



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

Appeal Number: PA/11885/2018 (P)

**THE IMMIGRATION ACTS**

**Decided under Rule 34 of the  
Upper Tribunal (Procedure) Rules  
2008  
Without a hearing  
On 1 July 2020**

**Decision & Reasons Promulgated  
On 27 July 2020**

**Before**

**UPPER TRIBUNAL JUDGE OWENS**

**Between**

**DM**  
(ANONYMITY DIRECTION MADE)

Appellant

**And**

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

Respondent

**DECISION AND REASONS**

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Mackenzie, promulgated on 4 December 2018.
2. Permission to appeal was refused by First-tier Tribunal Judge Andrew on 2 January 2019 and then by Upper Tribunal Judge McWilliam on 11 March 2020. The appellant then petitioned the Court of Session. Following a joint minute and consent from the parties the Lord Ordinary reduced the decision of Upper Tribunal Judge McWilliam and remitted the application to the Upper Tribunal. On 13 November 2019 Vice President of the Upper

Tribunal Ockleton granted permission in light of the Interlocutor of the Lord Ordinary.

### Decision without a hearing

3. In light of the need to take precautions against the spread of Covid-19 and with regard to the overriding object set out in the Upper Tribunal Procedure Rules to decide matters fairly and justly, directions were sent out by the Vice President of the Upper Tribunal by post on 23 March 2020 seeking written submissions on the assertion of an error of law from both parties with a view to determining that issue on the papers, and giving an opportunity for any party who felt that a hearing was necessary in the interests of justice to make submissions on that issue too. Submissions were received from the appellant and respondent, and the appellant responded to the respondent's submissions.
4. The appellant sent in detailed submissions on 16 April 2020. In response, on 23 April 2020, the respondent indicated that in the light of the joint minute and consent, it was accepted that the judge had materially erred in failing to give adequate reasons for the assessment of risk based on the appellant's 'sur place' activities in the UK, although it was not accepted that there was any material error in that part of the decision which related to prior events in Iran. Neither party objected to the error of law hearing being determined without a hearing. On this basis I find that it is fair and in the interests of justice to determine whether there has been an error of law in the decision of the First-tier Tribunal such that the decision should be set aside, without an oral hearing.

### Anonymity

5. Since this appeal concerns a claim made under the Refugee Convention, having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders, I consider it appropriate to make an anonymity order.

### Background

6. The appellant, who is a national of Iran arrived in the United Kingdom on 5 April 2018 and claimed asylum on the same day.
7. The basis of the appellant's protection claim is that he is at risk from the Iranian authorities as a result of his support for a Kurdish political party the Party Serbesti Kurdistan (Kurdistan Independent Party) ('PSK') when he was in Iran. He also relies on his 'sur place' activities in the UK, having attended demonstrations arranged by Kurdish political parties.
8. The appellant's protection claim was refused on 1 October 2018. The respondent did not accept the appellant's account of his political involvement and activities in Iran. The respondent further did not accept that the appellant would face real risk of serious harm on the basis of having left Iran illegally or being of Kurdish ethnic origin.

### The decision of the First-tier Tribunal

9. The judge made negative credibility findings against the appellant. The judge found that the appellant was neither detained at an opposition protest nor mistreated by the authorities as he claimed. The judge rejected the appellant's account of putting up posters in March 2018 and being wanted by the authorities in the light of these activities. The judge also rejected the appellant's assertion that he was at risk on return to Iran on account of his 'sur place' activities in the UK including attending anti-regime demonstrations. The judge concluded that the appellant did not have a well-founded fear of persecution and would not face any treatment contrary to Article 3 ECHR if returned to Iran.

### Grant of permission

10. On 13 November 2019 Vice President of the Upper Tribunal Ockleton granted permission in light of the Interlocutor of the Lord Ordinary.

### The grounds of appeal

11. The grounds of appeal are as follows;

#### Ground 1 - Errors in assessing credibility

12. Failure to give adequate reasons for finding that the appellant was not involved in Kurdish opposition groups when the judge accepted that someone of Kurdish origin might want to support such a group; mis-recording the appellant's evidence and then relying on that mis-recording to find the appellant's account implausible and failing to take into account material evidence from the appellant in relation to the letter from the PSK when deciding what weight to accord to that evidence.

#### Ground 2 - Failing to make adequate and reasoned findings of fact

13. Failure to take into account relevant evidence in respect of the appellant's 'sur place' activities and irrationally concluding that the appellant had not come to the attention of the Iranian authorities in the light of the evidence. Failure to assess the risk to the appellant properly on the basis of his 'sur place' activities.

### Respondent's position

14. In her letter dated 23 April 2020 the respondent indicated that the Secretary of State does not oppose the appellant's challenge to the First-tier Tribunal decision in respect of error of law in relation to the findings on the 'sur place' activities, but continues to defend the judge's findings on the appellant's activities in Iran.

### Decision on error of law

15. When considering whether there was an error of law, I start with Ground 2 because it is accepted by the respondent in the 'Joint note and minute' and the respondent's response that there has been an error of law in relation to the 'sur place' activities material to the outcome of the appeal.

### Ground 2 – Sur place activities

16. The joint note and interlocutor is in the following terms;

“Neither the Upper Tribunal nor the First-tier Tribunal made a finding that certain photographs which were presented in evidence featured the petitioner. Those photographs were produced in order to prove his attendance at demonstrations in the UK in support of Kurdish political activity. The First tier finding was that the photographs “appear to show” the appellant being present at demonstrations (para 45 of production 6/3) but did not make a finding of fact that he had so attended (paras 45 -54). The Upper Tribunal’s conclusion was on the basis that the appellant was not identified in one of the photographs and if the photograph came to the attention of the Iranian authorities there was no evidence [that he] would be identified (para 4 of production 6/5).

In SSH and HR Iran [2016] UKUT 308 (IAC) the Upper Tribunal found that failed asylum seekers who had left Iran illegally will be questioned at the airport upon their return (at paragraph 23). In HB (Kurds) Iran CG [2018] UKUT 430 (IAC) the Upper Tribunal identified that Kurdish ethnicity constitutes a risk factor which when combined with other risk factors such as perceived political activity may serve to enhance the risk of persecution upon return to Iran.

In that light it is considered that without a finding as to the petitioner’s participation in political activity, the question of whether he is at risk upon return to Iran cannot be answered”.

17. I am in agreement that there has been a material error of law in this respect. At [45] the judge refers to a number of photographs which he states;

“appear to show the appellant present at demonstrations”.

18. He then states at [53];

“I find there to be no credible or reliable evidence before the Tribunal suggesting that the appellant was anything other than a bystander at the demonstrations”.

19. Numerous photographs were submitted in evidence from page 25 to 49 of the appellant’s bundle showing the appellant manifestly participating in pro-Kurdish demonstrations by holding flags and banners with other people in public places including outside the Scottish parliament which is consistent with his evidence in his witness statement that he has attended 3 demonstrations including one in George Square, Glasgow, one outside the Iranian Embassy in London and one in Edinburgh. In the light of this, I am satisfied that the judge’s conclusion that the appellant was just a “bystander” is not adequately reasoned or sustainable.

20. The judge finds at [46];

“it is not suggested the photographs were in the public domain”

21. And at [53] that;

“the appellant has failed to discharge the low burden of proof on him to show that his presence at the demonstration which he claims to have been recorded by photographic evidence is within the public domain, that it would be accessible to the Iranian authorities. He has in addition failed to prove that even if the photographs were accessible that the appellant would be identified as a person with an adverse profile”.

22. At page 23 of the appellant’s bundle there is a photograph published on the website of the Scottish Solidarity with Kurdistan entitled ‘members of the Edinburgh Kurdish community gathered outside the Scottish parliament in Monday to call on Iran to life the planned execution of Ramin Hossein Panachi’. The website address is set out below the article. The article refers to Amnesty International and encloses a letter to Boris Johnson. I am satisfied that the appellant appears in this photograph and that the photograph is in the public domain and that the judge’s findings to the contrary above at [53] are, in these circumstances, irrational.

23. I am satisfied that the judge’s findings on the appellant’s ‘sur place’ activities in the UK are vitiated by error in that he has failed to take into account relevant evidence and failed to make adequately reasoned findings. It is incumbent on the judge to make clear and reasoned findings on the appellant’s ‘sur place’ activities in the UK in order to undertake an assessment of the risk to the appellant on return to Iran.

24. I am also in agreement that these errors were compounded by the judge’s failure to take into account that the appellant would be questioned at the ‘pinch point’ on his arrival at the airport in Iran because he is a failed asylum seeker who left Iran illegally. He is also of Kurdish origin. He would be questioned about the reasons he claimed asylum and his involvement in political activities in the UK as confirmed in the recent country guidance case of PS (Christianity- risk) Iran CG [2020] UKUT 00046. He is not expected to have to lie. It is for the judge to give consideration as to whether the appellant would be subject to treatment amounting to serious harm in the context of the Iranian government’s extreme sensitivity to those perceived to be against the regime which is confirmed in HB (Kurds) Iran CG [2018] UKUT 000430 (IAC) at headnote 10 which states;

“the Iranian authorities demonstrate what could be described as a ‘hair-trigger’ approach to those suspected of or perceived to be involved in Kurdish political activities or support for Kurdish rights. By ‘hair -trigger’ it means that the threshold for suspicion is low and the reaction of the authorities is reasonably likely to be extreme”.

25. I am satisfied that these errors are material to the assessment of risk to the appellant on his return to Iran and that the part of the decision relating to the appellant’s ‘sur place’ activities should be set aside.

### Ground 1 - credibility

26. I now turn to Ground 1 in relation to the asserted errors in the judge's approach to the appellant's account of what happened to him in Iran and the negative credibility findings. This did not form part of the 'joint note' prepared by the parties and there is no concession by the respondent that there has been a material error of law in this part of the decision. The material errors in the 'sur place' consideration form a discrete aspect of the asylum claim and do not infect per se the judge's decision in relation to events in Iran.

27. I go on to consider whether these grounds are made out. It is said that the judge has failed to provide clear reasoning as to why he does not accept that the appellant became involved with the PSK. At [30] the judge accepts that;

"someone who is Kurdish might want to assist elements aimed at helping the position of the Kurds including becoming involve [sic] in anti-government activity"

28. Nevertheless, at [34] the judge finds the appellant's reasons for becoming involved in the PSK are "vague". It is submitted that the judge fails to explain why having accepted that a Kurdish individual might want to become involved with anti-government elements that this reasoning would not apply to the appellant, who is himself Kurdish. I am satisfied that there is some tension in the reasoning here, particularly given the fact that in his statement the appellant explains that his uncle was a martyr and talks in general about the difficulties faced by Kurds in Iran, however I am not satisfied that this amounts to inadequate reasoning such to amount to an error of law in that the judge appears to be making a general observation at [30] before moving on specifically to the appellant's own account at [32].

### Mis-recording of the evidence

29. Further it is asserted that the judge has erred in law by mis-recording the appellant's evidence and relying on the mis-recorded evidence to make a negative credibility finding.

30. At [38] the judge says;

"In my view it is implausible that the appellant would, as he invites the Tribunal to accept, go to elaborate precautions to avoid being detected when putting up posters at night, yet would leave his identification in a car, which was left unattended".

31. The appellant points to the appellant's evidence at paragraph 15 of the appellant's first statement in which he said;

“He showed us where he was going to stop and wait for us to finish putting the posters up. He dropped us off at our areas and told us to meet him back at the car”.

32. It is submitted that there is no reference in the appellant’s statement nor in the appellant’s oral evidence to the car being left “unattended”. Having checked the appellant’s evidence, I am satisfied that at no point did the appellant claim to have left his jacket in an “unattended car”.
33. The respondent’s position is that what the judge found to be implausible was that the appellant would take his ID with him when putting up posters illegally. I am not convinced by that argument. Firstly, this is not what the judge found at all. The judge did not question the fact that the appellant was carrying his ID documents in his jacket but found incredible the fact that appellant left his jacket containing the ID in an unattended car. I am satisfied from the wording of [38] that the judge gave weight to the fact that the car was “unattended” and that the judge may have found the appellant’s account to be more plausible had the judge considered that the jacket with the appellant’s ID in it had been left in a car which was attended by the appellant’s friend. The judge’s subsequent finding that the appellant’s account that he was so focused on carrying the bag with the leaflets that he didn’t think to take his jacket was incredible must be viewed in this context.
34. I am satisfied that this is an error which demonstrates a lack of anxious scrutiny on the part of the judge. I also take account of HK v SSHD [2006] EWCA Civ 1037 which is authority for the proposition that judges must exercise great care when considering the inherent implausibility of events.
35. In this appeal, in the context of the judge’s finding at [30] and [31] that the appellant’s account was broadly consistent with background material and internally consistent from the time he claimed asylum and noting that section 8 of the Asylum and Immigration (Treatment of Claimant’s etc) Act does not apply, I am satisfied that this error in mis- recording the evidence and relying on it to undermine the appellant’s credibility in relation to one of the core events of his claim is significant and undermines the assessment of the appellant’s credibility as a whole.

#### Failure to take into account appellant’s evidence

36. Finally, it is asserted that the judge erred in law in failing to give weight to the letter of support from the PSK because he did not take into account the appellant’s explanation that the PSK would make enquiries prior to issuing the letter. I find that the judge’s findings in respect of the PSK letter are sustainable and adequately reasoned. I am satisfied that the judge was entitled to take into account inconsistencies in the provenance of the letter and question how the writer would be aware that the appellant was of interest to the Ettela’at. I do not find that this ground is made out.

37. I am satisfied however, that the error in recording the appellant's evidence indicates a lack of anxious scrutiny which renders the judge's findings in respect of events in Iran unsafe and on this basis together with the agreed error of law in the findings on the 'sur place' activities, I set aside the decision in its entirety.

### Disposal

38. The appellant is neutral as to whether the decision should be made in the First-tier Tribunal or the Upper Tribunal although indicates that the appellant would want to produce more evidence both in relation to events in Iran and in relation to his 'sur place' activities. The respondent submits that the appeal should be re-made in the Upper Tribunal.
39. I am satisfied that the most appropriate way to proceed is to remit the appeal to the First-tier Tribunal to be heard by a differently constituted Tribunal. The decision has been set aside in its entirety and an extensive fact-finding exercise is needed.

### Decision

**The decision of the First-tier Tribunal did involve the making of an error on a point of law.**

**The decision of the First-tier Tribunal is set aside in its entirety. The appeal is remitted to the First-tier Tribunal for re-hearing de novo before a differently constituted 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 or any member of their 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: R J Owens

Date: 15 July 2020

Upper Tribunal Judge Owens