



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/13201/2018

THE IMMIGRATION ACTS

Heard on: 11th January 2021
At: Manchester Civil Justice Centre (remote hearing)

Decision & Reasons Promulgated
On 2nd March 2021

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

RFK
(anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant: Ms Rutherford, Counsel instructed by Halliday Reeves Law Firm
For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Iran born in February 1989. He appeals with permission against the decision of the First-tier Tribunal (Judge IF Taylor) date the 29th August 2019 to dismiss his protection and human rights appeals.
2. The Appellant has a long history of interaction with the immigration services. For the purpose of this decision the relevant dates to note are as

follows. He is known to have been in the United Kingdom since the 18th September 2005 when he was encountered in a vehicle at Dover. He claimed asylum on that date, a claim that was rejected. His efforts to appeal against that decision came to nothing and his appeal rights were exhausted on the 30th August 2007. The Appellant subsequently obtained permission to marry, and on the 23rd July 2010 he was granted Indefinite Leave to Remain, for reasons that remain opaque. Seven years later, however, the Appellant put that leave in jeopardy when he was convicted of assault occasioning Actual Bodily Harm for which he received a sentence of 12 months' imprisonment. The particulars of the offence were described by the trial judge as a "not insignificant glassing". This was his eighth criminal conviction, and the length of sentence triggered the 'automatic deportation under s32 Borders Act 2007.

3. In response to the decision to deport him the Appellant relied on both human rights and protection grounds.
4. In respect of Article 8 the Respondent recognised that the Appellant has children in the United Kingdom, but found him to have failed to demonstrate that it would be unduly harsh for those children if he were to be deported. She refused to grant leave and the First-tier Tribunal found the relevant exception at s33 of the Borders Act not to be engaged. There is no appeal against that decision.
5. That leaves the protection grounds. Before the First-tier Tribunal the Appellant argued that he has a well-founded fear of serious harm in Iran because he is a Kurd, and because he is a draft evader. He does not wish to undertake military service because of human rights abuses perpetrated by the Iranian military. The Appellant submitted that he would be at risk on arrival because he left Iran illegally, has been out of the country a long time and has not completed his military service: he relied in this regard on the "hair trigger" approach by the Iranian security services towards Kurdish returnees as set out in HB (Kurds) Iran CG [2018] UKUT 00430 (IAC). Further he argued that once back in Iran he faces a real risk of prosecution and imprisonment for his draft evasion, in conditions amounting to a violation of his inviolable Article 3 rights.
6. The First-tier Tribunal noted that the Appellant's original asylum claim had been rejected as fabrication, his account being found "neither reliable nor credible". That said, there does not ever appear to have been any dispute that the Appellant is a Kurd. Nor does there appear to be any dispute that given his age, and date of arrival in the United Kingdom, it is reasonably likely that he has not yet completed military service in Iran. The First-tier Tribunal's findings can be summarised as follows:
 - i) Military service is compulsory in Iran for males. It lasts between 12 and 24 months and is undertaken between the ages of 18 and 40;

- ii) Although it is 'compulsory' there are a plethora of exceptions and "buy outs" – an individual can for instance pay a sum of money (\$6500) in lieu of service;
- iii) The Appellant had not demonstrated that he would be unable to buy his way out;
- iv) Even if the Appellant did undertake service there is not a real risk that he would be required to be involved in acts contrary to the basic rules of human conduct. Whilst the Iranian army are currently active in Syria, and human rights violations are occurring, the evidence indicates that the conscripts sent there are generally poor Afghan refugees hoping to gain Iranian citizenship through their service;
- v) The conditions experienced by conscripts are grim but not sufficiently inhuman or degrading to engage Article 3;
- vi) Although there is a possibility of a prison sentence the Appellant could avoid this by paying, or by undertaking his military service. "There appears to be little appetite to prosecute longstanding service defaulters and in the circumstances it would be unlikely that the Appellant would serve a prison sentence"
- vii) If an individual were sent to prison for draft evasion he would face conditions that would violate Article 3

7. The Appellant was granted permission to appeal on the 15th November 2019 on the grounds that in reaching its decision the First-tier Tribunal erred in the following material respects:

- i) A failure to have regard to country background information indicating that while the standard punishment for draft evasion is imprisonment for between 6 months and 2 years, "longer draft evasion (one year during peace or two months during war) may result in criminal proceedings before a military court";
- ii) A failure to consider the material fact that the Appellant is a Kurd who has previously spent time in Iraq;
- iii) Misunderstanding the objective evidence in respect of "buy out" options – these are available only at the time of call up, and are not likely to be offered as an alternative after 16 years of evasion

8. Before me Ms Rutherford submitted that there was no evidential foundation for the Tribunal's conclusions in respect of ground (iii). If it was wrong about that, the appeal should have been allowed, since on the Tribunal's own findings the Appellant could, as a long term draft evader, end up facing conditions breaching Article 3 in an Iranian jail.

9. Mr McVeety opposed the appeal on all grounds. He submitted that the Appellant's case is entirely hypothetical since there was no evidence before

the Tribunal of actual prosecutions, prison sentences or otherwise. No matter what the Iranian law said, the Appellant could only make out his claim if he faced an *actual* risk of punishment for the evasion thus far. 'Real' did not mean notional. Furthermore, the grounds as argued were all irrelevant since the Appellant could, in the final analysis, avoid prosecution, prison and/or persecution by simply undertaking his military service. He has raised no reason of conscience as to why he would not wish to do so, and his assertion that he would be required to undertake acts contrary to the basic rules of human conduct was expressly rejected by the Tribunal.

Discussion and Findings

10. At the end of its paragraph 23 the First-tier Tribunal, citing from the CPIN, says this:

“In the latest budget the administration propose that those who have defaulted on their service for more than eight years [which would include the Appellant] can pay a fine to buy out their military service. The fines differ based on level of education, with a higher education demanding higher fines”

It is on the basis of this information that the First-tier Tribunal goes on to find that this is an option available to the Appellant, and rejects his contention that he would be unable to find the money.

11. Ground (iii) takes issue with this proposition, alleging that the Tribunal misunderstood the evidence. The written grounds (which I do not understand to have been drafted by Counsel) assert that the “IJ fails to grasp” the nature of the buy out, and that it is an option not available after such a long time.
12. The CPIN before the First-tier Tribunal was published in October 2016. Section 5 of that CPIN *Iran: Military Service* sets out the available information on the buy out under the heading “exemptions or alternatives”. It notes that there are many reasons a man could be exempted, including but not limited to “payment in lieu of service” [5.1.6]. It then discusses some proposed shifts in attitude towards the ‘buy out’, with military leadership complaining that it is discriminatory – I note that there is no evidence that the scheme was ever scrapped and this issue was not raised in the appeal before me. At 5.2.3 comes the crucial evidence, at least in respect of ground (iii):

“In the latest budget, the administration proposed that those who have defaulted on their military service for more than eight years can pay a fine to buy out of their military service”.

13. This was evidential foundation for the Tribunal’s findings that this was one option for the Appellant if he wished to avoid prison, alongside actually performing the military service legitimately ordained by law in Iran. If there

were any doubt about that, I note that it is dispelled by new evidence provided in the latest version of the CPIN (April 2020):

5.5.3 The Interests Section of the Islamic Republic of Iran found on the Embassy of Pakistan's website provided information regarding the purchase of military service. Form 011, dated 7 January 2019 stated: 'In accordance with notice number 22213/12/3 dated 7 May 2017 by Headquarters of the Armed Forces, and the budget resolution for 2017, all men who have been absent from [evaded] military service for more than 8 years can take action to purchase their military service.

14. This is followed by a detailed list of the documents etc that the applicant is required to produce. I am satisfied that the First-tier Tribunal based its decision on the available evidence, which in retrospect has been supported by yet further evidence. There was nothing before the First-tier Tribunal to indicate that the buy out would not be an available option for the Appellant. Ground (iii) is not made out.
15. I return to ground (i). this ground is concerned with the standard of proof, and whether the statements in the CPIN that an evader "may" face prosecution before a criminal court were sufficient to demonstrate a 'real risk'.
16. By the time it came to consider whether this constituted a real risk the Tribunal had of course already rejected the idea that the Appellant would face prosecution at all, holding that he could simply buy his way out. I note that this finding of fact has not been challenged. That said, the Tribunal acknowledges, at its §33, the passage upon which the grounds rely. It goes on to cite 7.2.1 of the CPIN that the punishment could "possibly" include imprisonment but it then concludes "there seems to be little appetite to prosecute longstanding service defaulters such as the appellant and in the circumstances I find that it would be unlikely that the appellant would have to serve a prison sentence". At 7.2.3: "it is not known whether, in practice, the Iranian authorities pursue a policy of actively tracking down and prosecuting draft evaders....". The Tribunal concludes, in the absence of any positive evidence of people actually being prosecuted or imprisoned, at its §37: "in the circumstances I am not satisfied that the appellant has established, even to the low standard required, that if returned to Iran there is a real risk that he will face persecution...or serious harm".
17. I am satisfied that here the Tribunal expressly considered whether the term "may" was capable of establishing a real risk, but it concluded, on the evidence before it, that it was not. The CPIN features words such as "punishable", "liable", "may" and "the law provides for" but what is lacking is any evidence at all that anyone, including Kurds, has actually gone to prison for failing to report for duty, even for a lengthy period. In the absence of any actual risk, the Tribunal was correct to find that the notional threat of prosecution was insufficient to discharge the burden of proof. I note that

there is nothing in the new CPIN that offers the Appellant any assistance in that regard.

18. That leaves ground (ii). The Tribunal expressly recognised that Kurds face discrimination in Iran [at its §32] but again there was nothing in the evidence before it to indicate that Kurds would be excluded from the 'buy out' scheme or that they face a disproportionate risk of prosecution. I note that the CPIN does expressly address the position of groups perceived to be at greater risk, including religious minorities or LGBT individuals. Being Kurdish does not feature. I was taken to no evidence to the contrary. The grounds place reliance on HB but as that decision makes clear, being Kurdish does not in itself create a real risk of harm. This Appellant has no political profile that might bring him to the adverse attention of the Iranian authorities – I note that his original claim was based on a local fight and had nothing to do with the regime. Ground (ii) is not made out.

Anonymity Order

19. This appeal concerns a claim for protection. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order 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”

Decision and Directions

20. The decision of the First-tier Tribunal is upheld. The appeal is dismissed.
21. There is an order for anonymity.

Upper Tribunal Judge Bruce
15th February 2021