



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/00348/2018

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre

Decision & Reasons

On 6 November 2018

Promulgated

On 28 November 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR K N M S
(ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr Mills, Home Office Presenting Officer

For the Respondent: Mr Dickson

DECISION AND REASONS

1. The Respondent, to whom I shall refer as the Claimant, is a national of Iran born on 30 April 1984. He arrived in the United Kingdom and claimed asylum on 3 December 2015. The basis of his claim essentially was that he was born in the Kurdish area of Iran, his father was a supporter of the Democratic Party and once this was discovered by the authorities the family left Iran and went to live in Iraq in 2001. His parents never returned to Iran and have both subsequently died. The Claimant, shortly before coming to the United Kingdom, volunteered and fought with the PUK Peshmerga against ISIS for six months but decided after that time that he

did not wish to do so anymore and thus he left Iraq. The basis of his claim however was that he would be at risk on return due to his father's former involvement with the Kurdish Democratic Party as a result of which he would be questioned and arrested on return. This application was refused in a decision dated 18 December 2017.

2. The Claimant appealed against this decision and his appeal came before First-tier Tribunal Judge Thomas for hearing on 6 February 2018. In a decision and reasons promulgated on 20 March 2018 Judge Thomas allowed the appeal, not on the basis that the Claimant would be at risk based on his father's work for the KDPI, but because of his former involvement as a fighter with the PUK Peshmerga in Iraq.
3. Permission to appeal was sought, in time, by the Secretary of State on the basis that the judge had erred materially in law in allowing the appeal on the basis of the Claimant's Kurdish political activity when this was activity in Iraq and it was not explained why this should attract the adverse attention of the Iranian authorities or how it would come to their attention. The grounds submitted:

"1. The judge finds that the Appellant is likely to be asked about his whereabouts during his absence from Iran and at paragraph 23 that he would disclose his involvement with the Peshmerga in Iraq. It is not explained why the Appellant should feel the need to make such disclosure. This is not an HJ (Iran) situation where the Appellant should not be expected to conceal his faith.

2. It is noted that the Appellant himself did not rely on his involvement with the Peshmerga as the basis for his asylum claim (paragraph 10). He relied on other matters related to his father which the judge rejects".

4. Permission to appeal was granted by First-tier Tribunal Judge Birrell in a decision dated 9 April 2018 on the basis that:

"it is arguable that the judge has failed to adequately explain why fighting for the Peshmerga would put the Appellant at risk given this was not the basis of the claim and the judge has not referred to any background material that supports this view".

Hearing

5. At the hearing before the Upper Tribunal, Mr Mills did not seek to place great weight on the submission as to how the Iranian authorities would become aware of the Claimant's activities fighting with the Peshmerga in light of HJ (Iran) and the subsequent jurisprudence. However, he sought to focus on the question that, even if the authorities in Iran were aware of the Claimant's former activities fighting for the Peshmerga against ISIS in Iraq, why this would cause him to be at risk of persecution or Article 3 mistreatment on return to Iran. Mr Mills submitted that this was not the basis of the claim as put forward by the Claimant, which was that his

father had been involved with the KDPI and as a consequence the family had left Iran to live in Iraq in 2001. Mr Mills submitted the Claimant in his witness statement had not focused on his former fighting for the Peshmerga. Whilst he accepted that this did not preclude the judge from considering the point if the background evidence supported it and good reasons were given, he submitted that this was not the case.

6. The judge held as follows at [16]:

“The Respondent acknowledged there could be a tacit fear because he had fought with the Peshmerga. If apprehended the authorities would be able to find his identity and that would put him at risk. He has been out of the country for seventeen years which is a further risk factor”.

Mr Mills objected to this on the basis that this was not a fair summary of the Respondent’s position, however [16] is in fact simply a record of the submission made on behalf of the Claimant by his representative. At [22] Mr Mills acknowledged that the judge had found the Claimant’s evidence that he had fought with the PUK Peshmerga in Iraq to be plausible and credible but took issue with the judge’s conclusions at [23]. He submitted that the crux of the Secretary of State’s challenge is that the judge was comparing apples with oranges. Whilst the Claimant is a Kurd and has been involved with the Peshmerga in Iraq, it does not follow he will be perceived in the same way as a politically active Iranian Kurd. This is because the Iranian state had been fighting ISIS themselves so they shared a common enemy. Consequently, there is no reason why he will be deemed to be an enemy of the Iranian regime. He submitted that the judge had failed to give adequate reasons for why six months’ fighting with the Peshmerga would put him at risk on return and in so doing made a material error of law.

7. Mr Dickson on behalf of the Claimant sought to rely on a Rule 24 response which I will summarise as follows: the judge had not erred in law in that the judge’s reasoning as to the risk to the Claimant on return is amply supported by the sources cited at [17] of the decision, in particular the country guidance case of SSH and HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 0308 at 23 where the Upper Tribunal found:

“If there are any particular concerns arising from their previous activities either in Iran or in the United Kingdom or whichever country they are returned from, then there would be a risk of further questioning, detention and potential ill-treatment. In this regard it is relevant to return to Dr Kakhki's evidence in re-examination where he said the treatment they would receive would depend on their individual case”.

The Tribunal also found at [34] that Kurdish ethnicity is “an exacerbating factor for a returnee otherwise of interest”.

8. Reference was also made to the Home Office Country Information and Guidance Note concerning Iran: Kurds and Kurdish political groups July

2016 at 3.1.2 which describes that those involved in Kurdish political groups are at risk of arbitrary arrest, prolonged detention and physical abuse.

9. It was submitted that the Peshmerga are a Kurdish fighting force and involvement with them would not be tolerated. It was submitted that it is clear from *SSH and HR* (op cit) at [7] that a person cannot be expected to lie in order to avoid a former status being likely to be revealed and that this is consistent with the approach set out in *HJ* (Iran) [2010] UKSC 31 at 82 and *RT* (Zimbabwe) [2012] UKSC 38 at 42.
10. In relation to the second ground of appeal, it was submitted that the Claimant's case was put on the basis of his Kurdish ethnicity and fear of arrest on return and that given that evidence as to being part of the Peshmerga was before the judge, it was incumbent upon the judge to evaluate on the basis of this evidence whether the claimant fell for consideration within the Refugee Convention and Article 3 of the ECHR.
11. The Upper Tribunal were urged to uphold the decision of First-tier Tribunal Judge Thomas.
12. Mr Dickson in addition sought to rely on paragraph 2.3.3 of the CIG which was also cited in the case referred to by the judge at paragraph 17 viz *MA v SSHD* [2017] CSOH 134. He submitted that clearly, on the facts accepted by the judge, the Claimant has been involved in a Kurdish organisation and thus would fall within a category of either a real or perceived political opponent of the Iranian regime. He submitted that Kurdish groups are perceived by the Iranian authorities as threatening the Iranian state and the fact that ISIS may be a common enemy is not the fundamental point. The material issue is whether the Claimant will be regarded as having been actively involved in a Kurdish group and whether this would be enough to put him at risk. Mr Dickson drew attention to the bundle of background evidence before the First-tier Tribunal, in particular a report at page 52 dated 4 May 2017 from the US Military Academy entitled *Iranian Kurdish Militias: Terrorist-Insurgents, Ethno Freedom Fighters, or Knights on the Regional Chessboard?* where the author, Franc Milburn, noted that earlier in the year, i.e. 2017, Iran announced it had greatly increased surveillance activities in the KRI due to increasing concerns over the threat posed by Kurdish Iranian militant groups operating inside Iraqi territory. Mr Dickson submitted that this reinforced the point made in the CIG as to the sensitivity of the Iranian regime to Kurdish groups. He submitted there was a real risk that the Claimant would be questioned as to his Peshmerga activity, there was no doubt he would have to tell the truth about that and it would not be reasonable, applying *HJ* (Iran), for him to conceal the truth of his former activities. Whilst Mr Dickson accepted that the judge had not made express reference to this document or the specifics of the background material, the judge had at [23] clearly absorbed and summarised the effect of that background information where she found "*it is well documented that the Iranian authorities have no tolerance of Kurdish political activity and that*

the treatment despatched to anyone engaged in such activity is persecutory". Mr Dickson submitted the judge had given sustainable reasons and it was clear that if one considered both the Claimant's activity for the Kurdish Peshmerga in Iraq and his very long absence from Iran of seventeen years, then together this clearly gave rise to a potent risk to him which was bound to cause concern from the point of view of the Iranian authorities.

13. In reply, Mr Mills expressly accepted that activity with Kurdish separatists or pro-Kurdish political groups fighting for the interests of Kurds within Iran was on the lower standard likely to lead to persecution. However, he submitted that was not the case here as the Claimant had been involved with a non-Iranian group in a different country fighting not against the Iranian regime, but against a common enemy. He submitted that the judge had failed to grapple with the fact that the activity did not take place in Iran. He acknowledged there may be evidence to support a claim in this respect but this had not been referred to by the judge who had applied simply a broad-brush approach.
14. I reserved my decision, which I now give with my reasons.

Decision and reasons

15. I have concluded that there is no material error of law in the decision of First-tier Tribunal Judge Thomas. Mr Mills helpfully narrowed the focus of the grounds of appeal essentially to make the point that the Claimant would not be at risk even if the Iranian authorities knew of his former activity with the Iraqi pro-Kurdish Peshmerga, because the enemy that he faced was a common enemy and this activity did not take place within Iran. This, however, fails also to take account of the Claimant's extensive absence from Iran of more than seventeen years which was considered by the judge and a material factor in her decision. The judge held as follows:

"22. I find the Appellant's evidence on this issue to be plausible and credible and I find to the lower standard of proof that he fought as stated with the PUK Peshmerga in Iraq.

23. *It is well documented that the Iranian authorities have no tolerance for Kurdish political activity and that the treatment despatched to anyone engaged in such activity is persecutory. This Appellant has been absent from Iran for seventeen years. He is Kurdish and will be returning to Iran from the United Kingdom without a passport and as a failed asylum seeker. Whilst these factors in themselves would not expose him to a risk of persecution or harm, taken cumulatively, they make it reasonably likely that the Appellant will be questioned on return. Such questioning is reasonably likely to include his whereabouts for the seventeen past years and his activities. It is to be presumed that the Appellant will tell the truth and disclose his involvement with the Peshmerga in Iraq. This in itself would*

result in him being of adverse interest to the Iranian authorities. Further if it is the case that his father's activities with the KDPI were known or if the Appellant disclosed them and even if considered low-level this would heighten adverse interest in the Appellant. In these circumstances I find to the lower standard of proof that there is a reasonable degree of likelihood that the Appellant will be suspected of anti-regime behaviour and will be perceived to be involved in the Kurdish political cause. This would result in him being considered a threat to the Iran government and would expose him to a real risk of detention, persecution or serious harm on return to Iran now".

16. I find that the judge's conclusions at [23] also have to be read in light of her her acknowledgement of the context in which her findings needed to be made at [17] where she states:

"I have had regard to the conditions set out in paragraph 339L of the Immigration Rules to assess credibility. In assessing risk on return I have considered the Country Information and Guidance Iran: Kurds and Kurdish political groups July 2016, the case law of SB (risk on return; illegal exit) Iran CG [2009] UKIAT 00053; SSH and HR (illegal exit: failed asylum seeker) CG [2016] UKUT 308 (IAC) and MA v SSHD [2017] CSOH 134 and the background information indexed".

17. I find that, contrary to the assertion in the grounds of appeal, the judge has provided sufficient reasons for finding that the Claimant would be at risk on return in Iran in light of the jurisprudence and the background evidence.

Notice of Decision

18. I find no material error of law in the decision of the First tier Tribunal Judge, which is upheld.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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 their 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 Rebecca Chapman

Date 22 November 2018

Deputy Upper Tribunal Judge Chapman