



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: PA/11039/2019

**THE IMMIGRATION ACTS**

**Heard at Bradford by Skype for business  
On 29 July 2020**

**Decision & Reasons Promulgated**

**On 6 August 2020**

**Before**

**UPPER TRIBUNAL JUDGE REEDS**

**Between**

**F M A  
(ANONYMITY DIRECTION MADE)**

Appellant

**AND**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Schwenk, Counsel instructed on behalf of the appellant  
For the Respondent: Ms. R. Petterson, Senior Presenting Officer

**DECISION AND REASONS**

**Introduction:**

1. The appellant, who claims to be a citizen of Iran, appeals with permission against the decision of the First-tier Tribunal (hereinafter referred to as the "FtT") who dismissed his protection appeal in a decision promulgated on the 10 February 2020.

2. I make a direction regarding anonymity under Rule 14 of the Tribunal Procedure (Upper Tribunal Rules) Rules 2008 as the proceedings relate to the circumstances of a protection claim. 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. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.
3. The hearing took place on 22<sup>nd</sup> July 2020, by means of *Skype for Business*. which has been consented to and not objected to by the parties. A face to face hearing was not held because it was not practicable and both parties agreed that all issues could be determined in a remote hearing. I conducted the hearing from court at Bradford IAC. The advocates attended remotely via video. There were no issues regarding sound, and no substantial technical problems were encountered during the hearing and I am satisfied both advocates were able to make their respective cases by the chosen means.
4. Whilst Ms Petterson was missing some of the documents, Counsel for the appellant was able to provide the relevant documents to her by email and it was confirmed by her that she had the documents she required to proceed with the hearing.
5. I am grateful to Mr Schwenk and Ms Petterson for their clear oral submissions.

Background:

6. The appellant's claim is summarised in the decision of the FtTJ at paragraphs 3-15. The appellant arrived in the United Kingdom on the 7 September 2017. He applied for asylum whilst in detention. He was encountered a second time and detained in 2018 and the claim was refused on 30 October 2019.
7. The respondent accepted that the appellant was of Kurdish ethnicity but in relation to his claim to be a national of Iran, the respondent noted that it was not possible to verify that claim. As to the events in Iran/Iraq, the respondent did not accept that the appellant's father had encountered any issues on account of any political activities and therefore his account of his father being taken by the authorities in May 2017. Thus, it was not accepted that he was of any interest to the authorities as a result of his father. As to his involvement in activities on behalf of the KDPI in the UK, it was noted that whilst he claimed to have supported the party in the UK, he was not currently a member and had not attended any meetings. His political activity was considered to have been limited and at times inconsistent. Thus, it was considered by the respondent that he would not be of interest to the Iranian authorities and would not be at risk of harm. The decision

letter also set out why he could not meet the immigration rules in relation to any Article 8 claim or why there were any circumstances which would result in unjustifiably harsh consequences for him on return.

8. The appellant appealed against this decision and it was dismissed by the First-tier Tribunal in a decision promulgated on the 10 February 2020.
9. In that decision the FtTJ considered the issue of nationality and noted that there was no supporting evidence in relation to his claim. In particular at [55] he outlined the difficulties with the account given by the appellant that he lived in Iraq for a substantial amount of time with his family members without any form of documentation. However, the FtTJ gave consideration to the objective material upon which he accepted did demonstrate that Iranian Kurds lived in Iraq for prolonged periods (see [54]). After considering the evidence he concluded at [58] that notwithstanding the difficulties in the account, when applying the lower standard of proof, he was satisfied that he was Iranian as claimed. He therefore considered the decision on the basis that he was an Iranian national and would be returned to that country rather than to Iraq.
10. The FtTJ considered the events in Iran but rejected the appellant's account that he had been of interest to the Iranian authorities in May 2017 for the reasons given at paragraph [63 – 67]. As to his sur place activity, the FtTJ considered that any activities undertaken were not out of any genuine conviction. In this context, the judge rejected his account to be able to properly engage with Facebook material on the basis that he was illiterate, and that the material would not be seen by anyone other than his Facebook friends as it was not public. When considering his activities at the highest he found it was "fairly low level" and considered his pattern of behaviour was "dishonest". Having considered the country guidance he did not consider that the appellant would be at risk of return as a result of his Kurdish ethnicity or because of the very low level and opportunistic activity in which he had engaged. The FtTJ therefore dismissed his appeal.
11. Permission to appeal was issued and on 25 March 2020 permission was granted by FtTJ Kelly.

#### The hearing before the Upper Tribunal:

12. In the light of the COVID-19 pandemic the Upper Tribunal issued directions, inter alia, indicating that it was provisionally of the view that the error of law issue could be determined without a face to face hearing and that this could take place via Skype. Both parties have indicated that they were content for the hearing to proceed by this method. Therefore, the Tribunal listed the hearing to enable oral submissions to be given by each of the parties.

13. Mr Schwenk, Counsel on behalf of the appellant relied upon the written grounds of appeal. There were no further written submissions. There was no Rule 24 response filed on behalf of the respondent. I also heard oral submission from the advocates, and I am grateful for their assistance and their clear oral submissions.
14. Mr Schwenk began his submissions by setting out the mistakes of fact that he stated had been made in the decision of the FtTJ which were material to the judge's assessment of credibility. They are set out in the grounds and were also highlighted in the grant of permission by FtTJ Kelly.
15. Having had the opportunity to hear the submissions and to have the documentation that had not been previously forwarded, Ms Petterson conceded that the FtTJ had made errors of fact which she considered were fundamental to his decision and the assessment of credibility and as such would have been likely to affect the outcome. That being the case, she invited me to find that there was a material error of law in the decision and that the appeal should be remitted for a rehearing before the FtTJ.
16. Mr Schwenk in his reply agreed with Ms Petterson that the appeal should be remitted to the FtT as a result of the fact finding that would be required. He also made submissions as to the paragraphs which should be preserved findings.
17. He submitted that the findings of fact made by the judge which relate to the issue of nationality should be preserved. In addition, he submitted that the past history relating to the appellant's father also appeared to have been accepted by the FtTJ in the last sentence at paragraph 62.
18. Ms Petterson submitted that in view of the errors of law outlined in the grounds, a sensible course would be for the entire decision to be remade by the FtT.
19. Given the agreement between the parties that the decision of the FtTJ involved the making of an error on a point of law, it is only necessary for me to set out in brief terms why I am in agreement with that view.
20. The grounds set out factual mistakes that were made in the FtTJ's assessment. The first concerned the appellant's level of literacy. The FtTJ recorded the appellant's evidence at [27] that the appellant was not educated and that he did not go to school. It stated that he learnt to read and write with his father at home. Asked if you could read or write he said that he only knew a little bit in the Kurdish language.
21. At [59] the judge referred to the appellant as "illiterate in his own language" and then later confirmed that he considered the appellant's account on the basis of his illiteracy.

22. When making an assessment of the credibility of his account in the context of his Facebook activity, the FtTJ found at [76] that the difficulty with believing his account was that he was illiterate. The judge also made reference to the point that he did not know he had an email address and reached the conclusion that he shared the respondent's incredulity that the appellant could engage with Facebook posts "if he were entirely illiterate".
23. However, as Mr Schwenk submits, the appellant's evidence was not that he was entirely illiterate. In his witness statement at paragraph 6 he referred to his level of language skills and that his father had taught him to read and write in the Kurdish language as it was important to know his mother tongue. Also, the post set out in the Facebook evidence within the bundle are also written in Kurdish.
24. The second area also relates to evidence that expressly concerned his sur place activities. At [82] the FtTJ stated that there was no evidence of the appellant's attendance at demonstrations. However, the appellant's bundle exhibits a schedule at page 14 of the demonstrations that he attended in 2019. Furthermore, in the bundle there were a number of photographs of the appellant attending demonstrations and his particular place in them showing the appellant holding material arguably relevant to the KDPI. There was also reference to this at paragraph 17 of his witness statement.
25. Also, at [82] the judge found that there was no evidence of his Facebook account would be open to the world or that it would be seen by anyone other than his Facebook friends. However, the evidence before the FtTJ in the appellant's interview at questions 207-208 when asked about this point the appellant made plain that the posts were made public and made similar references to posting publicly his account to others. The grounds also make reference to the global icon shown on the posts.
26. Whilst Mr Schwenk also refers to mistake of fact set out at paragraph 76 where the FtTJ stated that it was not possible to open a Facebook account without an email and this was incorrect, he relied on material that was not available to the judge (this being annexed to the grounds (Facebook help sheet)). However, I would accept that the finding made was not based on any proper evidence and appears to have been based only on a submission made on behalf of the presenting officer without any material in support.
27. Ms Petterson on behalf of the respondent concedes that the mistakes of fact undermined the judge's assessment of the appellant's credibility and particularly when considering the appellant's sur place activities.
28. It was also accepted that the judge erred in his assessment of the credibility of the appellant's account by stating there was no objective

evidence of the authorities targeting family members (see ground 2 at paragraph 6). The CPIN report on Kurds in Iran (dated January 2019) includes a section on family members at 10.5. **10.5 Treatment of family members**

'10.5.1 The Landinfo report stated:

'Asked about the consequences for family members of political activists, an international organization in Ankara informed that 'If a person is deemed to be affiliated to a separatist party, he would be at risk. Family members could be regarded as oppositional as well. In the Kurdish regions, families are larger and links are closer. If a person is affiliated to the KDPI, one would expect to find other activists [sic] within the family. It is the general trend of the authorities to seek out family members in the event that an activist is a fugitive. Going after families also creates an example of fear as well.'

29. Whether that mistake was material or not would depend upon other factual issues including that of his mother's continued residence in Iraq.
30. Other issues related to the assessment of risk consequent to the factual findings. However, as Mr Schwenk submits if there were mistakes of fact, they would necessarily affect the assessment of risk.
31. One aspect of risk on return relates to the likely knowledge that the Iranian authorities would have of the appellant and whether it was reasonably likely that they would have information concerning his father who was said to be a member of the KDPI (see ground five). It is unclear whether the FtTJ accepted the appellant's father had a profile as asserted by the appellant and on the factual matrix that he advanced and consequently this was not a factor that was considered in the assessment of risk.
32. For those reasons, it is agreed by the parties that the decision demonstrates the making of an error on a point of law and should be set aside.
33. I have considered the submissions made by each of the advocates as to what findings should be preserved. One aspect of the appeal related to the appellant's claimed nationality in the lack of evidence to demonstrate that he was an Iranian national. The judge was clearly troubled about that issue based on the appellant's own evidence that he lived as an Iranian Kurd in Iraq and did so without any documentation (a civil status identity document known as a "CSID", or a biometric Iraqi national identity card (INID) both of which are considered to be essential part of life in Iraq as set out in the country guidance decisions that relate to that country (see FtTJ's decision at [55]). However at paragraphs of 52 to 58, whilst the FtTJ found that there were difficulties in the appellant's account of how he lived for 19 years in Iraq and how the family survived without documentation, he accepted "to the lower standard" that he was Iranian as claimed

and thus the decision was predicated on the basis that he was Iranian and would be returned to Iran rather than Iraq.

34. In the light of that assessment, which is not affected by the error of law, it seems to me that those paragraphs should be preserved.
35. However, I am not satisfied that any other paragraphs of the decision should be considered as preserved findings. Having considered the decision as a whole it is not clear to me whether the judge did in fact accept the appellant's evidence relating to his father's past history or his likely profile. The judge certainly did not accept the events which he referred to as the "core events" that referred to May 2017 (see paragraph 63]. In the light of the assessment of the appellant's credibility, in my judgement the past history forms part of that global assessment and I am not satisfied that there were clear findings in relation to the appellant's father and his past history. Such findings are necessary when considering the issue of risk on return in light of the relevant country guidance decisions.
36. Therefore, the only issue that I consider is capable of being preserved is that relating to nationality.
37. I have therefore considered whether it should be remade in the Upper Tribunal or remitted to the FtT for a further hearing. In reaching that decision I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal.

"[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-

  - (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
  - (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."
38. Both advocates submit that the venue for hearing the appeal should be the FtT. I have considered their submissions in the light of the practice statement recited above. As it will be necessary for the appellant to give evidence and to deal with the evidential issues, further fact-finding will be necessary alongside the analysis of risk on return in the light of the relevant law and in my judgement the best course and consistent with the overriding objective is for it to be remitted to the FtT for a further hearing. The Tribunal will be seized of the task of undertaking a credibility assessment relating to events in Iraq/Iran and also in United Kingdom and will be required to do so on the basis of the evidence as at the date of the hearing. If either party

seek to provide further evidence, any arguments as to fresh evidence are likely to be considered by the FtTJ.

39. For those reasons, I am satisfied that it has been demonstrated that the decision of the FtTJ did involve the making of an error on a point of law. I therefore set aside the decision of the FtTJ save that the finding made as to his nationality shall be preserved.

### **Notice of Decision**

The decision of the First-tier Tribunal did involve the making of an error on a point of law and therefore the decision shall be set aside and to be remitted for a further hearing before the First-tier Tribunal.

### **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. 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 Upper Tribunal Judge Reeds

Dated 30 July 2019

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### **NOTIFICATION OF APPEAL RIGHTS**

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days, if the notice of decision is sent electronically).
3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days if the notice of decision is sent electronically).
4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days, if the notice of decision is sent electronically).
5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday, or a bank holiday.



6. The date when the decision is 'sent' is that appearing on the covering letter or covering email