



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/10318/2016

THE IMMIGRATION ACTS

Heard at Field House
On 22 June 2017

Decision & Reasons Promulgated
On 29 June 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

DZ (IRAN)
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Cecilia Hulse, Counsel instructed by Barnes Harrild & Dyer
Solicitors

For the Respondent: Mr P Nash, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Shiner sitting at Taylor House on 27 October 2016) dismissing his appeal against the decision of the Secretary of State to refuse to recognise him as refugee, or as otherwise requiring international or human rights protection. The

First-tier Tribunal made an anonymity direction in favour of the appellant, and I consider that it is appropriate that the appellant continues to enjoy anonymity for these proceedings in the Upper Tribunal.

The Reasons for the Grant of Permission to Appeal

2. On 11 May 2017 Upper Tribunal Judge Plimmer granted the appellant permission to appeal for the following reasons:

Having accepted the evidence of the Country Expert on the situation for Kurds in Iran post-**SSH and HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 00308 (IAC)**, it is arguable that the First-tier Tribunal has provided inadequate reasons for not departing from the Country Guidance [57 and 58].

The Hearing Before, and the Decision of, the First-tier Tribunal

3. Both parties were legally represented before Judge Shiner. The Judge received oral evidence from the appellant, and he took into account written submissions from Counsel for the appellant which he received after the hearing.
4. Counsel for the appellant, Mr Lee, submitted that there were four factors which suggested that the appellant would be at risk upon return to Iran. They were:
 - (i) the authorities would have “*an adverse inference*” in him as the result of his support for PJAK (a party of free youths of Kurdistan);
 - (ii) he was an ethnic Kurd;
 - (iii) he exited Iran illegally; and
 - (iv) he would be returning to Iran as a failed asylum seeker.
5. In his subsequent decision, the Judge accepted the appellant’s identity, nationality and ethnicity. He found that the appellant had come to the UK from Iran, arriving in the UK on or about 27 March 2016. He also accepted that, before leaving Iran, the appellant had lived in the district of Gorasher. At paragraphs [45]-[53] of his decision, the Judge gave his reasons for finding that neither the appellant nor his father had engaged in distributing leaflets on behalf of the PJAK, or that the appellant had otherwise manifested support for the PJAK. The Judge also rejected the appellant’s account of having come to the adverse attention of the Iranian authorities through either his or his father’s involvement with the PJAK. Specifically, he did not accept that the authorities had raided the family home and had beaten up him and his mother; or that, on a more recent occasion, the police had come to arrest him and his father, but that he had escaped and there was an outstanding warrant for his arrest which had since been sent to the family home.
6. At paragraph [54] onwards, the Judge turned to consider the issue of risk on return in the light of the appellant being an ethnic Kurd, who had exited Iran illegally, and who would be returning to Iran as a failed asylum seeker. He referred to **SSH and**

HR -v- SSHD. He said that while he was not duty bound to follow this Country Guidance authority, he had had regard to **EM and Others (Returnees) Zimbabwe CG [2011] UKUT 98 (IAC)** and to the 2014 Practice Direction on the status of a reported determination of the Tribunal bearing the letters "CG". The Guidance stated that the determination shall be treated as an authoritative finding on the country guidance issue identified in the determination, based upon the evidence before the members of the Tribunal that determined the appeal. Such a Country Guidance case was authoritative in any subsequent appeal, insofar as that appeal (a) related to the Country Guidance issue in question; and (b) depended upon the same or similar evidence.

7. The Judge noted paragraph 12.4 of the 2014 Practise Direction which provides as follows:

Because it is a principle that like cases should be treated in like manner, any failure to follow a clear, apparently applicable Country Guidance case or to show why it does not apply to the case in question, it is likely to be regarded as grounds for appeal on a point of law.

8. In his written submissions, Mr Lee invited the Judge to depart from the conclusions of the Country Guidance case of **SSH and HR** in light of the contents of a generic report entitled "*Kurds in Iran*" from Professor Joffé dated 26 August 2016 which was included in the 508-page appellant's bundle at section A, pages 8-17.
9. The Judge discussed the thrust of Professor Joffé's report in paragraph [57], and reached the following conclusions in paragraph [58]:

I accept the expert's evidence as to the increased tensions and the increased effort by Kurdish militants and the consequential hardening of the authorities' approach. However, I conclude such change in circumstances insufficient to give rise to a finding, even to the lower standard, that the appellant would be at risk as a returning failed asylum seeker. I do not accept that this will result in the appellant being at any elevated risk upon return. I do not accept that the appellant, just because he is a returning Iranian, including a returning Iranian who has sought asylum, would be subject to any significantly greater risk upon return either at the airport or later. I conclude, having regard to all the circumstances to which I have been referred, and have referred to myself, that **SSH and HR -v- SSHD** is authoritative.

The Error of Law Challenge

10. Permission to appeal was initially refused by Judge Chohan. He said that there was no substance in the grounds, as the Judge had considered all the relevant facts and evidence, and the findings he had made were open to him. The Judge had duly considered the expert report but concluded that it was insufficient to find the appellant would be at risk upon return. Those findings were open to the Judge.
11. In a renewed application for permission to the Upper Tribunal, Mr Lee accepted that the Judge's credibility findings as a whole were not challenged. The Judge's rejection of the appellant's account of his activities in Iran, and the Judge's findings on that aspect of the appellant's case, did not form part of the application for permission to appeal. The issue was over the risk on return. The Judge had failed to engage with much of the argument put before him. It was not simply that there had been a

change of circumstances since **SSH and HR** had been decided, but also the expert evidence vigorously challenged the conclusions that the Tribunal had reached in **SSH and HR**. On the basis of Professor Joffé's expert evidence, the Judge was entitled to depart from the findings of the Upper Tribunal in **SSH and HR**, as the Tribunal had done in similar cases. The report was significant evidence from a well-respected and knowledgeable expert. It was incumbent upon the Judge to engage at the very least with the evidence and argument that the Upper Tribunal's conclusions were not safe in the light of Professor Joffé's evidence. For example, the expert gave evidence as to why a *laisser-passer* could not be obtained without risk. The Tribunal's conclusions as to the ability of a returnee to obtain a *laisser-passer* were central to the Tribunal's finding in **SSH and HR** that there was no risk on return after illegal exit.

The Error of Law Hearing

12. At the hearing before me to determine whether an error of law was made out, Ms Hulse developed the arguments advanced in the renewed application for permission to appeal. She directed my attention to various passages in the expert report and in the Country Guidance case upon which she relied. In reply, Mr Nash adhered to the Rule 24 response settled by a colleague, opposing the appeal.

Discussion

Ground 1

13. The guidance given in **SSH and HR** in the headnote and at paragraph [33] is as follows:
- (a) An Iranian male who it is sought to return to Iran, who does not possess a passport, will be returnable on a *laisser-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 no a real risk of prosecution leading to imprisonment.
14. An issue which arose in the course of oral argument before me is whether this Country Guidance applies to Iranian males who are ethnic Kurds. Ms Hulse submits that Kurdish males fall outside the scope of the Country Guidance authority.
15. Her submission on this issue is arguably supported by an unreported decision of Upper Tribunal Judge John Freeman dated 21 September 2016 which appears at the back of section D of the appellant's bundle. In PA/04135/2015, the First-tier Tribunal found in the claimant's favour that he faced a real risk on return as a failed Kurdish asylum seeker who exited illegally. The First-tier Tribunal Judge did not apply **SSH and HR**, as this case had not been decided, or at least reported, when she heard the appeal on 10 June 2016. The Secretary of Stated appealed the decision on

the sole ground that the Judge had not taken into account the “*subsequent*” decision of the Tribunal in **SSH and HR**. Judge Freeman dismissed the appeal of the Secretary of State on the ground that the country guidance in **SSH and HR** did not include any explicit statement that, “*someone who puts themselves forward merely as a Kurd who has left illegally, and will be returned as a failed asylum seeker, does not face a real risk of persecution for that reason.*” Judge Freeman continued:

Whilst it would have been an extremely relevant decision if it had been available by the time of the hearing in this case, and might well have changed the Judge’s view of the situation, if it had been put before her, there is nothing to show that she made an error of law by failing to take account of *any express country guidance in existence* (my emphasis) by the time she wrote and sent out her decision.

16. I consider that the decision of Judge Freeman turns on its particular facts, as I have highlighted by placing the crucial part of Judge Freeman’s reasoning in italics. At best it only provides weak support for the proposition that **SSH and HR** does not apply to Kurdish Iranian males as well as to Iranian males of other ethnicities.
17. The two claimants in the Country Guidance case were Kurds. As is apparent from paragraph [45] of Appendix 1 to the decision, their legal representatives relied on their Kurdish ethnicity as an additional risk factor. At paragraph [47] of Appendix 1, the Tribunal summarised the thrust of the expert evidence as follows:

The examples contained in Dr Kakhki’s report in relation to imprisonment, torture and execution relate to individuals who are reported to be political or similar activists who have been convicted of other offences including national security offences. The inference which Dr Kakhiki seeks to draw from those is that being a Kurd does not in itself does not result in prosecution but when combined with other criminal suspicions, persecution “*is likely to surface*”.

18. After summarising their conclusions on the country guidance issues in paragraph [33], the Tribunal continued in paragraph [34] of their decision as follows:

It was not suggested to us that an individual faces risk on return on the sole basis of being Kurdish. It was, however, agreed that being Kurdish was relevant to how a returnee would be treated by the authorities. For example, the Operation Guidance note refers at 3.12.14 to the Government disproportionately targeting minority groups including Kurds, for arbitrary arrests, 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 of such returnees, though we accept that it might be an exacerbating factor for a returnee otherwise of interest. Accordingly, we conclude that it has not been shown that a person in the position of these appellants faces a real risk on return to Iran either on the basis of what would happen to them when questioned at the airport or subsequently if they were convicted of an offence of illegal exit.

19. Accordingly, I consider that Judge Shiner was right to treat the Country Guidance case as applying to the appellant, and right to direct himself that he should treat the Country Guidance case as authoritative on the issue of the risk on return faced by the appellant, insofar as his appeal (a) related to the country guidance issue in question (which it clearly did) and (b) was dependent upon the same or similar evidence as that considered by the Upper Tribunal.

20. In evaluating whether the Judge has failed to give adequate reasons for declining to depart from the authoritative Country Guidance directly applicable to the appellant, it is necessary to distinguish between two distinct strands of the expert report of Professor Joffé. The first, and main, strand of his report is that the Tribunal was simply wrong in their conclusions with regard to ethnic Kurds. He refers back to what he said in "*Report A*" of 15 October 2014, where he says that he pointed out that Kurds are generally treated with more discrimination in Iran than are other Iranians for reasons connected with the situation in Kurdistan, and therefore he finds himself substantially in disagreement with the conclusions of the Tribunal with respect to Kurds. He considers that Kurds face an increased risk of persecution simply because of their Kurdish ethnicity. He also considers that the Tribunal has under-estimated the potential difficulties associated with the acquisition of *laisser-passer* documentation, a point which he develops later on in his report at paragraphs 31-34. He says that he does not see how an application for *laisser-passer* can be made without potentially endangering its bearer.
21. The second, and more minor, strand of his report is the worsening security situation inside Iranian Kurdistan and the increased domestic tensions that have arisen in consequence of the elections in May 2016 as the result of a struggle between moderates and hard-liners around the new figure of the Supreme Leader. At paragraphs 11-16 of his report, Professor Joffé gives specific examples of the deterioration of the security situation inside Iranian Kurdistan in a period running from April 2016 through to 4 August 2016.

Pre-Country Guidance case evidence

22. Professor Joffé's thesis as to the persecutory risk faced by ethnic Kurds is almost entirely based upon the same or similar evidence as that considered by the Upper Tribunal in the Country Guidance case. His criticism is not that the Upper Tribunal overlooked a raft of evidence which completely changes the landscape, but that they drew the wrong conclusions from the same body of evidence that he was commenting on *inter alia* in Report A of 15 October 2014.
23. Accordingly, it is enough that the Judge should direct himself that the Country Guidance case is authoritative. It was not open to the Judge to depart from the country guidance conclusions given by the Tribunal insofar as Professor Joffé's criticisms of their conclusions are based upon the same or similar evidence.
24. There is no material error in the Judge failing to explain why Professor Joffé's observations about the *laisser-passer* did not advance the appellant's case. At paragraph [57], the Judge notes the criticism that the Tribunal has under-estimated the potential difficulties connected with the acquisition of *laisser-passer* documentation, but he does not make a specific finding as to whether this criticism has any merit. However, it is apparent from the Country Guidance case, which the Judge adopts, that this criticism does not have any merit. At paragraph [23] the Tribunal found as follows:

In this regard, it is relevant return to Dr Kakhki's evidence in re-examination where he said the treatment they would receive would depend on their individual case. If they cooperated 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 of 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 have 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.

25. The significance of this finding by the Tribunal is that it is irrelevant that one of the requirements for obtaining a *laisser-passer* from the Iranian Embassy is a letter from the Home Office confirming that an application for asylum in Britain has been made, or a photocopy of a residence permit, as Professor Joffé says is the case in paragraph 30 of his report. For the Tribunal's assessment of risk on return assumes that the Iranian authorities will obtain confirmation that the bearer of the *laisser-passer* is a failed asylum seeker when the bearer is questioned on arrival. So the bearer of a *laisser-passer* will not be potentially endangered by having to declare to the Iranian embassy in the UK the same information which he can be expected to declare on arrival in Iran, namely that he is a failed asylum seeker.

Post-County Guidance evidence

26. As previously stated, a subsidiary strand of Professor Joffé's expert report is directed towards recent events in 2016, some of which post-date the hearing in **SSH and HR** which took place in May 2016.
27. The Judge is alive to the crucial distinction between pre-country guidance evidence and post-country guidance evidence, and he rightly considers it necessary only to comment on evidence of incidents which took place after the hearing in May 2016, as clearly the Tribunal will not have taken such incidents into account.
28. The Judge refers at paragraph [57] to recent reports since May 2016 of incidents such as an attack by the Iranian authorities upon the PJAK, the execution of five human rights activists and outbreaks of violence between the Kurdish political party and the authorities. He accepts Professor Joffé's evidence that the security situation has significantly worsened as a result of the KDPI renewing hostilities, resulting in a series of executions of Kurdish militants.
29. The incidents identified by Professor Joffé do not include any examples of returning Kurdish failed asylum seekers being prosecuted or being subjected to persecutory ill-treatment. So, it was open to the Judge to find, for the reasons which he gave, that what he characterised as the "*change in circumstance*" did not transform an absence of persecutory risk on return for the appellant, as indicated by **SSH and HR**, into a real risk of persecution, given that the appellant does not have any profile beyond that of being a failed Kurdish asylum seeker who has exited illegally.

Ground 2

30. The Tribunal in **SSH and HR** acknowledges that the Iranian Government disproportionately targets minority groups, including Kurds, for arbitrary arrests, prolonged detention and physical abuse. Ground 2 is that the Judge erred in law in not giving reasons as to why the appellant would not thereby face very significant obstacles to his re-integration into life and society in Iran. I consider that this ground is merely argumentative. The Judge has given adequate reasons for finding that the appellant would not face very significant obstacles to his re-integration into life and society in Iran, notwithstanding any societal disadvantage of the Kurdish community in Iran and the discriminatory treatment of them by the authorities, which the respondent accepts: see Appendix 1, paragraph 46. His reasons include the fact that the appellant only left the country recently, that he is thus fully familiar with its customs, society and culture, and that he has a family in Iran to whom he can turn for accommodation and support.

Notice of Decision

The decision of the First-tier Tribunal does not contain an error of law, and accordingly the decision stands.

This appeal to the Upper Tribunal is dismissed.

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 his 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.

Signed

Date 28 June 2017

Judge Monson

Deputy Upper Tribunal Judge