



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/04602/2017

THE IMMIGRATION ACTS

Heard at Field House

Decision and Reasons Promulgated

On 9 August 2018

On 10 September 2018

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

S M H

[ANONYMITY ORDER MADE]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Rudolph Spurling, Counsel instructed by Barnes Harrild & Dyer, solicitors

For the respondent: Mr Tony Melvin, a Senior Home Office Presenting Officer

DECISION AND REASONS

Anonymity order

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity order in this appeal. The appellant will be referred to in these proceedings only as S M H. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of

publication thereof shall identify the original appellant, whether directly or indirectly. This order applies to, amongst others, all parties. Any failure to comply with this order could give rise to contempt of court proceedings.

Decision and reasons

1. The appellant appeals with permission against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to refuse him international protection under the Refugee Convention, humanitarian protection, or leave to remain in the United Kingdom on human rights grounds. The appellant is a citizen of Iran, 20 years old, a Muslim, and of Kurdish ethnicity.

Background

2. The appellant arrived in the United Kingdom clandestinely in November 2015 and claimed asylum on arrival. The basis of the appellant's claim is that while in Iran he was involved with PJAK (which at interview he misnamed as the PKK) and that following refusal of his asylum claim, he posted or reposted a number of anti-government statements and photographs on his Facebook account, and is now, therefore, a *sur place* refugee because of the view that the Iranian authorities are likely to take of his actions when he is returned.

First-tier Tribunal decision

3. There was no reliance before the First-tier Tribunal on Article 8 ECHR. The appellant gave evidence in Kurdish (Sorani). The Judge rejected the appellant's account of having been recruited by PJAK in Iran. The First-tier Judge accepted part of what it described as the appellant's 'tale', but only his nationality (Iranian) and ethnicity (Kurdish).
4. The Judge also accepted, at least implicitly, the appellant's evidence that he had a Facebook account which he had opened three or four months before the First-tier Tribunal hearing (August or September 2017). The appellant's evidence was that such an account was not possible in Iran. The appellant showed the Facebook posts to the First-tier Judge on his mobile telephone: they were live on the internet at the hearing in November 2017.
5. The Judge rejected the appellant's account of having been lost his father when he was 3 years old, fled with his mother to Iraqi Kurdistan, but returned when she too died and he was an orphan. The Judge found it improbable that the appellant had managed to return without difficulty or that he was then adopted by a friend of his father.
6. The First-tier Judge excluded from consideration an updated country report from Dr George Joffé, prepared for a different appeal, which dealt with generic country conditions.
7. The First-tier Tribunal found the appellant's evidence overall to be below the standard of reasonable likelihood or real risk, and that the appellant's claims 'viewed as a whole and in the round are improbable and implausible'. The Judge did not go on to consider

what might happen if the appellant were telling the truth, because 'the appellant's story is so unworthy of belief that any such analysis is neither feasible nor necessary'.

8. The First-tier Judge dismissed the appeal and the appellant appealed to the Upper Tribunal.

Permission to appeal

9. Permission to appeal was granted by Upper Tribunal Judge Lindsley, who summarised the appellant's renewal grounds as follows:

- (1) The First-tier Judge reached an unreasoned decision, without evidence, that the appellant had not been adopted by his late father's friend;
- (2) The First-tier Judge failed to apply *Danian v Secretary of State for the Home Department* [1999] EWCA Civ 3000 and look at how the appellant's Kurdish separatist Facebook posts would be interpreted by the Iranian authorities, and their likely reaction to those posts, focusing instead on the genuineness of the appellant's beliefs;
- (3) The First-tier Judge failed to apply *AB and others* (internet activity - state of evidence) Iran [2015] UKUT 257 (IAC);
- (4) The First-tier Judge should not have relied upon *SSH and HR* (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 00308 (IAC) which did not purport to provide guidance on the risks in Iran to returning failed Kurdish asylum seekers; and
- (5) The First-tier Judge erred in law in excluding from consideration Professor Joffé's updating report, on the basis that it was confidential and copyright, when in fact it was a background report on conditions and risk in Iran.

10. Permission to appeal was granted on all grounds.

Rule 24 Reply

11. There was no Rule 24 Reply on behalf of the respondent.
12. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

13. For the appellant, Mr Spurling produced emails dated 26 April 2017, before the First-tier Tribunal hearing, showing that Professor Joffé did consent to the reuse of his report. It is unclear whether those emails were before the First-tier Tribunal. Mr Spurling relied on pages 10-11 of the report which he contended was relevant to credibility and thus its omission was material.
14. In relation to *AB and others*, Mr Spurling reminded the Tribunal that the decision was reported only for the findings of fact it contained and was not a country guidance case. He continued to rely on *SSH and HR* which dealt with failed asylum seekers and illegal

exit. Merely being Kurdish was insufficient to create a risk of persecution on return; about 20% of the population of Iran were Kurds.

15. The appellant also relied on *BA* (Demonstrators in Britain - risk on return) Iran CG [2011] UKUT 36 (IAC) at [65], which dealt with physical demonstrations and *sur place* risk:

“65. As regards the relevance of these factors to the instant case, of especial relevance is identification risk. We are persuaded that the Iranian authorities attempt to identify persons participating in demonstrations outside the Iranian Embassy in London. The practice of filming demonstrations supports that. The evidence suggests that there may well have been persons in the crowd to assist in the process. There is insufficient evidence to establish that the regime has facial recognition technology in use in the UK, but it seems clear that the Iranian security apparatus attempts to match names to faces of demonstrators from photographs. We believe that the information gathered here is available in Iran. While it may well be that an appellant’s participation in demonstrations is opportunistic, the evidence suggests that this is not likely to be a major influence on the perception of the regime. Although, expressing dissent itself will be sufficient to result in a person having in the eyes of the regime a significant political profile, we consider that the nature of the level of the *sur place* activity will clearly heighten the determination of the Iranian authorities to identify the demonstrator while in Britain and to identify him on return. That, combined with the factors which might trigger enquiry would lead to an increased likelihood of questioning and of ill treatment on return.”

16. The Iranian authorities were twitch and more responsive to criticism than other regimes. In this appeal, the pinch point would be at the airport on return: if questioned, the appellant could not be expected to lie about whether he had a Facebook account, and even if he did, the authorities could search online for it. His evidence was that he had left Iran illegally and never possessed a valid passport.
17. Copies of the appellant’s Facebook posts were in the bundle and the originals had been demonstrably live at the hearing before the First-tier Judge. The reasoning regarding the appellant’s adoption was unsustainable (see [21] of the decision).
18. Mr Spurling asked me to find an error of law and allow the appeal.
19. For the respondent, Mr Melvin said that he could not see how the Judge could have done anything different, nor how he could have interpreted the Facebook page, which was in Arabic. The appellant could delete his Facebook page at any time, for example before returning to Iran, and then there would be no risk. He noted that in *SSH and HR*, both appeals had been dismissed.
20. I reserved my decision, which I now give.

Post-hearing application under rule 15(2A)

21. On 13 August 2018, four days after the hearing, Mr Melvin sent to the Tribunal an unreported Upper Tribunal decision by Upper Tribunal Judge Hanson promulgated on 2 May 2018, dealing with the question of Facebook posts. It came with a covering letter, stating that:

“Application under rule 15(2A) of the Procedure Rules

I appeared before you in the above appeal on Thursday 9 August 2018. At the conclusion of the appeal you reserved your decision. It has been drawn to my attention that the Upper Tribunal are in the process of reporting a detailed decision on this exact point [Facebook] (Upper Tribunal Judge Hanson) which was promulgated on 2 May 2018.

I apologise for not making an application for this, currently unreported decision to be before you at Thursday's hearing. I feel that the Tribunal would benefit from considering this decision whether there has been an error of law in the decision of the First-tier Tribunal.

A copy of this letter and the unreported decision have been forwarded to the appellant's representatives."

22. The letter does not indicate exactly what in this decision is considered to be likely to interest the Tribunal.
23. Rule 15(2A) is not the appropriate rule: that Rule deals with the introduction of evidence which was not before the First-tier Tribunal, not of unreported decisions.
24. The introduction of unreported decisions is governed by the Practice Directions of the Immigration and Asylum Chambers of the First-tier Tribunal as amended on 13 November 2014, at [11] thereof:

"11 Citation of unreported determinations

11.1 A determination of the Tribunal which has not been reported may not be cited in proceedings before the Tribunal unless: ... (b) the Tribunal gives permission.

11.2 An application for permission to cite a determination which has not been reported must:

- (a) include a **full** transcript of the determination;
- (b) identify the proposition for which the determination is to be cited; and
- (c) certify that the proposition is not to be found in any reported determination of the Tribunal, the IAT or the AIT and had not been superseded by the decision of a higher authority.

11.3 Permission under paragraph 11.1 will be given only where the Tribunal considers that it would be materially assisted by citation of the determination, as distinct from the adoption in argument of the reasoning to be found in the determination. Such instances are likely to be rare; in particular, in the case of determinations which were unreportable (see Practice Statement 11 (reporting of determinations)). It should be emphasised that the Tribunal will not exclude good arguments from consideration but it will be rare for such an argument to be capable of being made only by reference to an unreported determination. ..."

25. Mr Melvin's letter does not identify the proposition for which the decision is to be cited, nor does it certify that such proposition is not to be found in any reported decision of the Tribunal, the IAT or the AIT, and I am not satisfied that I would be materially assisted by citation (as opposed to adoption of the reasoning) of this decision.
26. I therefore refused to permit Mr Melvin to rely on the decision. I also indicated, in a response from the Field House administration, that submissions had closed and that such application should have been made at the hearing: the decision was handed down in May 2018 and the hearing was in August 2018.

Discussion

27. I begin by considering the adoption question. The First-tier Judge found that:

“His claim to have been an orphan was not impossible, but the story of unhindered travel and return to Iran was improbably, seen against the country background evidence, if his father had been known as a Kurdish fighter and that the family had been forced to flee Iran in consequence. The appellant had not claimed that he had returned to a large city where some degree of anonymity might have been possible. *Given the tribal nature of Kurdish society, the appellant is unlikely to have been ‘adopted’ by a friend of his father’s. He and his sister, if orphaned, are more likely to have been claimed by a close relative, within the extended family structure. Kurdish families tend to be large and it is accordingly improbable that the appellant had no known relatives on either side as he asserted.*

...”

[*Emphasis added*]

28. There appears to be no evidence advanced by either party to support these suppositions, and the standard of proof applied (not impossible, more likely, improbable) does not appear to be the lower standard of proof applicable in international protection claims.

29. Dealing next with *SSH and HR*, in that decision the Upper Tribunal held that:

“(a) An Iranian male whom it is sought to return to Iran, who does not possess a passport, will be returnable on a laissez passer, which he can obtain from the Iranian Embassy on proof of identity and nationality.

(b) 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.”

30. The appellant having exited illegally (if he did) or having no passport now, is not enough to put him at risk.

31. The real risk, if any, arises from the *sur place* claim (the *Danian* question): there was evidence at the date of hearing of live Facebook posts in trenchantly anti-government terms, from a Facebook page apparently created for that express purpose, just a few months before the hearing, on which the posts were live at the date of hearing.

32. The posts are not subtle either as to their wording, or their intended effect. The appellant’s Facebook page, as shown in the photocopies in the file, has as its main picture a photograph with the words *PJAK Activities* endorsed on it. The translations of his posts refer to execution of 4 Kurdish citizens in Urmya prison, more than 2300 children living in Iranian prisons, the sharing of a post by the KDPI Scotland about another person being sentenced for 11 years, another link about the ‘execution machine of the Islamic republic’ having executed a Kurdish woman, and so on. There is a photograph of someone who seems to have been badly beaten, and a page in English saying that Iran executes 1 person every 8 hours.

33. Whatever one's reservations about the reason for creating a page of that type, it was necessary, therefore, for the Judge to consider how the appellant's Kurdish separatist Facebook posts would be interpreted by the Iranian authorities, and their likely reaction to those posts. I reject Mr Melvin's assertion that these posts should be considered on the basis that the appellant could delete them before returning to Iran and be at no risk: that is a variant of the return to discretion argument which was rejected by the Supreme Court in *HJ (Iran)*. If the reason the appellant would change his behaviour (delete his Facebook profile and the posts thereon) is fear, then that cannot be taken into account in assessing risk.
34. The assessment of the risk on return in the First-tier Tribunal decision is materially impoverished by the failure to have regard to the evidence of Dr Joffé. As already stated, the Judge erred in considering that the evidence was confidential and copyright, since emails in the First-tier Tribunal bundle confirmed Professor Joffé's consent to its use. I have not heard detailed argument on Professor Joffé's report.
35. I am satisfied that the errors set out above are so serious that the First-tier Tribunal decision cannot be maintained and that the appeal should be reheard afresh by a different constitution of the First-tier Tribunal.

DECISION

36. For the foregoing reasons, my decision is as follows:
The making of the previous decision involved the making of an error on a point of law. I set aside the previous decision. The decision in this appeal will be remade in the First-tier Tribunal on a date to be fixed.

Date: 31 August 2018

Signed *Judith AJC Gleeson*
Upper Tribunal Judge Gleeson