



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/01115/2016

THE IMMIGRATION ACTS

Heard at Glasgow
On 24 October 2017

Decision & Reasons Promulgated
On 27 October 2017

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

[H M]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr S Winter, Advocate, instructed by Latta & Co, Solicitors
For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a Kurdish citizen of Iran, born on [] 1995. He sought asylum, based on his support for the KDPI, and on a friend who had been arrested having given his name to the authorities.
2. The respondent refused the appellant's claim for reasons explained in her letter dated 28 January 2016. It was not accepted that the Iranian government knew or suspected him to be a member or supporter of the KDPI.

3. First-tier Tribunal Judge Sweeney dismissed the appellant's appeal for reasons explained in his decision promulgated on 16 November 2016.
4. The appellant's grounds of appeal are stated in his application for permission to appeal dated 11 November 2016 (which in terms of the TP (UT) Rules 2008, rule 23 (1A), now stands as the notice of appeal to the UT).
5. Ground (1) is that the judge placed "too much weight on one perceived inconsistency in the appellant's account, rather than taking the evidence as a whole". [The inconsistency is not specified.]
6. Ground (2) is that the judge "placed too much weight on plausibility" in relation to the appellant finding out from someone who works for the Ettela'at that his friend had been detained.
7. Ground (3) challenges the finding at ¶62 that the appellant's participation in a single demonstration [in the UK] was unlikely to attract attention or prompt enquiries from the authorities. This is said to be contrary to *BA Iran CG UKUT 36*, which lists *sur place* activities among the criteria to be assessed, and to constitute an error of failing to engage with country guidance.
8. FtT Judge Keane granted permission to appeal on 10 January 2017. He thought it "*Robinson* obvious" that the judge failed to refer to background evidence which might have supported the appellant's account of events.
9. Deputy UT Judge Murray dismissed the appeal by decision promulgated on 27 February 2017. UT Judge Pitt refused permission to appeal to the Court of Session by decision dated 29 March 2017. The appellant sought and was granted permission to appeal to the Court.
10. Parties then entered into a joint minute:

"WINTER for the appellant and MACIVER for the respondent concur in stating to the court that this appeal has been settled extra-judicially, it being accepted by the respondent that the Upper Tribunal erred in law in taking the decision under appeal for the following reason:

In concluding that the appellant would not face risk of persecution or ill-treatment upon his return to Iran, the UT founded upon its assessment that his activity during his time in Iran was not of a nature to "attract the attention" of the Iranian authorities "or to prompt enquiries" from them upon his return ... and upon its assessment that the authorities would not have identified him as having taken part in political activity during his time in the UK ... Although the UT did found upon the case of *SSH and HR Iran CG [2016]* as part of its assessment of risk, it failed to take account of the finding at paragraph 23 of that case the returnees would face questioning at the airport upon return ... It thereby failed to take account of the possibility that the appellant's political activity during his time in the UK would by that route become known to the authorities, and consequently failed to assess the risk to him should that occur.

They therefore crave the court:

to allow the appeal;

to set aside the decision of the UT ...;

to remit the case to a differently constituted UT ... for reconsideration, on all grounds which are before it ... “

11. The Court pronounced an interlocutor accordingly on 13 September 2017.
12. Mr Winter submitted thus:
 - (i) The grant of permission was on the “*Robinson* obvious” point rather than anything in the grounds.
 - (ii) The appellant’s focus in course of his onward appeals shifted to ¶15(j) and 60 of the FtT decision: the finding that he took part in a demonstration organised by the KDPI in London on 12 July 2016.
 - (iii) Nevertheless, and, notwithstanding the focus in the joint minute, all grounds were open in terms of the interlocutor, not only the issue of risk arising from questioning at the airport.
 - (iv) The appellant’s FtT bundle 2, item 1, the respondent’s country information and guidance, 2.3.3, was evidence of a distinction drawn by the Iranian authorities between ordinary Kurds and those involved or perceived to be involved in Kurdish political activities.
 - (v) Although the judge found at ¶61 no risk of the appellant being identified as a participant in the demonstration, that overlooked his liability to questioning.
 - (vi) The respondent’s guidance also acknowledged zero tolerance and risk of persecution for perceived activism at any level.
 - (vii) These points had been made to the FtT: written submissions, ¶38.
 - (viii) On this issue, the outcome should be reversed.
 - (ix) Alternatively, the case should be remitted to the Ft for fresh decision, setting aside the credibility findings, on the issue identified in the grant, or on grounds (1) and (2).
13. I observed that there was no explicit finding on whether the appellant took part in the demonstration in bad faith or in good faith, and while that usually made no difference to a *sur place* claim, it might have some bearing on risk on return, and the account the appellant might be expected to give of himself to the authorities.
14. Mr Winter submitted it should be taken that he acted in good faith, there being no finding to the contrary, and that he would respond accordingly to questioning, which led to a risk of a stage of interrogation and ill-treatment entitling him to protection.
15. Mr Matthews accepted that all grounds were open, and that ground (3) was wide enough to cover the appellant’s principal argument. He submitted further thus:

- (i) There was no merit in the grounds challenging the credibility findings. The judge referred to and said he took account of background materials and local circumstances (e.g. ¶¶22-23), this was a specialist tribunal, and it had not been shown that he failed to do as he said.
 - (ii) In any event, the crucial reasons for discounting credibility were to do with internal inconsistencies and implausibilities, unrelated to background materials.
 - (iii) The only possible *lacuna* in the decision was the absence of an explicit finding on whether the appellant engaged in the demonstration in good or in bad faith.
 - (iv) The absence was unsurprising, as the demonstration was 6 months after the respondent's decision; it was first mentioned in a witness statement dated shortly before and effectively produced only at the hearing; the respondent was not represented at the hearing; the matter had not been the subject of specific submission; and the issue had been formulated only since.
 - (v) The judge decided that the appellant was not credible, and not politically active.
 - (vi) The judge's general finding of bad faith extended also to the attendance at the demonstration.
 - (vii) It was accepted that some questioning was routine on return, and that the appellant was not to be expected to lie; but once the finding was read across, there was no reason to conclude that he might place himself at risk. There was no more to come to light than a failed asylum claim. It has been decided that such does not amount to a protection need.
 - (viii) If there was a need for any further finding, that should be reached by way of a further hearing in the UT.
16. Mr Winter in reply said that if the decision were to be set aside only on the specific point turning on attendance at the demonstration, the appellant was likely to seek to give further evidence.
17. I reserved my decision.
18. Grounds (1) and (2), the general attack on credibility, lack meaningful content, and have not been shown to be any more than disagreement on the facts. The terms of the grant of permission were not adopted or developed in submissions, and that matter takes the appellant no further.
19. While the possibility of a further hearing was tentatively discussed, I have decided that on any view of legal error, that would serve no practical purpose. The appellant has said all he wishes to say, to the effect that he engaged in activities both in Iran and in the UK in good faith. He has not made any application to give further evidence, and is hardly likely to shift his ground.
20. As to good or bad faith in attending the demonstration, the reason the judge recorded no separate finding is that one was not asked for. It was a possible fine distinction which had not occurred to parties as of any possible relevance.

21. No reason has been shown for the generally adverse credibility finding not to apply to attendance at the demonstration. A distinction on this point would be exceedingly improbable.
22. The appellant therefore has no more to say to the Iranian authorities than that he is a failed asylum seeker, with a history no different from many others.
23. *SSH and HR* (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 00308 (IAC), is headnoted thus. The paragraph relied upon by the appellant is also set out:

“(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.

...

23. This has to be seen, as with all these pieces of evidence, in the context of the evidence overall. In our view the evidence does not establish that a failed asylum seeker who had left Iran illegally would be subjected on return to a period of detention or questioning such that there is a real risk of Article 3 ill-treatment. The evidence in our view shows no more than that they will be questioned, and that 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 that the treatment they would receive would depend on their individual case. If they co-operated and accepted that they left illegally and claimed asylum abroad then there would be no reason for ill-treatment, and questioning would be for a fairly brief period. That seems to us to sum up the position well, and as a consequence we conclude that a person with no history other than that of being a failed asylum seeker who had exited illegally and who could be expected to tell the truth when questioned would not face a real risk of ill-treatment during the period of questioning at the airport. We should add that we see no reason to doubt Dr Kakhki’s evidence that there is a special court at or near the airport which considers the cases of returnees but the evidence does not show a real risk of ill-treatment in breach of Article 3 amounting to persecution as a consequence of attending at the court.”

24. Paragraph 34, which appears immediately after the passage which became the headnote, makes it clear that it extends to Kurds:

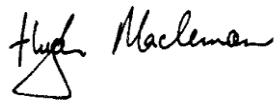
“It was however agreed that being Kurdish was relevant to how a returnee would be treated by the authorities. For example, the Operational Guidance Note refers at 3.12.14 to the government disproportionately targeting minority groups, including Kurds, for arbitrary arrest, prolonged detention and physical abuse. No examples however have been provided of ill-treatment of returnees with no relevant adverse interest factors other than their Kurdish ethnicity, and we conclude that the evidence does not show risk

of ill-treatment to such returnees, though we accept that it might be an exacerbating factor for a returnee otherwise of interest.”

25. Similar issues arose in *AS (Iran)* [2017] EWCA Civ 1539:

- “30. I turn next to Ground 3. Under this Ground Ms Farbey argues there were three flaws in the decision. First, while it was correct to conclude, with *SB (Iran) CG* [2009] UKAIT 00053 in mind, that earlier illegal exit was insufficient to give rise to a risk on return, Judge Beg failed to consider the risk that the Appellant's UK-based political activities in Britain might become known, as a result of form-filling or questioning on her arrival in Iran. Second, when placing reliance "on the lack of evidence as to what [she] would be questioned about on return" [paragraph 55], Judge Beg failed to have regard to the Country Information Guidance as to the treatment of failed asylum seekers. In particular, the Appellant makes reference to a report from Amnesty International of February 2012, indicating that returning asylum seekers are interrogated as to their political activities abroad, and "will be held for a few days until it is clear to police that they have not been involved in political activity". This guidance was referred to in the Respondent's Country Information, and should have been considered by the First-tier Tribunal.
31. Thirdly, if and to the extent that the First-tier Tribunal placed reliance on the Appellant's ability to conceal her political activities by omitting any mention of them when completing questionnaires or in interview, such an approach would conflict with the dicta of the Supreme Court in *RT (Zimbabwe) v The Secretary of State for the Home Department* [2013] 1 AC 152, see the judgment of Lord Dyson at paragraphs 26/27.
32. The Secretary of State suggests that the First-tier Tribunal dealt properly with this aspect of the claim, in paragraphs 45 to 55 of the determination. Starting from the findings that the Appellant had exaggerated the interest in her during her previous stay in Iran, and sought to boost her case by her *sur place* activities, and then having regard to the general and low-level nature of those activities, the Tribunal was justified in concluding that those activities had not been sufficient to bring her to the attention of the Iranian regime, despite the degree of monitoring of activities within and outside Iran. She has "no real political profile" in Iran, and there was no convincing evidence that she was identifiable or identified by the Iranian regime. Mr Hickman submits that Judge Beg dealt with this issue directly and sufficiently. He further argues that the fact the judge did not mention "every item of evidence" falls far short of an error of law.
33. Here too I would accept the submissions of the Respondent. This Ground in large part represents a challenge to the factual findings in the First-tier Tribunal. In essence, Judge Beg concluded that the Appellant's political activity was at a low level, so low that she has fallen under the radar of the Iranian government. There was no evidence to suggest the Appellant would be a suspected political activist or that she would be questioned directly about political activity. Mr Hickman is correct that the Tribunal did not conclude that the Appellant would be required to lie about her political engagement in Britain. As the Appellant's expert Dr Fatah stated (paragraph 55), it is "not always clear why people are questioned" on entry and "there is no way of knowing what they are questioned about".
34. It appears to me that the Tribunal's reasoning is sufficiently clear in relation to this Ground, and here too I would dismiss the appeal.”

26. The paragraph of the country guidance on which the appellant relies does support the possibility of questioning at the airport, but the argument that this creates a risk in a case such as the present is rejected. The same line failed in the Court of Appeal in AS.
27. The appellant might be questioned, but the findings and background evidence do not show that in order to avoid persecution he would have to tell any lies.
28. The grounds and submissions do not show that the making of the decision of the FtT involved the making of any error on a point of law, so that decision shall stand.
29. No anonymity direction has been requested or made.

A handwritten signature in black ink, reading "Hugh Macleman". The signature is written in a cursive style with a large, stylized initial 'H'.

26 October 2017
Upper Tribunal Judge Macleman