Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06179/2018

THE IMMIGRATION ACTS

Heard at North Shields	**Decision and Reasons Promulgated**
On 25 January 2019	**On 20 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

F. H.
(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Cleghorn, Counsel, instructed by Halliday Reeves Law Firm
For the Respondent: Mr Diwnycz, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a citizen of Iran, entered the UK illegally and then claimed asylum on 6 November 2017. His protection claim was refused on 30 April 2018. His appeal against the decision to refuse him protection status was heard, and allowed on

Article 3 grounds only, by decision of First tier Tribunal Judge Moran, promulgated on 23 July 2018. That decision followed a hearing at which the Respondent, without explanation or application for an adjournment, was unrepresented. The asylum ground of appeal was dismissed.

2. The Respondent was granted permission to appeal to the Upper Tribunal by decision of First tier Tribunal Judge Lambert of 21 August 2018. The grant was made on only one of the two grounds advanced in the application. That challenge focused upon whether the Judge had erred in concluding that a Kurd, who was of no previous interest to the Iranian authorities, would be questioned about his previous activities in Iran, if returned to Iran as a failed asylum seeker, so that his past non-political criminal activity would come to light, so that there was no adequate basis for the conclusion that the Appellant faced a real risk of a breach of his Article 3 rights.
3. Neither party applied in writing under Rule 15(2A) for further evidence to be admitted in the remaking of the decision, should the decision of the First tier Tribunal be set aside.
4. The Appellant lodged no Rule 24 response to the grant of permission, and also lodged no cross-appeal (whether within or out of time). Thus, no matter the arguments Ms Cleghorn sought to advance, the dismissal of his asylum appeal is unchallenged.
5. Thus the matter comes before me.

Renewed grounds?

6. Mr Diwnycz confirmed that the Respondent did not seek to advance the first ground. He accepted the criticisms that had been made of it by the Judge who granted permission to appeal.
7. There is therefore no challenge by either party to any of the Judge's findings of primary fact. The Judge accepted that the Appellant had been engaged in the smuggling of cigarettes and general goods from time to time in Iran, but found that the Appellant had never been involved in the smuggling of alcohol, drugs, or, any political materials [26-7]. The Judge rejected the claim that the Appellant's criminal activities had come to the attention of the Iranian authorities.
8. Save for his claim to have been a smuggler the Appellant did not claim to have ever engaged within either Iran or the UK in any political activity, or any other activity that would be perceived to be politically motivated, or, a pursuit of Kurdish rights generally.

Error of law?

9. The Respondent's challenge is therefore a simple one. The Appellant failed to establish that he had any reason to leave Iran unlawfully, because he was unable to establish that he had ever come to the adverse attention of the Iranian authorities; his evidence of having done so was rejected as a fiction. He had admitted to having been issued with a passport in Iran. If in truth he retained possession of that passport (despite his claim to have lost it en route to the UK), then he could demonstrate with ease that he had left Iran legitimately. Even if he had told the truth when he had claimed to have lost his passport, there was no reason why he could not seek from the Iranian authorities, the issue of a replacement whilst in the UK.
10. Moreover, the Appellant had not established that records were not kept by the Iranian authorities of the grant of exit visas. Thus he had not shown that he would be unable to demonstrate that he had left Iran legitimately. He had had no reason to do so, and there was therefore in the circumstances of his fabricated account, any reason why the Tribunal should infer that he had done so.
11. Thus, it was argued, the prospect of risk of harm upon return had to be assessed on the basis the Appellant would simply be processed upon return as having the following characteristics;
    i) a male Kurd,
    ii) who was a failed asylum seeker,
    iii) who was returning from the UK, and,
    iv) who had failed to attract any adverse attention from the Iranian authorities as a result of either his activities in Iran or the UK.
12. The available country evidence, and country guidance, did not permit the Judge to reach a conclusion that such an individual would be detained and questioned at the airport upon return to Iran in order to ascertain whether they had engaged in any criminal activity within Iran prior to their departure.
13. Nor was there a real risk that the questioning the country guidance suggested he would be likely to be subjected to upon return would mean he faced a real risk of having to disclose his past criminal activity.
14. To the extent that the Judge had been persuaded to assume that this would be the case, there was no proper evidential basis for such a finding, and it was not therefore one that was open to him; HB (Kurds) Iran CG [2018] UKUT 430. Accordingly his assessment of the risk factors that applied to the Appellant was materially flawed; the assessment was however one that could be undertaken by the Upper Tribunal without remittal, and if undertaken would necessarily lead to the dismissal of the Article 3 appeal.

The Appellant's response

15. Ms Cleghorn initially disputed that the Appellant had ever held a passport, until his admission to this effect was drawn to her attention, along with the relevant finding by the Judge [A2 Q1.8] [13]. There was no answer to Mr Diwnycz's point that if in truth the Appellant retained possession of that passport (despite his claim to have lost it en route to the UK), then he could demonstrate with ease that he had left Iran legitimately. Even if he had told the truth when he had claimed to have lost his passport, there was no reason why he could not seek from the Iranian authorities, the issue of a replacement whilst in the UK.
16. Ms Cleghorn accepted that the Judge had rejected as untrue the Appellant's account of why he had left Iran, and was unable to identify any reason why in those circumstances the Appellant needed to leave, or had left, illegally. There was no answer to Mr Diwnycz's point about exit visas. Accordingly there was no reason for the Tribunal to assess the risk the Appellant would face upon return to Iran on the basis that he would be perceived to have left illegally.
17. Ms Cleghorn then suggested that the Appellant might not have performed military service in Iran, although his witness statement had made no such claim, and his appeal had never been advanced on the basis that he was a draft evader. Asked to identify any previous suggestion that the Appellant had not performed military service, she pointed to the denial at the screening interview that the Appellant had been a member of the national armed forces [A6 Q5.2]. The difficulty with this, as she acknowledged, is the unchallenged objective evidence that young men are called up for eighteen months national service at the age of 18 (they can volunteer to undertake their service from the age of 16), and that those who are draft evaders can have any existing driving licence and passport cancelled; CPIN; Iran; military service v1 October 2016 #4.5.1 & #7.2.4. It followed that in my judgement there was no evidential basis that would have legitimately allowed the Tribunal to find, or to infer, that the Appellant had failed to perform national service, or, that he is perceived by the Iranian authorities to be a draft evader. The Judge made no such finding, and he was entirely correct not to have done so.
18. It is quite clear from the available country information that an individual who had performed military service would have been issued with the consequent military service completion card [#6.3.1]. Even if this had subsequently been lost the Iranian authorities would hold records of its issue. The legitimate alternative to performing military service is of course to obtain a legitimate certificate of exemption from service, or, when legislation from time to time permits the practice to "buy out" of the obligation for service, but in either case the individual would also be able to establish upon return to Iran that they

had done so. In neither case would the individual be perceived as a draft evader.

19. Ms Cleghorn then focused upon the questioning that the Appellant might face upon return to Iran, and in so doing she relied upon a skeleton argument. Although this was drafted after the promulgation of HB (Kurds) Iran CG [2018] UKUT 430, it failed to engage with the content of HB, or even to acknowledge its existence. Indeed she went so far as to argue that HB was of no assistance, since it did not examine the particular position of an ex-smuggler. I regret that I cannot adopt such a cavalier approach to such recent country guidance, particularly given that the Upper Tribunal took evidence from both Professor Joffe and Dr Enayat, upon the approach taken by the Iranian authorities to Kurds who would correctly be perceived upon return to be failed asylum seekers.
20. Central to Ms Cleghorn's argument, as advanced, was that the Appellant would not be perceived by the Iranian authorities to be simply a failed Kurdish asylum seeker. Pressed upon the evidential basis for this proposition, she was unable to identify one. On the Judge's unchallenged findings, this was a man who had left Iran without ever having come to the adverse attention of the Iranian authorities. He had not claimed to have done anything in the UK to come to their attention either, and thus any intelligence led enquiries into his activities in advance of his return to Tehran would have identified no grounds for concern beyond his ethnicity.
21. Ms Cleghorn's argument also assumed that the Appellant, as one who was perceived to be a failed asylum seeker, would be detained upon return to Tehran airport and questioned in circumstances that would necessarily mean a breach of his Article 3 rights. There is no proper foundation for that assumption to be found in either HB or in AB and Others (internet activity-state of evidence) Iran CG [2015] UKUT 257, or, in SSH and HR (Illegal exit: failed asylum seeker) Iran CG [2016] UKUT 308. Had matters been otherwise, every Iranian national able to demonstrate that they would be perceived to be a failed asylum seeker upon return, would have been bound to succeed in an Article 3 claim. That has not been the Tribunal's approach to date, and it did not become the Tribunal's approach as a result of HB.

Conclusions

22. Upon return to Iran, it is common ground that the Appellant would (correctly) be perceived by the Iranian authorities to be a Kurd who had unsuccessfully claimed asylum in the UK.
23. The Appellant had not come to the adverse attention of the Iranian authorities whilst he previously lived in Iran, and nothing he has done since will have drawn him to their adverse

attention either. He has never had any engagement in politics or Kurdish rights movements, and he has never advanced a case based upon association within the UK with others who have done so. It was not suggested that interrogation of any social media accounts (whether maintained by himself or others) would give rise to any grounds for concern about him.

24. Thus the Iranian authorities' intelligence enquiries into the Appellant prior to his return to Iran would have disclosed no adverse interest in him, because he has done nothing to give rise to such interest. If asked directly, upon return to Iran, the Appellant would truthfully be able to confirm that he had never been engaged in any political activity either within, or outside Iran. However suspicious generally they may be of Kurds, the Appellant has failed demonstrate any reason why the Iranian authorities would conclude he was not telling the truth about this.
25. The Appellant would either be able to produce his original Iranian passport, or, he would have been able to provide sufficient accurate biographical information to the Iranian authorities (with the support of his family in Iran) to have allowed the issue to him of a replacement passport in the UK. There is no proper evidential basis that would permit the Tribunal to infer that he would necessarily be required to travel to Iran upon an emergency travel document or laissez passer.
26. If he were able to produce his original passport there was also no proper evidential basis to permit the Tribunal to infer that the Appellant would be likely to be perceived by the Iranian authorities as one who had left Iran illegally. Even if he was required to travel upon a replacement passport there was no proper evidential basis to permit the Tribunal to infer that the Appellant would be unable to satisfy the Iranian authorities that he had been issued with an exit visa in the past.
27. As an Iranian national travelling upon his own original passport, endorsed with an exit visa, who has never come to the adverse attention of the Iranian authorities, the mere fact that the Appellant would be perceived to be a Kurdish failed asylum seeker returned from the UK, does not upon the current country guidance suggest that he will be detained and questioned at all. He might be asked to sign a declaration to the effect that he regretted making a false claim to asylum abroad, but even on the basis of Dr Enayat's evidence in HB there is no reason why he should be reluctant to do so [HB Annexe B #11-2, #50].
28. If travelling upon a replacement passport, that necessarily did not have the original exit visa endorsed in it, because the original had truthfully been lost, the Appellant might be questioned about why that was the case; BA. However he would be able to demonstrate that he had been accepted for the issue of a replacement passport, and he would be able to give accurate details of when the exit visa used to leave Iran

had been issued to him. Ultimately Ms Cleghorn accepted that even if this questioning were to occur it would not give rise to a real risk of a breach of his Article 3 rights.

29. Thus Ms Cleghorn's argument ultimately rested upon the assumption that the Iranian authorities would have some reason to detain the Appellant and question him about his activities in Iran prior to his departure, so as to lead to the disclosure of his criminal activity. I can see no proper evidential basis for that assumption on the evidence that was accepted by the Judge. There is no support to be found within HB for an assumption that the questioning of the Appellant would be so wide ranging.
30. Indeed, I would venture that paragraph 4 of the summarised guidance offered by HB is actually inconsistent with the Appellant's case. If, the mere fact of being a returnee of Kurdish ethnicity with or without a valid passport, and even if combined with illegal exit, does not create a risk of persecution or Article 3 ill-treatment, then the Appellant has to demonstrate that there is a real risk that the breadth of the routine questioning of a returnee without any adverse profile will require him to disclose his past criminality.
31. The evidence offered by Professor Joffe as summarised by the Upper Tribunal in HB [Annexe B #97] did suggest that the Iranian authorities might assume that a smuggler was involved in political activity, but fell well short of establishing that a Kurdish returnee travelling upon his own passport, with no adverse profile, would be questioned in such a way as to require disclosure of such activity in the past.
32. In the circumstances I am satisfied that, for the reasons given above, the Judge did fall into error in his approach to the Article 3 claim. The decision can, and should, be remade upon the basis of the Judge's own core findings. Neither party has applied under Rule 15(2A) for the Upper Tribunal to consider new evidence. There is no good reason offered as to why the Upper Tribunal should waive that requirement. Moreover, the key findings of primary fact by the Judge are unchallenged by the parties and in my judgement they are sufficient to permit the decision to be remade. It follows that I dismiss the appeal on Article 3 grounds. The decision to dismiss the appeal asylum, humanitarian protection and Article 8 grounds is not challenged before me, and is therefore confirmed.

DECISION

The Decision of the First Tier Tribunal to allow the appeal on Article 3 grounds which was promulgated on 23 July 2018 did involve the making of an error of law that requires the decision to be set aside and remade.

The appeal is dismissed.

Direction regarding anonymity – Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until the Tribunal directs otherwise the Appellant is granted anonymity throughout these proceedings. 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 proceedings being brought for contempt of court.

Signed

Deputy Upper Tribunal Judge JM Holmes

Dated 15 February 2019