IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-005178

First-tier Tribunal No: PA/51797/2020
LP/00213/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 11 September 2024

Before

UPPER TRIBUNAL JUDGE CANAVAN
UPPER TRIBUNAL JUDGE HOFFMAN

Between

MK
(ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Ms N O'Mara, Counsel
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

Heard at Field House on 21 August 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. The appellant, who is a citizen of Iran, seeks to appeal the decision of First-tier Tribunal Judge Rhys-Davies promulgated on 7 September 2023 dismissing his appeal against the respondent's decision dated 29 September 2020 to refuse his protection and human rights claim made on 25 July 2019.

Background

2. The background to the appellant's case is a lengthy one, stretching back over 20 years. He arrived in the UK on 9 August 2003 and subsequently made an asylum claim (it would appear after he was apprehended). His asylum claim was refused on 9 February 2004. He appealed that decision to the Immigration Appellate Authority. Following a hearing, his appeal was dismissed by the adjudicator Mr A H Alakija on 19 April 2004. The appellant was refused permission to appeal by the Immigration Appeal Tribunal but, following a successful statutory review by the High Court, leave to appeal was granted. The appellant's case was next heard by Immigration Judge D J Boyd QC sitting in the Asylum and Immigration Tribunal who, in a determination dated 23 August 2005, also dismissed the appellant's appeal. The appellant's appeal rights were exhausted in relation to his asylum claim in February 2006.

3. Following this, on an unknown date, the appellant left the country. However, on 31 December 2006 he was returned to the UK by the Dutch authorities after he attempted to enter the Netherlands using a false Norwegian passport. The appellant then received a 12-month prison sentence on 13 January 2009 for possession of a false/improperly obtained/another's identity document with intent. The appellant's conviction led to a deportation order being signed on 3 June 2009 and his appeal against that decision was dismissed by First-tier Tribunal Judge Vaudin d'Imecourt and Mr A J Cragg CMG JP on 25 October 2010. Despite the appellant having been unsuccessful with his appeal, his deportation never took place.

4. On 25 July 2019, the appellant made a fresh asylum and human rights claim. This was refused by the respondent on 29 September 2020 and the appellant was given a new right of appeal. The appellant's appeal was dismissed by First-tier Tribunal Judge Mensah on 28 June 2021. However, Judge Mensah's decision was found to contain an error of law and set aside by Upper Tribunal Judge Grubb in decision promulgated on 5 August 2022. The appeal was remitted to the First-tier Tribunal where it was heard by Judge Rhys-Davies on 18 July 2023. In a decision promulgated on 7 September 2023, Judge Rhys-Davies dismissed the appellant's appeal.

5. The appellant then sought permission to appeal to the Upper Tribunal relying on the following grounds:

    1) The judge failed to consider legal submissions material to the appellant's claim to be Yarsan.

    2) The judge misapplied the country guidance case of HB (Kurds) Iran CG [2018] UKUT 430 (IAC) in his assessment of the factual matrix in the appellant's case and supporting evidence.

    3) The judge reached an irrational conclusion as to the material deterioration of the situation in Iran and his approach to the country guidance.

    4) The deterioration of the situation of Kurds in Iran following the outbreak of protests in September 2022 is such to justify the Upper Tribunal considering whether the country guidance determination of HB ought to be revised, irrespective of the outcome of he underlying case.

6. Permission to appeal was granted by First-tier Tribunal Judge Dainty on 30 October 2023, seemingly on all grounds.

7. At the hearing before us, Ms O'Mara, representing the appellant, explained that she was no longer pursuing ground 1. It was also acknowledged that ground 4 was not in reality a ground of appeal. Ms O'Mara confirmed that she would therefore be focussing on grounds 2 and 3.

Findings – Error of Law

Ground 2: Misapplication of HB to the factual matrix and evidence

8. For the following reasons, we find that the judge did not err in law by misapplying the country guidance case of HB.

9. As the appellant's appeal focuses on the judge's findings at [64], we therefore set out that paragraph in full:

> "Turning to the other issues to be addressed, I find that being Kurdish and having left illegally do not per se present a real risk of persecution or serious harm on return: ***HB*** **(Kurds) Iran CG [2018] UKUT 00430 (IAC)**. Ms. Kashefi speaks of a potential risk of ill-treatment because the Appellant has been here a long time, so would have had ample opportunity to engage in anti-Iranian government activity. However, the Appellant does not claim to have been engaged in any such activity, whether in the form of demonstrations or meetings, or online. He has a "clean record" in that respect. Given my findings about the Appellant's claim to be Yarsan, that potentially "aggravating" feature does not arise. There is no evidence that the Appellant considers himself westernised, or that he would be considered so by others. While the country information and expert evidence recounts the recent protests and crackdown in Iran, given the already previously high level of oppression, I am not persuaded that there has been a material deterioration so as to depart from the country guidance, for which I would need very strong grounds accompanied by cogent evidence: ***SG*** **(Iraq) [2012] EWCA Civ 940**."

10. In oral submissions, Ms O'Mara argued that the judge had failed to take into account the hair-trigger approach of the Iranian authorities to those suspected of or perceived to be involved in Kurdish political activities or support for Kurdish rights: see para (10) of the headnote to HB. She also submitted that notwithstanding the judge's findings that the appellant had not been involved in any activities since leaving Iran relating to Kurdish political activities or Kurdish rights, the hair-trigger approach had to be considered in the light of two particular risk factors identified in the expert evidence before him: (a) the long period of time that the appellant has spent in the west; and (b) the increase in the oppression of Iranian Kurds since the protests in 2022.

11. Ms O'Mara referred us to several passages of the expert report of Ms Roya Kashefi, including para 141.4 which says:

> "141.4. • **Any evidence of increased difficulty or danger associated with returning to Iran after a lengthy stay in the UK;**
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> A) The Islamic Republic has increased its terrorist activities in the UK as evidenced by MI5 reports and actions of the Foreign Secretary. These increased activities imply the regime perceives a real threat emanating from the UK. When supporting an English football team can contribute towards national security charges, we have crossed the borders of reason and logic. These actions point to the very arbitrary nature of administration of justice according to personal preferences of those involved in the interrogation and later trail.

B) Furthermore, once in the UK individuals can exercise freedom of opinion and expression freely. They can associate with established dissident Kurdish groups in the UK. Despite the presumption of innocence it is up to the returnee to prove they were not politically active against the regime particularly during the past few months."

12. Ms O'Mara also directed our attention to Ms Kashefi's opinion at para 141.2 that being a member of the Kurdish community increased the risk on return at the time of writing the report (May 2023) and her conclusions at para 162, which we set out in full:

> "162. Kurds, in general, are viewed with suspicion and [MK's] situation would be compounded as a Kurd returning from the United Kingdom with ample opportunity to participate in dissident Kurdish activity against the regime. Furthermore, the United Kingdom is regularly blamed for the present unrest in Iran alongside the USA. The hasty execution of dual national Alireza Akbari as a British spy in January 2023 was a clear message. The regime's efforts to silence the voices of Iranians outside Iran particularly that of Iranian journalists in the UK has resulted in several Metropolitan Police reports on credible terror threats on British soil against British nationals and additional sanctions packages imposed by the government. In his address to the United Nations Human Rights Council in February 2023, the Islamic Republic's Foreign Minster stated that the United Kingdom and the USA are complicit in the terror activities and unrest in Iran. This is the climate under which a young dissident Kurd would be returned to Iran. It is my opinion that at present risk to returnees from the UK is high."

On a plain reading, Ms Kashefi appears to suggest that any Iranian Kurds returning to Iran from the UK, who had "ample opportunity to participate in dissident Kurdish activity against the regime" would face a high level of risk on return, whether they had participated in such activities or not.

13. We remind ourselves that the decision under appeal was made by a specialist judge of the First-tier Tribunal. As Lord Hamblen said in HA (Iraq) v Secretary of State for the Home Department [2022] UKSC 22 at [72]:

> "72. It is well established that judicial caution and restraint is required when considering whether to set aside a decision of a specialist fact finding tribunal. In particular:
>
> (i) They alone are the judges of the facts. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. It is probable that in understanding and applying the law in their specialised field the tribunal will have got it right. Appellate courts should not rush to find misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently - see *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49; [2008] AC 678 per Baroness Hale of Richmond at para 30.
>
> (ii) Where a relevant point is not expressly mentioned by the tribunal, the court should be slow to infer that it has not been taken into account - see *MA (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49; [2011] 2 All ER 65 at para 45 per Sir John Dyson.
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> (iii) When it comes to the reasons given by the tribunal, the court should exercise judicial restraint and should not assume that the tribunal misdirected itself just because not every step in its reasoning is fully set out - see *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19; [2013] 2 AC 48 at para 25 per Lord Hope."

14. In the present case, the judge confirmed at [64] that he had taken into account HB and we find that it was not incumbent on him to rehearse the points raised the headnote to that country guidance case, including the hair-trigger point at headnote (10). It can be assumed that he was aware of the hair-trigger approach of the authorities. Furthermore, the judge was, we find, reasonably and rationally entitled to take into account the evidence of the expert witness, Ms Kashefi, about the potential risk to the appellant as a person who has spent a long time in the west and had therefore had ample time to engage in anti-Iranian government activities, but find that the important point was that the appellant had not in fact engaged in such activities. That finding is consistent with HB.

15. What Ms Kashefi says at paras 141.4(B) and 162 of her report means that returnees would have to prove a negative, which is of course an extremely difficult task. Those paragraphs also suggest that if not all Kurdish Iranians, then at least those who have been in the UK for a not insignificant period of time, would be at risk on return to Iran, either because they have been involved in anti-regime activities outside of the country or because they would struggle to prove that they have not. If correct, that would create a risk category with the potential to draw in a significant proportion, even a majority, of Iranian Kurdish asylum seekers in the UK yet it is not one reflected in HB, BA (Demonstrators in Britain – risk on return) Iran CG [2011] UKUT 36 (IAC) or the more recent country guidance case of XX (PJAK – sur place activities – Facebook) Iran CG [2022] UKUT 00023 (IAC) where the Upper Tribunal found that HB and BA continue to accurately reflect the situation for returnees in Iran. However, despite the implications of what she asserts in her report, Ms Kashefi does not provide any sources for the proposition that those who have been in the UK or west long enough to engage in political activities must prove to the regime that they have not done so.

16. Furthermore, being westernised is not a risk factor identified in HB, BA or XX. It is unclear from the materials before us how exactly this point arose in the proceedings before the judge. It was not listed as an issue in dispute at [15] nor is it a point Ms Kashefi was instructed to comment on and she does not use the term “westernised” in her report. In any event, we are satisfied that the judge was reasonably and rationally entitled to find that there was no evidence before him that the appellant considered himself westernised or that others would consider him to be so. The appellant’s challenge to that finding amounts to little more than a disagreement with the judge’s conclusion.

17. We are therefore satisfied that the judge properly took into account Ms Kashefi’s report and that his findings that the appellant did not face a risk on return were both rationally open to him and consistent with HB, i.e. that 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: see headnote (4). On the facts of his case, the appellant did not engage in any of the risk factors set out at headnotes (6) to (9), and the judge’s conclusions were reasonably and rationally open to him based on the available evidence.

Ground 3: Irrational conclusion as to the material deterioration of the situation in Iran and consequent approach to the country guidance

18. In ground 3, the appellant again focuses on a finding made by the judge at [64], this time in the final sentence. Having considered the evidence submitted on behalf of the appellant, including the expert reports, regarding the crackdown on demonstrators in Iran in 2022, the judge found that “given the already high level

of oppression, I am not persuaded that there has been a material deterioration so as to depart from the country guidance".

19. The appellant argues that finding is irrational. At the hearing before us, Ms O'Mara submitted that Ms Kashefi's report explained the background to the 2022 protests and how they originally began in the Kurdish regions of Iran leading to a harsh response by the authorities. Flowing from this, Ms O'Mara argued, was a situation whereby Kurds returning to Iran from the UK would be subject to heightened suspicion in the context of a worsening county condition. She submitted that the evidence before the judge was capable of falling within the four walls of HB but, in the alternative, she said that if we found that HB could not accommodate the appellant's country evidence, then the judge had taken an overly restrictive approach to SG (Iraq) v SSHD [2012] EWCA Civ 940 and he should have found that the evidence was sufficient to depart from the country guidance.

20. First, despite Ms O'Mara submitting that the evidence before the First-tier Tribunal was capable of fitting within the four walls of HB, we find that, in essence, the appellant was asking the judge to depart from the country guidance by creating possibly up to three new risk categories, e.g. (a) a Kurd who has been in the UK or west for a period of time long enough to have been involved in pro-Kurd or anti-government activities (whether or not they had); (b) a Kurd who has been living outside of Iran and is capable of being perceived by the authorities to be westernised; and/or (c) a Kurd who is returning to Iran following a period of absence in the UK or west in the context of the government's crackdown on the Kurdish community following the 2022 protests.

21. Second, on the basis that the appellant was asking the judge to depart from the country guidance, we do not accept that the judge's failure to do so was irrational or otherwise unlawful. As the Court of Appeal held in SG, a country guidance case remains authoritative unless and until it is set aside on appeal or replaced by a subsequent decision, and it cannot be departed from in the absence of a clear and coherent body of evidence that the findings of the Upper Tribunal were in error. In the present case, Ms O'Mara only addressed us on the report of Ms Kashefi. The judge's findings in relation to other aspects of the appellant's expert evidence are unchallenged. As we have noted above, Ms Kashefi's claims that returning Kurds would have to prove that they had not taken part in any pro-Kurdish or anti-Iranian government activities abroad is unsourced. Furthermore, as Mr McVeety submitted, most of the events and sources Ms Kashefi does rely on in the section of her report dealing with risk factors for Kurds pre-date HB (see, for example, paras 141.2 to 161). We do not therefore accept Ms O'Mara's submission that the report amounts to a clear and coherent body of evidence capable of undermining the findings made in HB, which was affirmed by the Upper Tribunal in XX only the year before the appellant's First-tier Tribunal appeal. We find that the judge was rationally entitled to consider that the country guidance already established a high level of oppression in Iran against its Kurdish population and, in that context, the evidence before him was insufficient to depart from the findings of the Upper Tribunal in HB so as to establish new risk categories. The judge was accordingly entitled to conclude that the appellant did not fall into any of the risk categories set out in HB and dismiss his appeal on that basis.

Notice of Decision

The First-tier Tribunal decision does not involve the making of an error of law

The decision shall stand

M R Hoffman

Judge of the Upper Tribunal
Immigration and Asylum Chamber

29th August 2024