Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/05567/2015

THE IMMIGRATION ACTS

Heard at: Liverpool	**Decision Promulgated**
On: 16th August 2017	**On: 27th September 2017**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

AM
(anonymity direction made)

Appellant

And

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: **Mr Nicholson, Counsel instructed by Broudie Jackson and Canter**
For the Respondent: **Mr Diwnycz, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The Appellant is a national of Iran born in 1983. He appeals with permission the decision of the First-tier Tribunal (Judge Birrell) to dismiss his appeal against the Respondent's decision to refuse him protection.

Anonymity Order

2. This appeal concerns a claim for protection. 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 therefore consider it appropriate to make an order in the following terms:

> "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 his family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Background and Matters in Issue

3. The Appellant claimed to have a well-founded fear of persecution for reasons of his imputed political opinion in Iran. The historical basis of that claim was that in November 2013 he had come to the adverse attention of the authorities who now believed him to have some association with the banned Kurdish group the KDPI.

4. The claimed circumstances were that the Appellant had been driving a work car in the border region between Iraq and Iran. He was employed by a private company which was subcontracted to the state-run Ground Water Company and he regularly drove in that area. He was contacted by a friend who asked if he could give him, and two other men, a lift from the border to Sar Pol E Zahab (a town in Kermanshah province, not far from the border). The friend told the Appellant that these men had come from Iraq. The Appellant agreed and picked the men up. The car was later stopped at a checkpoint, the men were searched and were found to have incriminating materials including documents bearing the emblem of the KDPI. The three passengers were all arrested. The Appellant managed to escape arrest by claiming that he had simply picked the men up at the side of the road. As he was driving a water board car, and had denied knowing the men, the police let him go, having taken a note of his details. When the Appellant returned to his office he was informed by his boss that the Etelaat had been looking for him, and had taken his personal laptop, which had been on his desk. The Appellant's boss asked him to wait at the office and not go anywhere. The Appellant became afraid because he knew that there was material on the laptop that linked him to the KDPI; he was not a member but had developed a sympathy for the cause whilst at university. He left his workplace

and went to a friend's house. About one – two hours later a neighbour called him to tell him that the Etelaat had been at his home. The Appellant knew he had other material there. The security services arrested his father and brother. He left Iran that night.

5. The Appellant further relied on his *sur place* activities in the UK, which he claimed further put him at risk. He had contacted the KDPI shortly after he arrived in Manchester. He has attended meetings and at least one protest. He has kept in touch with members of the group in the UK.

6. The Respondent had rejected the entire claim for want of credibility. The Appellant had then appealed to the First-tier Tribunal.

7. The decision of the First-tier Tribunal was promulgated on the 18th January 2017. In summary, the Tribunal did not find the historical account to be proven to the standard of reasonable likelihood. It did not consider it credible that the Appellant would agree to give the three men a lift without making any enquiries into what they had been doing in Iraq. Nor was it credible that the men would have been carrying incriminating materials when it was obvious that they would be stopped at a checkpoint, given the 'zero tolerance' attitude of the Iranian authorities to the KDPI. Nor for that reasons was it credible that the police would have arrested the three passengers and not the driver. The claim that the authorities very soon after attended the Appellant's workplace and seized his laptop was inconsistent with their apparent indifference at the checkpoint. As to the laptop the Tribunal noted the evidence that it was left unsecured, even though it contained incriminating materials. It did not seem likely that the Appellant would leave his personal laptop at work in those circumstances; when asked to explain why it was there at all he could give no reasonable explanation.

8. As to his sur place activity the Tribunal noted a tension in the evidence. The Appellant had said that he had developed a sympathy for the group at University in Iran but had not become involved because of the inherent dangers. He had arrived in the UK in December 2013 and although there was no such obstacle to his becoming more involved here, he did not contact them for approximately a year. Three letters of support from various sources within the KDPI were given little weight as they were vague, appeared to be in standard format and did not substantiate anything that the Appellant had said about events in Iran; nor could any of the writers speak to the *bona fides* of the Appellant's claim to be a genuine political supporter of the group. The Tribunal considered whether it was reasonably likely that any of the Appellant's claimed activities in the UK could have come to the attention of the Iranian authorities. There was nothing to suggest that any of the activity had been

reported online, and it was not clear why the Iranians would have any information on the attendees of a protest outside the UK Supreme Court. This was minimal level activity and a cynical attempt to bolster a claim.

9. The appeal was thereby dismissed.

The Appeal

10. Permission was refused by First-tier Tribunal but was granted upon renewed permission by Upper Tribunal Judge Rintoul on the 5th June 2017 who considered in arguable that Judge Birrell erred in her approach to credibility: it is arguable that the judge wrongly considered the appellant's actions as not credible when she was in practice considering whether they were plausible or not". The grounds are that the Tribunal erred in:

    (i) Failing to take material matters into account;

    (ii) Impermissible speculation;

    (iii) Raising new matters without giving the Appellant an opportunity to respond;

    (iv) Failing to consider submissions made on the Appellant's behalf;

    (v) Failure to apply the country guidance/consider submissions made.

Discussion and Findings

The Credibility Findings

11. I deal first with the challenge to the credibility findings about a) whether the Appellant would have given the men lifts without making enquiries as to what they were doing/where they were going etc, b) whether the men would have risked carrying incriminating materials on a road in that area, c) whether the police would have let the driver of the vehicle go in such circumstances and d) whether the Appellant would have left his personal laptop, containing illegal material unsecured at his workplace. Mr Nicholson made detailed submissions about why he vehemently disagreed with these findings; pressed to identify an error of law he settled with a failure to take relevant matters into account. Those matters were a) that people do give each other lifts and b) that young people "do not think" about whether it is

advisable to leave their personal technology lying around. It is further said that the First-tier Tribunal speculated about the degree of incriminating material found on the passengers and the extent to which the police/Etelaat would have considered this a serious matter. In Mr Nicholson's submission "there was no reason why the checkpoint officers would not have let A go".

12. The grounds place reliance on the fact that Judge Lever, who dismissed an earlier appeal in June 2015, did not consider it to be "particularly startling" that people give each other lifts. The grounds contend it is in fact perfectly normal, and suggest that this is particularly so in Kurdistan. Had Judge Birrell rejected as incredible the notion that the driver of a car might give someone else a lift, a rationality challenge might have been made out. But that is not what she found. She found that in these circumstances it was not credible that the Appellant would give a lift to two complete strangers – albeit introduced by a friend – who had just crossed the border from Iraq *without querying who they were and what they had been doing in Iraq*. This is all said to have taken place in Kermanshah, an area characterised by three things: illegal activity (eg smuggling), political opposition to the Iranian state (Kurdish nationalism) and for those reasons a high presence of Iranian security personnel (such as the checkpoints that feature in this account). Judge Birrell made her findings in that context: see paragraph 41 of the determination. It was a finding open to her that cannot be impugned on rationality grounds.

13. I would add that it is somewhat surprising that the grounds highlight the findings of Judge Lever, the full text of which reads: "on the face of it there is nothing particularly startling in the concept of the Appellant providing a lift to a friend and others. However, there are circumstances in this case which render those initial assertions lacking in credibility". Judge Lever went on to explain very clearly why he considered the account not to be credible, given the particular context: his reasoning foreshadows that of Judge Birrell. Contrary to the suggestion in the grounds, no error in his approach in this regard was found by the Upper Tribunal: Deputy Upper Tribunal Judge Harris set Judge Lever's decision aside for procedural impropriety. These issues were then clearly known to the Appellant and his representatives, and if there was an answer to them, there was in the remaking an opportunity to advance it.

14. Similarly I can find no error in Judge Birrell's findings on the laptop and on whether the men would be carrying KDPI material. Judge Rintoul is correct to note that these were plausibility points, and upon detailed consideration I find that it was open to the Tribunal to reach those negative findings. The country background material before the Tribunal was not in issue. Both parties agreed that the repression of

the Kurdish people in north western Iran is such that any association with the KDPI is likely to lead to persecutory ill-treatment. That was the context in which Judge Birrell evaluated the likelihood of the actors in this account risking discovery. The passengers in the car could have simply avoided checkpoints on the main road by taking a route over the mountains; the Appellant could have left his laptop at home. Mr Nicholson submitted that the Judge failed to take account of how a younger generation behave. He gave the example of a young person who routinely leaves his phone or ipod lying on the front seat of a car. Were this a 16 year old in Manchester City Centre then he might have had a point. It was not. It was an educated adult well aware of the consequences of discovery [paragraph 41] in an atmosphere of intense state surveillance. The Appellant was unable to explain why he decided to take his personal laptop to work, or more particularly to do so knowing that it contained material that could land him in jail or worse.

15. Finally, on this matter it is submitted that it was impermissible speculation on Judge Birrell's part to assume that the KDPI materials in the possession of the passengers would obviously have given rise to problems, or that the police officers who stopped the car would have viewed the possession of such material as serious. I find it hard to understand this submission in light of the agreed country background material. See for instance page 31 of the Appellant's bundle, at 2.3.3: "the authorities have no tolerance for any activities connected to Kurdish political groups and those involved are targeted for arbitrary arrest, prolonged detention, and physical abuse…those involved in Kurdish political activities also face a high risk of prosecution on vague charges such as "enmity against God" and "corruption on earth"". In the context of this material I Judge Birrell's findings were plainly open to her.

16. The grounds submit that the First-tier Tribunal erred in failing to consider Mr Nicholson's submission that the Appellant's pro-KDPI activities should have been weighed in the balance in assessing his historical account, since they supported his claim to be a sympathiser of the cause. This ground has no merit for the following reasons. First, it was nowhere part of the Appellant's case that he chose to give those men a lift, or left his laptop at work, because he was a KDPI sympathiser. In fact he expressly denies knowing that his friend had anything to do with the organisation. Second, Judge Birrell finds that the *sur place* activity relied upon is entirely cynical.

Risk on Return

17. There are two limbs to the challenge in respect of the First-tier Tribunal's assessment of risk on return. First it is said that the

Tribunal erred in failing to recognise that this Appellant would give rise to "particular concern" and so be likely to endure ill- treatment during questioning upon return to Tehran: SSH and HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 00308 (IAC). Second, issue is taken with the findings in that country guidance case, and with the First-tier Tribunal's failure to address the alleged lacunae in its conclusions.

18. As to the first limb, I cannot find any basis upon which Judge Birrell, on the findings she made, could have found that the Appellant would give rise to any "particular concerns" to the Iranian security services on return. Like the appellant in the country guidance case he is a Kurd being returned to Iran having made a failed asylum claim.

19. As to the second, the grounds set out detailed criticisms of the decision in SSH and HR, asserting that the Tribunal failed to address evidence before it, that the decision is unclear and that the Upper Tribunal failed to give guidance. As I understand this critique, the point made is that the Tribunal does not address what might happen to returnees while they are held at the airport pending investigations, and that the evidence of the expert in that case, Dr Kakhki, is not addressed. Although it is accepted that returnees will face questioning, and that conditions "in detention" are likely to breach Article 3, the Tribunal fails to make clear whether this includes detention at the airport.

20. I can find no merit in this ground. Whilst I agree that an absence of evidence does not amount to evidence of absence, it is quite clear from the decision in SSH and HR that the Tribunal analysed what happens at the point of return with anxious scrutiny. Dr Kakhki gave no evidence to the effect that there was any likelihood of ill treatment at the airport whilst detainees are waiting to be questioned. Mr Drabble QC, who represented the appellants in that case, made no submissions to the effect that there was evidence of a risk in the airport: in fact it is clear from his closing submissions that in speaking of 'detention' the parties in that case were concerned with *prison* (see for instance at paragraph 16 Annex 2). Mr Nicholson asks me to consider what might happen if the Appellant arrives at Tehran airport in the middle of the night and there is no one available to question him til morning. He asks me to surmise that it is reasonably likely that he would be transferred to Article 3 conditions at that point. I am satisfied that if this were the case, that would have emerged in the course of a country guidance hearing that had been convened specifically to hear expert evidence on the point. The express findings of the Tribunal are that there is not a real risk of ill-treatment during this initial period. It is only if something of concern arises in the questioning that the risk arises:

> "15. There is a general consistency to this evidence that a person returning on a *laissez passer*, having left Iran illegally, would be subjected to no more than a fine and probably a period of questioning although there is no indication in the evidence that that questioning would be of a kind or in a place where ill treatment could be expected…
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> 23…. "The evidence in our view shows no more than that they will be questioned, and that if there are any particular concerns arising from their previous activities either in Iran or the United Kingdom or whatever country they are returned from, then there would be a risk of further questioning, detention and potential ill-treatment. In this regard it is relevant to return to Dr Kakhki's evidence in re-examination where he said that the treatment they would receive would depend on their individual case. If they co-operated and accepted that they left illegally and claimed asylum abroad then

Decisions

21. The determination of the First-tier Tribunal contains no material error of law and it is upheld.

22. There is an order for anonymity.

Upper Tribunal Judge Bruce
26th September 2017