Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11398/2019 (P)

THE IMMIGRATION ACTS

Determined without a hearing pursuant to rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008	**Decision & Reasons Promulgated** On 24 September 2020

Before

UPPER TRIBUNAL JUDGE BLUM

Between

JM
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Grounds of Appeal by J. Holt, Counsel, further written submissions by I Palmer, Counsel, both instructed by Barnes Harrild & Dyer Solicitors
For the Respondent: written submissions provided by Ms H Aboni, Home Office Presenting Officer

DECISION AND REASONS (P)

1. This is an 'error of law' decision determined without a hearing pursuant to rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008, paragraph 4 of the Practice Direction made by the Senior President of Tribunals: *Pilot Practice Direction: Contingency arrangements in the First-tier Tribunal and the Upper Tribunal* on 19

March 2020, and paragraphs 4 – 17 of the Presidential Guidance Note no 1 2020: Arrangements During the Covid-19 Pandemic, 23 March 2020.

2. The appellant appeals against the decision of Judge of the First-tier Tribunal Malik (the judge) who, in a decision promulgated on 20 January 2020, dismissed his appeal in respect of a decision by the respondent dated 8 November 2019 to refuse the appellant's protection claim.

3. Permission to appeal to the Upper Tribunal was granted by Judge of the First-tier Tribunal O'Brien in a decision dated 19 February 2020 but sent on 24 February 2020.

4. On 30 April 2020 the Upper Tribunal issued directions to the parties authored by Upper Tribunal Judge Coker on 31 March 2020. The directions expressed Judge Coker's provisional view that, in light of the pandemic, it was appropriate to determine the questions (i) whether the judge's decision involved the making of an error of law and, if so, (ii) whether the decision should be set aside, without a hearing. On 13 May 2020 the Upper Tribunal received further submissions from the appellant in respect of the two questions. The appellant indicated that he was content for the two questions to be determined without a hearing. On 19 May 2020 the Upper Tribunal received further submissions from the respondent in respect of the two questions. No consideration was given by the respondent to whether the two questions could be determined without a hearing or whether a hearing was acquired.

5. Having regard to the overriding interest in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 to deal with cases justly and fairly, and having considered the nature of the appellant's challenge to the judge's decision (which does not involve the need for further evidence to be considered), and having regard to the relatively narrow focus of the legal challenge (relating to whether the judge failed to give adequate reasons or resolve an material issue, and whether he failed to give sufficient reasons in respect of his findings relating to the appellant's sur place activities) and the written submissions from both parties, and having satisfied itself that both parties have been given a fair opportunity of fully advancing their cases, the Upper Tribunal considers it appropriate, in light of the Covid-19 pandemic, to determine questions (i) and (ii) without a hearing pursuant to rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Background

6. The appellant is a male national of Iran of Kurdish ethnicity. He was born in 1986. He claims to have left Iran on 20 August 2015. He arrived in the UK 16 December 2017 and claimed asylum four days later.

7. I summarise the appellant's claim. He was a supporter of the KDPI (the Democratic Party of Iranian Kurdistan), an illegal organisation in Iran. He and his father worked as kolbars (cross-border labourers) transporting goods, including goods for the KDPI. On 19 August 2015 he and his father were ambushed by the Iranian authorities after they delivered items to the Peshmerga/KDPI in the mountains. Gunshots were fired and everyone ran in different directions. The appellant did not know that his father had been arrested. Instead of going home he went to the home of his father's cousin in a different village. He found out that his family home had been raided and his father arrested, and that the authorities were looking for him. The appellant left Iran illegally seeking international protection. The appellant attended several demonstrations against the Iranian regime in the UK and he claimed to have a Facebook account that contains posts criticising the Iranian regime. Although the respondent accepted that the appellant was Iranian, she rejected his account of the events that caused him to leave Iran. The appellant appealed the respondent's decision to the First-tier Tribunal.

The decision of the First-tier Tribunal

8. The judge considered a range of documents including the appellant's two statements dated 16 August 2019 and 16 December 2019, and screenshots of a Facebook account said to belong to the appellant. The judge heard oral evidence from the appellant. The judge was not satisfied that the appellant gave a credible account of his involvement with the KDPI or of being ambushed by the Iranian authorities, or that any sur place activities would bring the appellant to the adverse attention of the Iranian authorities.

9. The judge held against the appellant his failure to mention in his screening interview that he was a kolbar or a supporter of the KDPI, and his failure to mention the ambush. Whilst the judge accepted that a screening interview was a preliminary interview and that an applicant cannot be expected to give the full reasons of their claim, the judge did not find it reasonably likely that the appellant would have omitted reference to the ambush and/or his support for the KDPI ([21](a) and (e)). The judge then separately drew an adverse inference because the appellant said he was a shepherd when asked his occupation in his screening interview and failed to mention being a kolbar ([21](b)). The judge did not find it reasonably likely that the appellant would have been able to escape in the manner claimed, or that the appellant would have gone to his cousin's home if the Iranian

authorities were looking for him, “given the sophistication of the Iranian authorities” [21(c)]. Nor was the judge satisfied, “given the sophistication of the Iranian authorities”, that the appellant’s mother would not have been taken for questioning. The judge identified three, albeit minor, inconsistencies in the appellant’s account of the ambush ([21](d)]). The judge drew an adverse inference based on the appellant providing false details in an asylum claim lodged in Germany (including claiming that he was an Iraqi national) and his failure to lodge a protection claim in France.

10. From [23] to [28] the judge considered the appellant’s sur place activities based on his participation at demonstrations against the Iranian regime and posts on a Facebook account registered in the name ‘JR’. At [23] the judge summarised the Country Guidance decision in **BA (Demonstrators in Britain – risk on return) Iran CG** [2011] UKUT 36 (IAC). At [24] the judge summarised the appellant’s account of attending several protests in front of the Iranian embassy in London as well as in Manchester on various states in 2019. The judge stated there was no evidence of the details of the demonstration or where they occured “other than his say-so.” Although the judge accepted that the Facebook posts appeared to show the appellant in a group with other people there was no confirmation of the particular demonstrations. The judge found there was nothing to suggest the Iranian authorities would even be aware of the appellant’s attendance and she cited the facts of **MA v SSHD** [2017] CSOH 134 and the Court of Session’s conclusion that it was reasonably open to the FTT to find that full disclosure by **MA** of his activities, when questioned by the Iranian authorities, would not establish an interest in him sufficient to put him at risk of serious treatment.

11. Although the appellant claimed that his name was ‘JR’ the judge noted that the appellant’s first statement dated 16 August 2019 was signed the name ‘JM’ and that it did not mention the appellant’s name being ‘JR’ [25]. Given that the appellant provided a false name and date of birth to the German authorities and given that he was in contact with his family in Iran, but had provided no documentation to confirm his correct name [25], the judge did not find it reasonably likely that the appellant used his true identity in the Facebook posts such that they could be linked back to him [26]. While the judge accepted that there were a number of photographs on the Facebook posts that included the appellant there was nothing to suggest that the photographs had been taken outside the Iranian embassy as claimed. The judge stated that there was no evidence that the appellant made and operated the Facebook account and she did not find it reasonably likely that he would have been able to prepare the posts himself given his claimed inability to write [26]. Nor was the judge satisfied that the appellant provided evidence that the posts remained public (supra). The judge was not satisfied that the

appellant had a profile in the UK that would bring him to the attention of the Iranian authorities.

12. Having found that the appellant would not face a real risk of serious ill-treatment even if he did leave illegally, the judge dismissed the appeal.

The challenge to the judge's decision

13. The grounds of appeal, amplified in Mr Palmer's further submissions dated 12 May 2020, contend that the judge failed to resolve a submission made by counsel at the hearing that to be a kolbar in Iran is an inherently illegal act and that it would be unrealistic and unfair to have expected the appellant to disclose illicit and illegal activity at an early stage such as his screening interview. This matter was neither considered nor determined by the judge. It was further claimed that the judge failed to consider and apply the decision in **YL (Rely on SEF) China** [2004] UKIAT 00145, and that the judge appeared to rely at [21(c)] on unsourced evidence and/or personal knowledge not brought to the attention of the appellant's representative in respect of her knowledge of the 'sophistication' of the Iranian security forces which, in the judge's view, ran counter to the appellant's evidence on how he had been able to escape. To the extent that the determination suggest the appellant had not attended anti-Iranian government demonstrations, this was inconsistent with a wealth of evidence from the appellant that he had done so including his statements and the photographic evidence contained in the downloaded Facebook posts.

14. The grounds further contend that the judge failed to consider or apply the findings of the Tribunal in **HB (Kurds) Iran CG** [2018] UKUT 00430 (IAC) and that she failed to consider that even low-level pro-Kurdish activity will, if discovered, lead to ill-treatment. The judge's conclusion that the Iranian authorities would be unaware of the appellant's attendance at demonstrations was said to be inconsistent with the findings of the Tribunal in **AB and Others (internet activity – state of evidence) Iran** [2015] UKUT 0257 (IAC). The grounds further contend that the judge was not entitled to find that it was open to the appellant to delete his Facebook account.

15. In her written submissions the respondent maintains that the judge gave adequate reasons for rejecting the appellant's claim of being a KDPI supporter and working as a kolbar. The judge gave adequate reasons for finding that the appellant had not been involved in an ambush and was of no adverse interest to the Iranian authorities. The judge's adverse credibility findings were open to her. The judge properly directed herself according to the relevant country guidance cases on sur place activities and she gave adequate reasons for

finding that the appellant's activities would not bring him to the attention of the authorities such as to put him at risk on return. The judge also gave adequate reasons for finding that the Facebook activity would not be linked to the appellant as it was not his true identity, there was no evidence that the posts were public, and the appellant had not made his own posts but had used other people's posts in order to bolster a false asylum claim.

Discussion

16. There is no merit in the contention that the judge was not entitled to draw an adverse inference based on the appellant's failure to mention his support for the KDPI or the alleged ambush by the Iranian authorities in his screening interview. These were core elements of the appellant's claim and the judge did not act unreasonably when expecting them to be identified even at the screening stage. The appellant relies on **YL (Rely on SEF) China** [2004] UKIAT 00145. Here the Tribunal stated, at [19]

> … a screening interview is not done to establish in detail the reasons a person gives to support her claim for asylum. It would not normally be appropriate for the Secretary of State to ask supplementary questions or to entertain elaborate answers and an inaccurate summary by an interviewing officer at that stage would be excusable. Further the screening interview may well be conducted when the asylum seeker is tired after a long journey. These things have to be considered when any inconsistencies between the screening interview and the later case are evaluated.

17. The judge was however demonstrably aware of the nature of the screening interview. At [21(a)] the judge referred to the screening interview as a "preliminary interview" and acknowledged that "… an applicant cannot be expected to give the full reasons of their claim" at that stage. Given that the appellant's claim support for the KDPI and the alleged ambush by the authorities went to the very core of his account, the judge was rationally entitled to hold that his failure to mention these factors in his screening interview could be held against him.

18. The grounds further contend that the judge failed to resolve a submission made by counsel at the hearing to the effect that being a kolbar was "inherently an illegal act" and that it was unrealistic and unfair to expect the appellant to disclose such activity at the screening interview. Although counsel's oral submission at the hearing does not appear to have been accompanied by any independent supporting evidence relating to the nature of kolbar activities, the appellant's answers in his substantive asylum interview (see in particular question 89 - where the appellant indicates that being a kolbar is always illegal, as well as his answers to question 91

and 141), and his account of being a kolbar in his August 2019 statement (see, for example, paragraphs 3 and 6, where he describes a kolbar as a "border smuggler") do suggest that being a kolbar was an illegal activity. The judge failed to engage with counsel's submission, or to take it into account when drawing an adverse inference based on the appellant's answer when asked about his occupation in the screening interview. Whilst the judge may ultimately have been entitled to draw an adverse inference from the appellant's failure to mention that his occupation was a kolbar, even if that occupation was inherently illegal, the judge's failure to engage with counsel's submission and to consider whether the appellant should have been expected to disclose a potentially illegal occupation at the preliminary stage of his screening interview amounted to an error of law. I find the judge's failure to engage with and to resolve this issue renders unsafe the particular adverse inference drawn by the judge based on the appellant's answer to the question asked about his occupation in his screening interview.

19. I am additionally concerned that there was no adequate explanation and no evidential basis for the judge's conclusion that the appellant's account of the manner of his escape was incredible based on the "sophistication of the Iranian authorities". The judge does not refer to or identify any knowledge or authority or supporting evidence relating to the sophistication of the Iranian authorities. The judge does not describe the manner of the Iranian authorities' 'sophistication', nor does she explain how that 'sophistication' would prevent the authorities from capturing the appellant when he ran away from an ambush in a mountainous area in the early hours. Whilst it may ultimately have been open to the judge to reject the appellant's description of his escape, the judge has failed to support her finding with adequate reasoning or evidence.

20. The appellant's further submissions contend that the judge acted irrationally when concluding that the appellant gave materially inconsistent descriptions of the ambush. Whilst I acknowledge that the differences in the description given by the appellant in his substantive asylum interview, his August 2019 statement, and in his oral evidence at the hearing are relatively minor (a point acknowledged by the judge herself at [21(d)]), I cannot say that her conclusions were irrational. There were some differences in the descriptions given by the appellant and the judge cannot be said to have acted in an unreasonable manner in drawing an adverse inference based on those, albeit relatively minor, differences.

21. I must now consider whether the errors of law identified above and relating to the appellant's account of events in Iran require the decision to be set aside. I have found that the judge was entitled to draw an adverse inference against the appellant for his failure to mention his claimed involvement with the KDPI and the alleged

ambush in his screening interview. I have also found that the judge was entitled to draw an adverse inference based on minor differences in the appellant's account of the ambush. There has been no challenge to the judge's finding that the Iranian authorities would have taken his mother for questioning if the appellant was suspected of being involved with the KDPI. The judge was additionally entitled to draw a general adverse inference based on the fabricated information given by the appellant to the German authorities, and his failure to claim asylum in France. However, even taking account of these adverse credibility findings 'in the round', I cannot say that the errors of law that I have identified would have made no material difference to the judge's ultimate conclusion relating to the appellant's account of events in Iran. I am consequently satisfied that the errors of law identified above are material.

22. I have additional concerns with the judge's assessment of the appellant's claimed sur place activities. The appellant produced a number of screenshots from a Facebook page registered in the name 'JR'. The judge was not satisfied that this was the appellant's true identity and she supported this conclusion with adequate reasons (see, for example, [25]; the judge was rationally entitled to conclude that, if the appellant's identity was as claimed, he would have been able to ask his family in Iran to send him documentation confirming this). Although the judge stated that there was no evidence that the appellant made and operated the Facebook account [26] the judge did not actually make a finding to this effect. Further, although the judge found that the posts on the Facebook page may have been public at the time they were printed, she was not satisfied that the appellant provided any evidence that they were and remained public, the burden being on him [26]. It is not however clear what further evidence could have been provided and it is not apparent that this particular point was put to the appellant during the hearing. The judge also found there was no evidence that the appellant attended demonstrations outside the Iranian embassy "other than his say-so." This is however contrary to the colour photographs in the appellant's bundle, particularly at page 31 and 33 of his bundle, which show him attending a demonstration outside the Iranian embassy in London. Nor did the judge appear to consider the decision in **AB and Others (internet activity – state of evidence) Iran** [2015] UKUT 0257 (IAC) or the more recent country guidance case of **HB (Kurds) Iran CG** [2018] UKUT 00430 (IAC), which indicated that the authorities may well ask Kurdish individuals about their Internet activity (**AB**, at [457]) at the airport.

23. For the above reasons I am satisfied that the judge's decision is unsafe and must be set aside in its entirety. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 18 June 2018 a case may be remitted to the First-tier Tribunal if 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.

24. I have determined that the judge's conclusions relating to the issue of the appellant's credibility are unsafe. The appeal will be remitted to the First-tier Tribunal so that a new fact-finding exercise can be undertaken. It will be for the First-tier Tribunal to determine the most appropriate mode of hearing the appeal.

Notice of Decision

The making of the First-tier Tribunal's decision involved the making of errors on points of law and is set aside.

The case is remitted back to the First-tier Tribunal to be decided afresh by a judge other than judge of the First-tier Tribunal Malik.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant in this appeal 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.

D.Blum

Signed

Upper Tribunal Judge Blum Date: 22 September 2020