



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000343
First-tier Tribunal Nos:
PA/54022/2022
IA/10301/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 23 April 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

BQ
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms. A. Sheera, Counsel instructed by Barnes, Harrild & Dyer Solicitors
For the Respondent: Mr. C. Avery, Senior Home Office Presenting Officer

Heard at Field House on 21 March 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. This is an appeal by the appellant against a decision of First-tier Tribunal Judge Cohen, (the “Judge”), undated, but heard on 26 July 2023, in which he dismissed the appellant’s appeal against the respondent’s decision to refuse his protection and human rights claim. The appellant is a national of Iran who claimed protection on the basis of his political opinion and his ethnicity.
2. I have made an anonymity direction given that this is a protection appeal, and given the evidence in the appellant’s case.
3. Permission to appeal was granted by Upper Tribunal Judge Gill in a decision dated 16 February 2024 as follows:

“Ground 1: Judge of the First-tier Tribunal Cohen arguably failed to consider the cumulative risk on return on account of the appellant’s sur place activities prior to deletion of his Facebook account; in particular, whether, irrespective of his finding that the appellant is not genuinely politically motivated, there is a reasonable likelihood of his sur place activities having come to the adverse attention of the Iranian authorities; and the risk on account of the appellant’s Kurdish ethnic origin and work as a ‘Kolber’

Permission is refused on the remaining grounds for the following reasons:

1. Ground 3 (in the original grounds) amounts to no more than a disagreement with the judge’s reasoning and findings.
 2. It is unarguably plain from the judge’s decision that his observation a para 48, that the appellant’s failure to claim asylum prior to his arrival in the United Kingdom was further damaging to his credibility, was not material to his decision on the appeal. Ground 2 therefore does not arguably show any material error of law.”
4. In a Rule 24 response dated 14 March 2024 the respondent opposed the appellant’s appeal. The appellant provided a response to this dated 19 March 2024.

The hearing

5. The appellant attended the hearing.
6. Ms. Seehra stated at the outset that she wished to apply for the limited grant of permission to appeal to be set aside, and for permission to be granted on all grounds. She submitted in particular that ground 2 was arguable. She questioned how the Judge’s departure from the respondent’s concession that section 8(4) of the 2004 Act did not apply could be considered irrelevant to an assessment of the appellant’s credibility. The credibility of the appellant’s account went to the whole of his claim.
7. Mr. Avery submitted that no formal application had been made to set the limited grant of permission aside. In response, Ms. Seehra submitted that there was no procedure for a formal application, and that the respondent had been put on notice of the intention to apply to set it aside.

8. Having considered the grounds and the decision, and in accordance with rules 2 and 5 of the 2008 Rules, I stated that I would set the limited grant of permission aside and grant permission on all grounds.
9. I heard oral submissions from both representatives, following which I stated that I found the decision involved the making of material errors of law. I set the decision aside and remitted the appeal to the First-tier Tribunal to be reheard. I set out my full reasons below.
10. The documents before me were contained in the Upper Tribunal bundle of 480 pages and the appellant's supplementary bundle from the hearing in the First-tier Tribunal (160 pages). I also had before me the respondent's Rule 24 response, and the appellant's reply to that response.

Error of law

Ground 1 - the Judge's findings lacked reasoning and failed to consider relevant evidence in relation to the appellant's sur place activities

11. It was submitted that the Judge had failed to take into account relevant considerations such as the duration and public profile of the appellant's activities, and whether the appellant would be known to the authorities prior to the deletion of his Facebook account. The Judge failed to consider that whether the appellant's political motivation was genuine or not was irrelevant at [47]. Further, he failed to consider all of these factors cumulatively when considering risk on return. If this evidence was considered, the decision lacked reasoning as the Judge had provided no reasons for finding that the appellant would not have come to the attention of the Iranian authorities. Further points were raised in the reply to the response.
12. In submissions Ms. Seehra referred to [47] of the decision. The assessment of risk on return needed to be done in the view of the appellant's profile and the Country Guidance case of XX (P/AK, sur place activities, Facebook) (CG) [2022] UKUT 00023. The Judge had not done this. She made further submissions regarding the appellant's Facebook profile and the contents of his Facebook account. She submitted that, given his profile, including at demonstrations outside the Iranian Embassy, there were no reasons why the appellant would not have come to the attention of the authorities prior to the deletion of his Facebook account. His Kurdish ethnicity and work as a Kolber put him at higher risk.
13. Mr. Avery submitted that the Judge had gone through the appellant's account and considered it in great detail. He had found that the appellant was not someone who had a profile in Iran. The grounds were no more than a disagreement with the findings of the Judge. The Judge had engaged with the appellant's Facebook posts with reference to [27] of the decision. He had correctly applied the guidance in XX. The judge had given good and sound reasons for disbelieving the appellant's account and had properly considered all aspects with regard to the appellant's credibility. He submitted that the appellant had never been genuinely involved in Kurdish matters and his claim had been fabricated.

14. I find that ground 1 is made out and that the Judge failed to consider the cumulative risk to the appellant on account of his profile, including his sur place activity, his Kurdish ethnicity and his work as a Kolber in Iran.

15. The Judge states at [46] and [47]:

“46. I must go on to consider whether the appellant would face a well-founded risk of persecution or the breach of his human rights upon return to Iran. I have regard to the case of **HB**. I note that even low-level political activity was considered to lead to a risk of persecution or article 3 ill-treatment by the authorities. The Iranian authorities demonstrated what could be described as a “hair-trigger” response suspected or perceived to be involved in Kurdish political activities or support for Kurdish rights. This view is corroborated by the Home Office’s Country Information Report. However, I have found that the appellant was not politically active in any way in Iran and I therefore find that he does not risk his human rights being breached upon return on this or any other basis.

47. In considering the appellant’s show plus (sic) activities and in particular his Facebook post, I have regard to the case of **XX (PJAK, sur place activities, Facebook) (CG) UKUT [2022] 00023**. I find that the appellant is not genuinely politically motivated. Having regard to the findings in that case, I find that the appellant can simply delete his account prior to returning to Iran. I find that his previous postings will not have come to the attention of the authorities in Iran. I find that the appellant is not politically motivated and will not have to suppress his political opinions in Iran because they are not genuinely held in any event with reference to **HJ Iran**. In these circumstances, I find that the appellant will be of no interest whatsoever to the authorities on return to Iran and find that he would not be known to the and has no political profile and find that the appellant does not face a well-founded fear of persecution on the basis of political activity upon return to Iran.”

16. I find that the Judge has failed properly to take into account the appellant’s profile. There is no reference in [47] to the appellant’s Kurdish ethnicity, or to the accepted fact that the appellant worked as a Kolber in Iran. These are both factors which are relevant to a consideration of whether the appellant would have come to the attention of the Iranian authorities. As the Judge set out at [46], the authorities have a “hair-trigger” response to those “suspected or perceived to be involved in Kurdish political activities or support for Kurdish rights”. The Judge states that the respondent’s own Country Information Report corroborates this. It is acknowledged in XX that someone of Kurdish ethnicity may “face a higher risk than the general population” [103]. However, the Judge does not consider the appellant’s Kurdish ethnicity at [47] when considering the risk on return.

17. The Judge failed to consider the evidence from Facebook in any detail. He acknowledged at [19] that the appellant provided a supplementary bundle “which contains further Facebook entries posted by him”. This was not just “further entries posted by him”, but contained the appellant’s Facebook activity log from the “Download Your Information” function. The Judge failed to consider the duration of the appellant’s sur place activities, the extent of his activities, and his public profile. The appellant’s Facebook account showed him demonstrating in favour of Kurdish rights. He was seen outside the Iranian Embassy. The supplementary bundle also contained a witness statement from the appellant where he listed further demonstrations he had attended. Not only does the Judge give inadequate consideration to this evidence, but he makes no reference to this

activity in his consideration of risk. He has found that the appellant is not genuinely politically motivated, but this does not negate the need for a full assessment of all of the appellant's characteristics. In the skeleton argument before the First-tier Tribunal the factors which needed to be considered cumulatively were set out at [5(c)]. However, the Judge has failed to do so.

18. I find that the Judge has failed properly to consider whether the appellant's sur place activities would have brought him to the attention of the Iranian authorities, cumulatively with reference to the appellant's particular circumstances. I find that this is a material error of law.

Ground 2 - failure to consider a relevant concession

19. It was submitted that the Judge had erred in departing from the concession made by the respondent that section 8 did not apply to the appellant. Ms. Seehra submitted that section 8 was not determinative of the Judge's assessment, but it formed part of the credibility assessment. It was unfair to hold this against the appellant, who had arrived in the United Kingdom as an unaccompanied asylum seeking child. Mr. Avery submitted that this made no material difference.

20. At [48] the Judge states:

"I find that the appellant came to the UK via numerous safe countries including France and find his failure to claim political asylum prior to his arrival in the UK to be further damaging to his credibility. In the light of the above, I find the appellant's account to be incredible and inconsistent. I find that he has not proved, to the lower standard, that he would face persecution upon return. In reaching his conclusion I have regard to Section 8 of the Asylum and Immigration (Treatment of Claimants) Act 2004."

21. There was a clear concession by the respondent that the appellant's credibility was not damaged. The respondent stated at [38] of his decision:

"It is noted that you travelled to the UK via France, however you failed to claim asylum there before arriving in the UK. Your explanation as to why you failed to claim asylum in safe European country has been carefully considered. You state that your trip was organised by your uncle, and you didn't know where you were (AIR Q135). As you were an unaccompanied minor under influenced by other adults it is considered that your behaviour is one to which section 8(4) applies. However, your credibility is not damaged as a result."

22. Earlier in the decision, when setting out the respondent's case, the Judge erroneously states "The appellant's immigration history and failures claim political asylum in France were considered to be damaging to his credibility having regard to section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004" [15]. This is not the respondent's position. The respondent clearly stated that the appellant's credibility was not damaged. The Judge has carried out his consideration of the appellant's credibility against a background that it was already damaged by behaviour falling under section 8.

23. The finding at [48], when the Judge goes behind the concession and expressly finds that the appellant's "failure to claim political asylum prior to his arrival in the UK" further damages his credibility, comes after other negative credibility

findings. However, given the Judge's erroneous statement at [15], I find that it has infected all of the credibility findings. He states that he finds the appellant's account to be incredible and inconsistent "in the light of the above".

24. I find that to go behind a concession of such gravity, which goes to the credibility of the appellant's account, without putting the appellant on notice, is unfair. I find that the credibility findings are infected by this error and that it is material.

Ground 3 - Lack of reasoning and failure to consider relevant evidence in relation to key findings of fact

25. The grounds refer to several of the Judge's findings, but in the resumed grounds and at the hearing the focus was on the Judge's finding at [49] regarding the appellant's illegal exit. The Judge found that the appellant had his own passport but it was submitted that there was no evidential basis to support this finding. The issue of the appellant's illegal exit had not been put in issue in the respondent's decision or the review. "While it is acknowledged that the FTJ continued to consider the position in the alternative and if A had exited illegally, it is submitted the FTJ's primary finding that A exited legally lacked any foundation and reasoning."

26. At the hearing Ms. Seehra submitted that the issue of the appellant's illegal exit had never been questioned or disputed by the respondent. Mr. Avery submitted that ground 3 was no more than a disagreement with the findings of the Judge.

27. The Judge states at [48]:

"I find that the appellant had no reason to leave Iran illegally and find that he did not so and as indicated left legally on his own passport and so will have no problem returning. However, even if the appellant did leave the country illegally, having regard to case law and the objective evidence, I find that the appellant will undergo a short period of questioning before being released without any harassment or further action."

28. In the respondent's decision at [44] he considered the risk to the appellant on account of having left illegally. There was no challenge to the appellant's account that he left illegally. Similarly in the review it states "It is not considered that the A being a failed asylum seeker or that the A has exited Iran illegally will give rise to a real risk of persecution and that the A is able to return safely". Again there was no issue raised with regard to the appellant having left illegally.

29. The Judge finds at [48] that the appellant did not leave illegally, and further that he left on his own passport. I find that there are no reasons given for the finding that the appellant had his own passport. I find that this is an error of law. In relation to materiality, I find that the Judge's consideration of the appellant's illegal exit, which he considers in the alternative, includes the finding that the appellant will "undergo a short period of questioning" on account of having left illegally. Just as he has not considered the fact of the appellant having left illegally at [48] as a cumulative factor together with his Kurdish ethnicity and illegal work as a Kolber, neither does he consider either of those factors here, when finding that the appellant will be questioned on return to Iran. He concludes that the appellant will be "released without any harassment or further action", but he fails to give reasons for why this is the case.

30. I find that the Judge errs in his consideration of the appellant's illegal exit and the implications of that on the risk on return.
31. I find that the decision involves the making of material errors of law. In considering whether this appeal should be retained in the Upper Tribunal or remitted to the First-tier Tribunal to be remade I have taken into account the case of Begum [2023] UKUT 46 (IAC). At headnote (1) and (2) it states:

“(1) The effect of Part 3 of the Practice Direction and paragraph 7 of the Practice Statement is that where, following the grant of permission to appeal, the Upper Tribunal concludes that there has been an error of law then the general principle is that the case will be retained within the Upper Tribunal for the remaking of the decision.

(2) The exceptions to this general principle set out in paragraph 7(2)(a) and (b) requires the careful consideration of the nature of the error of law and in particular whether the party has been deprived of a fair hearing or other opportunity for their case to be put, or whether the nature and extent of any necessary fact finding, requires the matter to be remitted to the First-tier Tribunal.”

32. I have carefully considered the exceptions in 7(2)(a) and 7(2)(b) when deciding whether to remit this appeal. Given that I have found that the Judge materially erred in his consideration of the appellant's credibility, no findings can be preserved. I therefore consider that it is appropriate to remit this appeal to be reheard in the First-tier Tribunal.

Notice of Decision

33. The decision of the First-tier Tribunal involves the making of material errors of law and I set the decision aside. No findings are preserved.
34. The appeal is remitted to the First-tier Tribunal to be reheard.
35. The appeal is not to be listed before Judge Cohen.

Kate Chamberlain

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
6 April 2024