



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/00711/2019

THE IMMIGRATION ACTS

Heard at Field House
On 9 November 2020

Decision & Reasons Promulgated
On 21 December 2020

Before

UPPER TRIBUNAL JUDGE PITT

Between

E R
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Ward of James & Co Solicitors
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

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.

DECISION AND REASONS

1. This is a remaking of the asylum and human rights appeal of ER, brought against a decision of the Secretary of State dated 11 January 2019.

Background

2. ER is a national of Iran, born in 1985. He came to the UK on 27 October 2015 and claimed asylum on arrival. After his claim was refused on 11 January 2019 he appealed to the First-tier Tribunal. The appeal was heard by First-tier Tribunal Judge Ferguson on 12 July 2019 but was dismissed in a decision promulgated on 4 October 2019. Permission to appeal against that decision was granted by the Upper Tribunal on 10 December 2019. The error of law hearing was held in the Upper Tribunal on 20 January 2020. In a decision issued on 28 February 2020 the Upper Tribunal found an error of law in the decision of the First-tier Tribunal, set it aside and directed this re-making.
3. It is undisputed that the appellant is of Kurdish ethnicity and grew up in the Kurdish area of Bana on the border with Iraq. He maintains that from the age of 18 to 20 he avoided military service by leaving the village when the authorities came. He then moved to Seyagoz, over the border in Iraq, at the age of 20, in order to continue to avoid serving in the Iranian army. In Seyagoz he found work as a security guard at a storage unit on the Iran/Iraq border. He lived with the owner, SA, an Iraqi national. SA was also involved in smuggling across the Iran/Iraq border. In order to facilitate the illegal passage of goods over the border, SA would bribe the border guards. In 2015, after SA arranged for thirty villagers to transport goods across the border, Iranian officers arrived unexpectedly and two of the villagers carrying goods were shot dead. The families of those who had been killed were told that SA and the appellant had not paid money to secure the route. The men who died in the incident were members of the Younsi Mala tribe, dominant in the area and with links to the Iranian authorities. The families of those who had been killed indicated to the appellant's family that they wanted revenge, had declared a blood feud and intended to kill the appellant. On learning from his brothers what had happened, the appellant fled to the home of a family friend who arranged for him to travel to Europe. The appellant travelled through a number of European countries and arrived in the UK on 27 October 2015 and claimed asylum.
4. The First-tier Tribunal did not find the appellant to be credible as regards his claim to be at risk from the Iranian authorities or the Younsi Mala tribe concerning the smuggling incident. The Tribunal also concluded that the appellant would not be at risk on return as a Kurd who had avoided military service or left Iran illegally.
5. The error of law decision issued on 28 February 2020 set out that the Upper Tribunal accepted only that the First-tier Tribunal had erred as regards the assessment of the claim to be at risk on return as a Kurd who had avoided military service for an

extended period of time. The Tribunal's reasons for finding an error of law on that basis are set out in paragraphs 8 to 12 of the decision. The reasons for finding no further error in the decision of the First-tier Tribunal are set out in paragraphs 13 to 23. The Upper Tribunal confirmed in paragraph 24 of the error of law decision that the re-making of the appeal would concern only the assessment of whether a real risk of mistreatment on return arose from the appellant's profile as a Kurd who had avoided military service for many years and that this re-making would take place in the Upper Tribunal.

6. The appeal then became caught up in the COVID-19 pandemic which required many cases to be adjourned and consideration given as to whether they could be litigated on the papers, via remote hearing or face to face. In the event, this appeal was listed for a remote oral hearing on 19 November 2020.
7. In support of the remaking, the appellant served a further bundle of materials on 4 June 2020. These included written submissions and materials going to the issue of whether the appellant faced a risk on return as a Kurd who had avoided military service. The appellant also served 14 pages of printouts of sections of the appellant's Facebook posts and photos of him attending demonstrations in the UK. The appellant provided a further statement dated 25 May 2020 maintaining that he had posted opposition material on a Facebook page from 2015 onwards, the first post being a picture of the flag of Kurdistan. His statement also maintained that he had attended demonstrations towards the end of December 2019 (i.e. after the negative First-tier Tribunal decision) and further demonstrations on 5 January 2020, 2 February 2020 and 1 March 2020. The new materials included a supplementary report from Dr S Laizer dated 3 June 2020.
8. The respondent did not object to the new materials being admitted and, in all the circumstances, where the protection claim fell to be assessed as of the date of hearing, the Tribunal admitted the new materials for consideration.
9. In this re-making, it is undisputed that the appellant is an Iranian national of Kurdish ethnicity who avoided military service until he left Iran at the age of 30. It was accepted that he had lived for an extended period in the Kurdish Region of Iraq (the KRI). It was also undisputed that he had left Iran illegally and did not have an identity document.
10. The parties were also in agreement that the findings of fact as to the appellant's profile had to be considered against the country guidance in HB (Kurds) Iran CG [2018] UKUT 00430 (IAC). The head note of HB states:

“(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.”

11. The appellant maintains that his profile as a Kurd who avoided military service, who lived in Iraq for a number of years and left Iran illegally is sufficient to meet the low

threshold for suspicion and adverse treatment identified in HB. He submits that on that basis alone his claim should succeed. Further, he maintained that his Facebook posts and attendance at demonstrations in the UK further raised his profile and showed that he would be at additional risk of adverse treatment on return to Iraq.

12. The respondent does not accept that the appellant has shown that his residence in Iraq will lead to significant adverse interest where HB identifies that this is “a factor that will be highly-fact specific”. The respondent also maintains that HB does not identify being a Kurd who has avoided military service as a potential risk factor. Further, the appellant had failed to show that he could not be expected to buy an exemption from military service or obtain an exemption on the basis of his ill-health. The appellant’s Facebook postings were opportunistic and he could be expected to delete them prior to returning to Iran so they were not capable of leading to adverse interest. His attendance at demonstrations was also opportunistic and very limited and did not assist his claim.

Discussion

13. The case of HB identifies a raised sensitivity in Iran towards anyone of Kurdish ethnicity. That factor, even combined with illegal exit, however, was not found to be sufficient to create a real risk of mistreatment on return. Other risk factors may combine with that profile, however, to meet the required standard for persecution or Article 3 ECHR ill-treatment on return. Paragraphs 6 to 9 of the head note to HB set out an inexhaustive list of factors that may raise someone’s risk profile sufficiently so as to show that they are in need of international protection.
14. Amongst the additional risk factors set out in HB, as summarised in paragraph 6 of the head note, is that of a period of residence in the KRI. This is stated to a factor which is “reasonably likely to result in additional questioning by the authorities on return.”
15. The Tribunal in HB reached this finding after considering the expert evidence in paragraphs 85 and 86 in which it is recorded that one of the expert witnesses gave the following evidence to the Tribunal:

“He said that if the appellant said that he came from Iraq, the first thing is that it would mean he had left Iran illegally. The second question would be as to why he went to Iraq. It would be presupposed that he would be connected with the opposition movements which are all centred in Iraq.”
16. The Tribunal in HB clarify, however, that this is a risk factor that “will be highly fact-specific”, so an assessment must be made in each case in order to establish the degree of adverse interest that could arise. The Tribunal set out that length of residence in the KRI, what the person was doing there and why they left the KRI are relevant factors to be taken into account.
17. When assessing the importance of this factor in this appeal, it must be held in mind that ER has not been found to be a reliable witness regarding what he was doing in

the KRI. His account of assisting people to smuggle goods over the border was not found credible. It follows that his account of leaving Iran because of threats from the authorities and a local tribe arising from his smuggling work is not credible. As before, however, his residence in the KRI is undisputed and it is extensive, the accepted account being that he was there from 2005 to 2015. The evidence does not show any involvement in pro-Kurdish or illegal activities by the appellant whilst he was in the KRI. In the context of the low threshold for suspicion of Kurds in general identified in HB, however, and the indication that an ethnic Kurd being resident in the KRI raises an additional suspicion of therefore being a connection with the opposition groups based there, my conclusion is that the extent of this particular appellant's residence in the KRI is sufficient to make it reasonably likely that he will face additional questioning on return and that this is likely to lead to adverse treatment meeting the required level of persecution and Article 3 ECHR ill-treatment for his protection claim to succeed.

18. Even were that additional risk factor not sufficient to show that the appellant is in need of protection, however, there is the further undisputed factor of his having avoided military service from the age of 20 to 30 whilst in Iran/Iraq. The respondent's Country Policy and Information Note (CPIN) entitled "Iran: military service" dated April 2020 indicates in paragraph 2.4.15 that:

"A June 2016 report suggested that due to increasing numbers of draft evaders the process of tracking them down had intensified. However, it is not known how active the Iranian Authorities currently are in pursuing and prosecuting draft evaders".

19. The report also indicates in section 5 that there are exemptions from military service and that this can be on the basis of medical exemptions; see section 5.2. The report indicates in paragraph 5.2.1 that where an individual has a certain illness and is "thus not in a complete state of health" they may still be assessed as being "capable of carrying out noncombat/military related services in offices.". There are further exemptions for those of more serious health issues who can be exempted more extensively.
20. In section 6 the report considers further the position of the authorities towards draft evaders and desertion. In paragraph 6.1.1 the report quotes from an Australian Government Department of Foreign Affairs and Trade (DFAT) dated June 2018 which stated as follows:

"Draft evaders are liable for prosecution. A person who deserts from the military must complete his service on return if he is under the age of 40. Evading military service for up to a year during peacetime or two months during war can result in the addition of between three and six months to the total length of the required service. More than one year's draft evasion during peacetime or two or more months during war may result in criminal prosecution. Draft evaders may lose social benefits and civic rights, including access to Government jobs or higher education, or the right to set up a business. The Government may also refuse to grant draft evaders driver's licences, revoke their passports or prohibit them from leaving the country without special permission. Iranian Authorities periodically crack down on draft evaders. In June

2016, the chief conscription officer for the armed forces announced their Authorities would intensify the process of identifying and arresting those who had attempted to avoid their military service. DFAT understands that the desire to evade military service is a key motivating factor for the immigration of middleclass families with teenage sons”.

21. However, at page 30 of his supplementary bundle, the appellant provided a more recent version of the DFAT report which is dated 14 April 2020. Paragraph 3.162 of the DFAT 2020 report states:

“Exemptions could be purchased legally in the past, through payment of an absence fine. This practice was common among wealthier Iranians. According to local sources, the quantum is dependent on one’s educational attainment (those with a higher education were liable for higher fines than those without). Discounts reportedly applied to married men and those with children. According to EA World View, absence fines in 2015 range from roughly USD6,500 to more than USD13,000. The policy was scrapped in 2019, and the payment of an absence fine in exchange for military exemption is no longer an option.”

22. Paragraph 3.163 of the April 2020 DFAT Report confirms the comments of the earlier report on how draft evaders are liable for prosecution and so on. Paragraph 3.164 of the DFAT 2020 Report states that:

“Obtaining an exemption from military service is possible, but depends heavily on individual and socioeconomic circumstances. Religious minorities face a moderate risk of harassment on the grounds of their religious faith while undergoing military service. Those seeking to avoid military service are likely to face arrest and restricted access to a wide range of social benefits and civic rights, which may impact their ability to leave the country.”

23. In my judgment, again in the context of low threshold for suspicion of Kurds in general identified in HB, the avoidance of military service over a period of 12 years, particularly where 10 of those years were spent in the KRI, is a further factor creating a profile for this appellant showing a real risk of mistreatment on return. The respondent maintains that the case of HB does not specify that avoiding military service is a potential risk factor. That is because the Tribunal in HB was not asked to consider the issue of avoidance of military service at all. As before, the additional risk factors for Kurds identified in paragraphs 6 to 9 of the head note to HB is not exhaustive. The country evidence here, in particular the CPIN and the DFAT 2020 report, shows an increasingly hostile approach towards those who have avoided being called up for military service.

24. The respondent maintains that the appellant would not face mistreatment on return as he could seek an exemption from military service either by buying himself out or on the basis of his health. As before, the country evidence indicates that it is no longer possible or, at best, that it is unlikely that someone with the appellant’s profile could pay an absence fine in order to avoid the draft. The country evidence also does not suggest that this appellant’s level of ill-health would necessarily lead to an exemption where he experiences only sporadic episodes of pain and fever requiring

hospital treatment. In any event, it is not the appellant's case that he would be able to enter Iran and, having done so, negotiate either a payment for exemption or obtain a medical exemption. The country evidence shows that draft evasion is becoming a more serious matter for the Iranian authorities and that evasion for as little as 1 to 2 years may result in criminal prosecution. This appellant avoided military service for over 10 years and, by now, at least 15 years. It is reasonable to assume that this will be an issue of interest to the authorities on return, therefore. That has to be considered in the context of the authorities regarding Kurds with "even greater suspicion than hitherto" and subjecting them to "heightened scrutiny on return". There is the additional risk factor already identified of the appellant residing for 10 years in Iraq. It is my conclusion that the appellant's profile of Kurdish ethnicity, extended residence in Iran and draft evasion creates a real risk of serious mistreatment on return.

25. The respondent objected to weight being placed on the expert reports of Dr Laizer dated 4 July 2019 and 3 June 2020 which support the appellant's claim to be at risk as a Kurd who had avoided military service and his claim on the basis of his Facebook entries and demonstrations in the UK. The respondent maintained that on occasions Ms Laizer had been found by the Tribunal to be a "partial" witness, referring to SM and Others (Kurds - Protection - Relocation) Iraq CG [2005] UKIAT 00111 at paragraphs 252 and 253. It remains the case that Dr Laizer has been accepted as a reliable witness in a number of other country guidance and other Tribunal cases, for example SA and IA (Undocumented Kurds) Syria CG [2009] UKAIT 0006. In the reports here she sets out her extensive qualifications, expertise and the wide range of forums in which she has acted as an expert witness. She also confirms her understanding of her duty to the court, her awareness of the Ikarian Reefer tests. She remains an expert witness to whose opinion at least some weight can be given, therefore. The respondent also maintained that much of what was set out in Dr Laizer's supplementary report was unsourced and maintained that little weight could be attracted to it where that was so. Were Dr Laizer's report the main source of country evidence before me, that might be a material issue. In the event, her comments on draft evasion and time spent in Iraq are in line with the material in the respondent's CPIN, the DFAT report or HB. It is my conclusion, in any event, that even without the support of Dr Laizer's reports, the country evidence and country guidance case of HB show that the appellant makes out his case on the basis of his Kurdish ethnicity, residence in Iraq and avoidance of military service.
26. The appellant also maintains that he will be at risk because of some entries from 2015 onwards on his Facebook page which would be taken as showing support for Kurdish opposition to the Iranian regime and because of attending demonstrations in the UK. As before, the appellant has not been found to be credible concerning his original claim for protection and being at specific risk from the authorities and the Younsi Mala tribe because of his work as a smuggler. His Facebook entries are in a different name. Also, it is of note that his attendance at demonstrations began only after his appeal was refused by the First-tier Tribunal. In that context, it is my conclusion that these activities did not arise as a result of a genuine political motivation but, rather, were conducted in order to bolster his claim. There is

evidence that the Iranian authorities monitor Facebook accounts and activities of the Iranian diaspora but this appellant's profile in that regard on Facebook and at demonstrations is very low and, as before, he is lacking in genuine political motivation. The country evidence on surveillance by the authorities of Iranians abroad does not show that the limited activity he has engaged in thus far in the UK would be already known to the authorities. He can be expected to delete his Facebook entries before return given they are not genuine expressions of a political belief. This aspect of the appellant's claim is therefore not found to show a well-founded fear of mistreatment on return.

27. It remains my conclusion, however, this appellant has demonstrated that he faces a real risk of mistreatment when interviewed on return to Iran as a result of his profile as a Kurd who left illegally and who lived in Iraq and avoided military service for an extended period of time. This is sufficient to activate the "hair trigger" adverse reaction of the Iranian state against him immediately upon arrival. The risk of mistreatment of those detained for further questioning in those circumstances on is not in dispute. I therefore allow the appeal under the Refugee Convention and the Article 3 of the ECHR.

Decision

The appeal is allowed on refugee and Article 3 ECHR grounds.

Signed: *S Pitt*
Upper Tribunal Judge Pitt

Date: 10 December 2020