asylum grounds, alternatively humanitarian protection grounds, and alternatively human rights grounds.

I make no order for costs.

Signed: *DMW Pickup*
Upper Tribunal Judge Pickup
Date: 2 October 2020

Anonymity Direction

I am satisfied, having had regard to the guidance in the Presidential Guidance Note No 1 of 2013: Anonymity Orders, that it would be appropriate to make an order in accordance with Rules 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in the following terms:

> "*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 to, amongst others, both the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings*."

Signed: *DMW Pickup*
Upper Tribunal Judge Pickup
Date: 2 October 2020