



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

Appeal Number: AA/07248/2014

THE IMMIGRATION ACTS

Heard at Glasgow

Decision & Reasons

On 22 April 2015

Promulgated

On 14 August 2015

Before

UPPER TRIBUNAL JUDGE DEANS

Between

AA

(Anonymity order made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Martin, Jain, Neil & Ruddy Solicitors

For the Respondent: Mr M Matthews, Home Office Presenting Officer

DETERMINATION AND REASONS

- 1) This is an appeal against a decision by Judge of the First-Tier Tribunal Balloch dismissing an appeal on asylum and human rights grounds.
- 2) The appellant was born in 1986 and is a national of Iran. He arrived in the UK in 2008 and claimed asylum. This was refused in 2010 and an appeal in the same year was dismissed. Permission to appeal was refused. Further submissions made in 2011 were refused without a right of appeal, as were further representations made the following year. Following a pre-action protocol letter the respondent issued a further refusal letter dated 9 September 2014 with a right of appeal.

- 3) In broad terms the basis of the appellant's asylum claim is that he distributed propaganda materials for KDPI, of which his brother was a member. It is not disputed that the appellant is an Iranian Kurd. In his first appeal in 2010 the Judge at that time accepted that the appellant "may have been involved to some extent at a very low level with the KDPI" but the Judge did not accept that he had come to the adverse attention of the authorities, or that there was any reason to believe the authorities would be looking for him if he were to be returned.
- 4) In the present appeal the Judge of the First-Tier Tribunal had regard to the 2010 determination as a starting point, in terms of *Devaseelan* [2003] Imm AR 1. The Judge also had regard to the respondent's latest reasons for refusal letter, of 9 September 2014. At paragraph 31 of the determination the Judge recorded that in this letter the respondent wrote:-

"Immigration Judge Wallace fully considered your client's claim and whilst she found that your client had been a member of the KDPI, it was only at a low level. Furthermore she concluded that the authorities in Iran had no interest in your client."
- 5) At page 32 Judge Balloch went on to find that there was clearly an error on the part of the author of the refusal letter and this had gone uncorrected at the case management review hearing prior to the substantive hearing. There was no finding of fact made in the determination by Judge Wallace that the appellant was a member of KDPI. Indeed, in paragraph 7 of his witness statement the appellant had stated he was uncertain as to his status within KDPI and in his oral evidence he reiterated that he was not sure as to whether he had been made a member or not. Judge Wallace could not have gone on to make a finding that the appellant was a member of KDPI when his evidence before her was that he did not know himself whether he was a member or not. Judge Wallace did not make such a finding. Judge Balloch then stated, at paragraph 37, that all the findings of Judge Wallace should stand. She proceeded to consider further evidence lodged on behalf of the appellant but attached little weight to this.
- 6) The principal point on which permission to appeal was granted was that the Judge without giving notice of an intention to do so went behind a concession in the most recent refusal letter to the effect that the appellant was a member of KDPI. This was an arguable error.
- 7) In the application for permission to appeal a further challenge was brought to the findings made by the Judge of the First-Tier Tribunal in respect of the consequences of illegal exit from Iran and the risk on return to the appellant, given his history of involvement with the KDPI. In accordance with the decision of the Supreme Court in *RT (Zimbabwe)* [2012] UKSC 38, the appellant should not be expected on return to Iran to conceal his involvement with the KDPI in order to avoid persecution. The further grounds were considered arguable.

Submissions

- 8) At the hearing before me Mr Martin relied on the grounds of the application for permission to appeal. He submitted that Judge Wallace had found the appellant was a low level member of KDPI. This was recorded in the reasons for refusal letter at page 3. Judge Balloch was not entitled to go beyond this concession in her determination. The concession had been mentioned at the case management review hearing. Mr Martin acknowledged there might be an issue of materiality in relation to the concession.
- 9) Mr Martin further submitted that the appellant did not have to establish membership of KDPI in order for his appeal to succeed. He need only show low level involvement, which would be sufficient under *HJ (Iran)* [2010] UKSC 31 and *RT (Zimbabwe)*. This case law post-dated the decision by Judge Wallace.
- 10) Mr Martin continued that in order for the appellant to succeed he need not have a high profile. It was acknowledged that he was an Iranian national of Kurdish ethnicity. He had left Iran illegally. He had been involved with the KDPI, which was accepted by Professor Wallace. In terms of *SB (risk on return, illegal exit) Iran CG* [2009] UKAIT 00053 he would face scrutiny on return as a failed asylum seeker who had left Iran illegally. Illegal exit was not itself a significant risk factor but it would bring him to the attention of the authorities. He would be asked why he left Iran and claimed asylum. There was no legal proposition that required him to lie. The decision in *RT (Zimbabwe)* did not depend upon the extent of a person's involvement in opposition activities. Although the appellant had not previously come to the attention of the authorities he would do so on return. There was a reasonable degree of likelihood of persecution. There was no question about the nature of the Iranian regime and in terms of *SB* the appellant would be questioned about his departure. There was no expectation that he should conceal established facts and acknowledging these facts would place him at risk.
- 11) For the respondent, Mr Matthews acknowledged that there were some findings in favour in the appellant but submitted that the case being advanced on behalf of the appellant did not amount to very much. Judge Wallace found there was no reason to believe the authorities would be looking for the appellant on return. The appellant would not have anything to lie about. Judge Wallace did not accept that the appellant had fled from Iran because of a fear of persecution. She did not believe his account of why he left when he did. It would not be enough to put him at risk that he handed out leaflets on two occasions six years previously. Any involvement with KDPI was at a low level. The appellant had essentially no interest in KDPI and he had not been involved in this organisation in the UK. There was no evidence of any political beliefs by the appellant at the time of the hearing before Judge Balloch. The case of *RT (Zimbabwe)* concerned a situation where a person with no political beliefs was required to express

support for the government to avoid persecution, even though the person did not subscribe to this opinion. There were no findings to show the appellant subscribed to any political views. There was a distinction between holding political beliefs and incriminating oneself. Why should the appellant incriminate himself if this would lead to harm? As found by Judge Wallace, he was of no interest to the Iranian authorities.

- 12) Mr Matthews submitted that it was the lack of interest in the appellant by the authorities which was the real issue in the appeal. The supposed concession in the refusal letter was a side issue and its materiality was questionable. The respondent had referred to Judge Wallace as having found the appellant was a member of KDPI but it was not within the gift of the respondent to find this. It was not in fact a finding by Judge Wallace. There was no new evidence accepted by Judge Balloch. The respondent's reasons for refusal letter could not change the findings made by Judge Wallace without further evidence. The matter should have been addressed at the case management review hearing but there was clearly no disadvantage to the appellant. It was raised at the hearing in a submission by the Presenting Officer, recorded at paragraph 22 of the determination and was properly a matter for submissions. The reasons for refusal letter had not been drafted by a judge or a lawyer. The findings made by Judge Balloch did not bring the appellant within the terms of *SB* and the appellant could not show a risk on return.

Discussion

- 13) In his submission before me Mr Martin appeared to state that Judge Wallace had found that the appellant was a low level member of KDPI and this finding had been re-stated in the reasons for refusal letter of 9 September 2014. If this was Mr Martin's submission, I cannot accept it. The finding made by Judge Wallace at paragraph 57 of her determination was only to the effect that the appellant was involved to some extent at a very low level with the KDPI. As Judge Balloch pointed out in her determination, the appellant did not himself in his evidence before Judge Wallace know whether or not he was a member. Indeed, the question of whether he was a member was unlikely to be of any great significance, as has been accepted by both parties in their submissions before me. Assessment of the risk of persecution would depend not upon whether or not the appellant was a member but on the nature of the activities he undertook on behalf of KDPI, and whether this had brought him to the attention of the authorities. The finding of Judge Wallace was that these activities had not brought him to the attention of the authorities.
- 14) The finding of Judge Balloch, at paragraph 32 of her decision, was that clearly there was an error in the refusal letter where it was stated that the appellant was a member of KDPI. This was not the finding of Judge Wallace and there was no basis on which a finding to this effect could have been made in the refusal letter.

- 15) Nevertheless, a point does arise about fairness to the appellant. As Mr Matthews acknowledged, this is a matter which should have been dealt with more fully at the case management review hearing and it is regrettable that it was not. As Mr Matthews further pointed out, however, the point was addressed in the submission made orally on behalf of the respondent by Ms Aitken at the hearing before Judge Balloch. Judge Balloch recorded this submission at paragraph 22 of her determination. It was pointed out by Ms Aitken in her submission that in the previous appeal the appellant was not found to be a KDPI member.
- 16) Before Judge Balloch Mr Martin made his submission on behalf of the appellant after Ms Aitken had made hers, in accordance with the normal procedure. In his submission Mr Martin accepted that the starting point in terms of *Devaseelan* was the determination of 2010 by Judge Wallace. This point is recorded at paragraph 24 of Judge Balloch's decision. Mr Martin further accepted that the "matters of fact have been settled". The previous determination referred to the appellant's low level of involvement with KDPI. Mr Martin then submitted that according to page 3 of the refusal letter the appellant had been found on appeal to be a member of KDPI and this letter was relied upon by the respondent. Somewhat contradictorily, Mr Martin then appears to have submitted that the appeal before Judge Balloch had "nothing to do with the reassessment of the facts or credibility", according to paragraph 25 of Judge Balloch's determination.
- 17) Admittedly in her submissions, as recorded at paragraph 20 of Judge Balloch's decision, Ms Aitken relied upon the reasons for refusal letter. She then implicitly qualified this as her submission proceeded by pointing out that it was not found by Judge Wallace that the appellant was a KDPI member. Mr Martin must have been present when this submission was made and he had the opportunity of responding to it. He did not do so directly. At any point following Ms Aitken's submission he could have made an application to the Judge for whatever measures to be taken which he thought were appropriate if he considered that the fairness of the proceedings were in jeopardy. He did not do so. Instead he sought to rely on what was clearly an error in the refusal letter. While this error is unfortunate, it does not provide a basis for Mr Martin to extend the scope of Judge Wallace's findings beyond what he should have known to be their limited extent.
- 18) In these circumstances I cannot perceive any unfairness to the appellant arising from Judge Balloch's treatment of the apparent, although unfounded, concession in the respondent's refusal letter regarding the appellant's supposed membership of KDPI. This matter was thoroughly addressed both in the submission on behalf of the respondent at the hearing before Judge Balloch and in Judge Balloch's own decision. If Mr Martin, on behalf of the appellant, chose not to respond directly to the point made by Ms Aitken in her submission, that was a matter for Mr Martin's judgement at the time. He cannot subsequently claim unfairness when he did not respond to the point at the hearing when he had every opportunity to do so. As far as I am

concerned, there is no issue of substance in Judge Balloch's treatment of the supposed concession and no error of law arising from it.

- 19) There remains a further issue relating to the application of the decisions in *HJ (Iran)* and *RT (Zimbabwe)*. Mr Martin pointed out that these decisions were not in existence at the time Judge Wallace gave her decision. Judge Balloch did, however, consider submissions in respect of them.
- 20) First of all at paragraph 45 of her decision Judge Balloch noted that in *SB* it was found that having exited Iran illegally was not a significant risk factor but if a person would face difficulties with the authorities for other reasons, it could add to the difficulties likely to be faced. She found the appellant did not fall within the risk factors set out in *SB*. She acknowledged that country information provided for the hearing before her demonstrated that abusive and repressive behaviour by the authorities continued in Iran, notwithstanding a change of government. The evidence in respect of risk on return did not appear to have materially changed since the previous hearing.
- 21) Judge Balloch then stated, at paragraph 46, that the case of *RT (Zimbabwe)* supported the principle developed in *HJ (Iran)* that a person with political beliefs ought not to be obliged to conceal them in order to avoid persecution. The right to freedom of thought, opinion and expression protected non-believers as well as believers and extended to the freedom not to hold, and not to have to express, opinions.
- 22) The Judge then noted that the appellant was not found to be a member of KDPI although he was involved to some extent at a very low level. Judge Balloch then attempted to draw a distinction between a finding that he was involved with KDPI and a finding that he may have been involved. I do not consider that this is a helpful distinction, having regard to the low standard of proof in asylum appeals. The finding by Judge Wallace, although expressed in terms that the appellant may have been involved, was in effect a finding that he was involved, having regard to this low standard of proof.
- 23) Judge Balloch referred at paragraph 49 to *BA (Demonstrators in Britain – risk on return)* Iran CG [2011] UKUT 00036. In this case it was noted that Iranians returning to Iran were screened on arrival and that a returnee who met the profile of an activist might be detained while further searches were made. Students, particularly those with known political profiles, were likely to be questioned as well as those who had exited illegally. Judge Balloch then found that the appellant did not meet any of the risk factors in *SB* or *BA* other than having left Iran illegally. There was no evidence that he had taken any interest in politics while in the UK or had taken part in any activities of this nature. He had not shown any interest in KDPI. It was accepted, however, that he was of Kurdish ethnicity and the country information showed that the Iranian regime could be harsh in its treatment of Kurds as of other minority groups.

- 24) The question for me, accordingly, is whether Judge Balloch properly applied the principles in *HJ (Iran)* and *RT (Zimbabwe)*. In *RT (Zimbabwe)* the Supreme Court set out a number of principles. The first of these was that the principle in *HJ (Iran)* applied to any person who had political beliefs and was obliged to conceal them in order to avoid persecution as a result of revealing them. Secondly there was no distinction to be drawn between a “committed” political non-believer and an indifferent or neutral political believer. The right not to hold a protected belief was a fundamental right. Refugee law did not require a person to express false support for an oppressive regime, any more than it required an agnostic to pretend to be a religious believer in order to avoid persecution. There was nothing in *HJ (Iran)* to lend support to the idea that it was relevant to determine how important a right was to the individual. An individual might be at risk of persecution on the grounds of imputed political opinion and it was nothing to the point that the person did not in fact hold that opinion.
- 25) The case of *RT (Zimbabwe)* was, of course, concerned with the particular situation in Zimbabwe, where those returning were expected to show positive support for the regime. In essence, the appellant in that case was able to establish that he was not required to lie to show support for the regime in order to avoid persecution.
- 26) The position of this appellant is different but he may still come within the same principle. The argument for the appellant is that in order to avoid persecution he would have to deny his involvement in political activities if he were to be questioned either about his asylum claim or about his activities before he left Iran. If he were questioned about the basis of his asylum claim on return to Iran as a failed asylum seeker, what would he say? He might say “I claimed that I was involved with the KDPI”. This would lead to an obvious enquiry as to whether he was. The focus of attention would then be on his activities before he left Iran. In order to protect himself would he be required to deny that he ever undertook any activities on behalf of KDPI? The answer from *RT (Zimbabwe)* is that he would not be expected to lie.
- 27) Mr Matthews submitted that even though there was a finding as to the appellant’s involvement, the appellant had no real interest in KDPI and certainly no current interest, as demonstrated by his lack of engagement in the UK over a period of six years. Although this is relevant to the Iranian authorities’ perception of the appellant’s political profile, in terms of the application of *RT (Zimbabwe)* it is of little relevance. The appellant does not have to show that he is a committed supporter of KDPI. It would be enough simply that the opinion would be imputed to him as a result of his earlier activities, if he was questioned about these and admitted them. He does not have to be a current or committed supporter in order to face a real risk of persecution on the grounds of an imputed political opinion.
- 28) In her determination Ms Balloch accepted, at paragraph 49, that Iranians returning to Iran are screened on arrival and that a returnee who meets the profile of an activist may be detained while further searches are carried out.

Judge Balloch found though that there was nothing to show that the appellant met the profile of those who were likely to face difficulties with the authorities.

- 29) This point was considered by the Upper Tribunal in *BA*. It was acknowledged that Iranians are screened on return. However, there was no real risk of persecution for those who had exited Iran illegally or were merely returning from Britain. It was important to consider the level of political involvement before considering the likelihood of the individual coming to the attention of the authorities and the priority that the Iranian regime would give to tracing them. It was only after considering these factors that the issue of whether or not there was a real risk of the person facing persecution on return could be assessed. In particular, in respect of *sur place* activities it was necessary to look at the person's role in demonstrations and their political profile, as well as the surveillance of demonstrations. It should be asked whether the person was known as a committed opponent or someone with a significant political profile or fell within a category which the regime regarded as especially objectionable.
- 30) In *BA* the risk factors in *SB* were accepted. These included being a person who left Iran when facing court proceedings, or a person who is accused of anti-Islamic conduct.
- 31) In the present appeal, Judge Balloch found there was nothing in the appellant's history to bring him to the attention of the authorities on return. She considered his Kurdish ethnicity but found that this would not be enough by itself. He had never previously come to the attention of the authorities on the basis of his activities on behalf of KDPI, according to the findings made by Judge Wallace and accepted by Judge Balloch. His activities, were, moreover, undertaken more than six years ago and there was no evidence of any activities undertaken in the UK.
- 32) The protection afforded by *HJ (Iran)* and *RT (Zimbabwe)* only arises where there is evidence establishing a reasonable likelihood that the person concerned would be questioned about their political views or any relevant political activities on return to their country of origin. In this appeal, although it is acknowledged that the appellant would be identified on return to Iran as someone who had exited illegally, the evidence does not show a reasonable likelihood that the appellant fits the profile of somebody who would be questioned on return about involvement in opposition activities or about opposition political views, according to the findings in *SB*. On the basis of the evidence and the Country Guideline cases before her, Judge Balloch was entitled to conclude that the appellant would not be of any interest to the authorities on return to Iran and would not be questioned about his political views. This was a decision the Judge was entitled to reach and accordingly I find no error of law in this regard in her determination.

Conclusions

- 33) The making of the decision of the First-Tier Tribunal did not involve the making of an error on a point of law.
- 34) I do not set aside the decision.

Anonymity

- 35) The First-Tier Tribunal did not make an order for anonymity. Given the subject matter of the appeal, however, and the finding that the authorities in Iran would have no reason to suspect the appellant of any opposition activities were he to return there, I consider it appropriate to make an order for anonymity in the following terms.
- 36) Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an anonymity order. Unless the Upper Tribunal or a court directs otherwise, no report of these proceedings or any form of communication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Signed

Date

Judge of the Upper Tribunal