



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA087222016

THE IMMIGRATION ACTS

Heard at Field House
On 27th April 2017

Determination Promulgated
On 2nd May 2017

Before

UPPER TRIBUNAL JUDGE COKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

TM

(Anonymity order made)

Respondent

Representation:

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr A Khan, instructed by Barnes, Harrild & Dyer, solicitors

DETERMINATION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the respondent in this determination identified as TM. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings

1. The respondent was granted permission to appeal the decision of First-tier Tribunal Judge Sweet, promulgated on 2nd December 2016 allowing his appeal on Asylum grounds and under paragraph 276ADE. Deputy Upper Tribunal Judge Hill QC found a material error of law on the basis, in essence, that although the report by Dr Joffe dated 26 August 2016 indicated that the situation in Iran had deteriorated, the First-tier Tribunal judge had failed to engage adequately with the Country Guidance case of *SSH and HR (illegal exit: failed asylum seeker) Iran CG [2016] 00308 (IAC)*. DUTJ Hill QC set aside the decision, adjourned further consideration and directed that any further evidence was to be filed and served no later than 7 days prior to the resumed hearing.

Refusal to admit documents

2. The respondent, TM, failed to comply with directions. On 26th April 2017 he filed, through his solicitors, a redacted copy of an opinion by Dr Joffe which Dr Joffe had written for another person and a decision by UTJ Canavan allowing an appeal, which Mr Khan submitted was on the same basis as TM's. Mr Khan confirmed that he had not made any search to establish whether there had been any other Upper Tribunal decisions on the same topic and accepted he had not complied with Practice Directions in that regard. Mr Melvin had not received a full copy of Dr Joffe's redacted opinion. He had been offered a full copy the morning of the hearing but said he had refused to accept it or read it.
3. Mr Khan submitted the opinion should be admitted – it had not been available on the day of the hearing before the First-tier Tribunal judge (the opinion was dated 14th April 2017) and he apologised for not complying with directions. Dr Joffe had given reluctant permission for it to be used in this appeal. Mr Khan submitted that although UTJ Canavan's decision was not reported and he had not complied with the Practice Directions it was of persuasive authority.
4. I refused to admit either the redacted report or to consider UTJ Canavan's decision as of persuasive authority. Neither document was filed in accordance with directions, no search had been undertaken in connection with UTJ Canavan's decision to identify whether there were other decisions making similar or contrary findings and Dr Joffe has reluctantly agreed to his report being relied upon. He makes the perfectly valid point that by doing so he has in effect waived his entitlement to a fee to prepare a report for an individual. The application as made does not set out why it is relevant to TM's case. The DUTJ reached his decision on 15th February 2017 and gave very specific directions. If a report was considered necessary for TM, it could and should have been sought. No reason has been given why that was not done save for a vague reference to a caseworker being ill.

Submissions

5. DUTJ Hill QC stated that findings of fact were preserved namely that TM would be returning to Iran as a failed asylum seeker on a *laissez passer* and as an ethnic Kurd whose claim for asylum had been found not credible.

6. Mr Khan submitted that Dr Joffe's report of August 2016 confirmed there was a worsening situation for Kurds in Iran, a community which is already subject to severe discrimination. He submitted that *SSH and HR* was authority for the proposition that as a returned failed asylum seeker he would be subject to prolonged detention and investigation based upon his Kurdish ethnicity. He identified TM's ethnicity as the "trigger point". In particular, he submitted that *SSH and HR* had recorded that the case before them had not been argued on that basis. He accepted that if TM were returning on a passport he would not be subject to investigation and detention but returning on a *laissez passer* he submitted he would be subject to such investigations and would not be entitled to a fair trial or investigation.
7. Mr Melvin, relying on his written submissions, argued there was no evidence that the situation for Kurds was worsening, that Dr Joffe's assertions as to a worsening situation for Kurds was unsourced, that there were risks for those associated with Kurdish groups but TM had been found not to be associated and there was no evidence to merit a departure from *SSH and HR*. He relied upon the Country Information and Guidance report produced by the Home Office dated July 2016. This is an updated report; that referred to in *SSH and HR* is dated January 2016.

8. The head note of *SSH and HR* reads as follows:

(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.

9. *SSH and HR* are both Kurdish failed asylum seekers with no political or other associations with Kurdish opposition groups. Dr Khakhi in his report to the Tribunal in *SSH and HR* stated that when a request is made for a *laissez passer*, the Iranian Embassy would carry out security checks concerning the kind of activities an individual had been involved in whilst outside Iran ([8] of *SSH and HR*). [15] of *SSH and HR* refers to the

"general consistency [of] evidence that a person returning on a *laissez passer*, having left Iran illegally, would be subjected to no more than a fine and probably a period of questioning although there was no indication in the evidence that questioning would be of a kind or in a place where ill-treatment could be expected...there is no evidence to show that a period of questioning in the context with which we are concerned can be equated to pre-trial detention; nor does the evidence suggest that it would take place in a prison."

10. The conclusion by the Upper Tribunal in *SSH and HR* was that 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 ([23]). The Tribunal, in the same paragraph

refers to Dr Kakhki's evidence that the treatment an individual received would depend on their individual case.

"It they co-operated and accepted 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....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."

11. Dr Kakhki did not, it appears from the decision in *SSH and HR*, provide as an example of someone who might be at additional risk of intensive questioning and/or detention, a Kurdish failed asylum seeker returning on a *laissez passer*. [34] of *SSH and HR* states

...it was however agreed that being Kurdish was relevant to how a returnee would be treated by the authorities. ...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...with regard to HR specifically, it does not appear to be disputed that he is Kurdish and that he is undocumented: hence we see no reason for remittal. Prosecution for illegal exit is an outcome not generally experienced by returnees, and where it does occur, the most likely sentence in relation to illegal exit would be a fine....[appeal] dismissed."

12. Dr Joffe's report is a general report entitled *Kurds in Iran* and considers the current situation facing Kurds in Iran, the attitudes of the Iranian authorities towards Iranian Kurds who have returned to Iran having left illegally and having no documents to establish their nationality, the formal requirements in Iran which must be fulfilled to obtain a replacement passport or *laissez passer*. He comments on these issues in the light of *SSH and HR*. He considered, inter alia, the Country Information and Guidance issued by the Home office in July 2016. He referred to a report he had written in October 2014 and expressed his disagreement with the conclusions of the Upper Tribunal in *SSH and HR* with respect to the consequences upon return as a failed asylum seeker and considered that being returned as both a Kurd and a failed asylum seeker 'does imply a significant risk of persecution'. He "wonders" whether the Upper Tribunal overlooked two general aspects of the current situation in Iran – the worsening security situation and the increasing domestic tension. [30] of his report states

All these factors have led to intensified repression of Kurds and, if a Kurdish returnee has given rise to suspicions of anti-regime behaviour, either whilst abroad by, for example, applying for asylum, or before he left Iran, his prospects of avoiding persecution upon return will have been significantly diminished. I do not feel that the decision in the country guidance case has paid sufficient attention to these considerations. This is an issue which has also been neglected in the latest edition of the Home Office's Country Information and Guidance for Iran, dated July 2016.

13. Dr Joffe disagrees with the UT in its description of how a *laissez passer* is obtained and refers to the problem that the applicant must provide details of his asylum application. The UT in *SSH and HR* considered the position at its highest, namely that a returnee would not lie about his status (or lack of it) whilst

he had been in the UK and that the Iranian authorities would be aware that he was a failed asylum applicant.

14. Dr Joffe does not provide any examples of problems that have occurred for failed asylum seekers such as TM on return to Iran. Such evidence as there was before the Upper Tribunal in *SSH and HR* for returned Kurds, was considered. Although the headnote of *SSH and HR* does not refer to returned Kurds, what evidence there was, was in front of the Tribunal and the case put forward by TM was not argued although it appears that HR was similar factually. It was a matter that was considered. Dr Joffe's report does not identify any evidence that would have resulted in a different outcome. His report is no more than a disagreement with the conclusions of the Upper Tribunal.
15. There has been no appeal to the Court of Appeal of *SSH and HR*. SSH was represented by Mr R Drabble QC and HR was represented by Mr A Mills, both eminent and experienced counsel and each instructed by established and experienced solicitors. If there had been any indication that the Tribunal had overlooked relevant and/or significant matters it would be unrealistic to suppose that permission to appeal would not have been granted.
16. The July 2016 Country Information and Guidance Report produced by the Home Office does not consider the position of individuals in the situation of TM save to refer to [34] of *SSH and HR*, as set out above.
17. Taking the available evidence into account and bearing in mind the exhaustive examination of the evidence that was before the Upper Tribunal in *SSH and HR*, I conclude there is a dearth of evidence to justify departure from the country guidance case of *SSH and HR*. In my judgment TM is not at risk of being persecuted on return to Iran as a Kurdish failed asylum seeker on a *laissez passer*.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law and is set aside.

The appeal of the Secretary of State for the Home Department is allowed; the consequence of which is that TM's appeal against the decision to refuse him asylum/Article 3 protection is dismissed.

Although not argued before me as a separate issue, it follows that the appeal on human rights grounds under 276ADE is set aside and TM's appeal falls to be refused.



Date 27th April 2017

Upper Tribunal Judge Coker