



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/11127/2016

THE IMMIGRATION ACTS

Heard at Glasgow
On 26 July 2018

Decision & Reasons Promulgated
On 28 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DEANS

Between

L M
(Anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Ms J McCallum, Latta & Co, Solicitors
For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal is brought against a decision by Judge of the First-tier Tribunal Mill dismissing an appeal on protection and human rights grounds.
2. The appellant is a national of Iran of Kurdish origin. He claims to be at risk of persecution in Iran because of his support for the KDP. In addition, he states that he is at risk because of his activities on behalf of the KDP in the UK and on social media.

3. The Judge of the First-tier Tribunal did not believe the appellant's evidence of his experiences in Iran. The appellant's personal circumstances would not put him "at heightened risk" on return. Finding that the appellant had no pre-existing profile of interest to the authorities in Iran, the judge went on to state that the appellant would not "be at enhanced risk of interrogation and investigation on return". The activities of the appellant on social media were described by the judge as "very marginal and minor" in nature and would not give rise to a risk on return.
4. Permission to appeal was granted on the basis that the judge arguably erred by asking whether the appellant would face a "heightened risk" on return. It was arguable that the appellant's Kurdish ethnicity compounded the risk. In addition, it was arguable that the judge had materially misapprehended the appellant's evidence when making an adverse credibility finding.
5. The parties addressed me first on whether the judge erred in considering risk on return and applied a higher test than required.
6. Mr Govan contended that the judge had considered the appellant's social media activity in accordance with AB & Others (internet activity – state of evidence) Iran [2015] UKUT 00257. The Facebook extracts submitted did not show the appellant was expressing a personal opinion. The use of the term "heightened risk" was not applying a higher test. It meant that the appellant was at no greater risk of interrogation on return than anyone else.
7. I would have been inclined to give greater weight to Mr Govan's submission had the judge approached the issue of risk in a more structured and systematic manner and had proper regard, in particular, to the two reported decisions relied upon by Ms McCallum before the First-tier Tribunal, namely AB & Others, cited above, and SSH & HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 00308, to both of which the judge was referred at the hearing. Instead of showing reasoning in accordance with this case law the judge referred at paragraph 45 to a "heightened risk" and at paragraph 47 to an "enhanced risk". The use of this terminology on two occasions in the judge's reasoning lead me to conclude that the judge erred by failing to have proper regard to the considerations set out in the reported decisions when considering risk on return, and by failing to give adequate and valid reasons for the conclusion reached.
8. Having informed the parties of my decision on this issue the question arose of how to proceed in re-making the decision. Mr Govan sought to rely on an as yet unreported decision by Upper Tribunal Judge Hanson in LKIK (PA/03758/2016). Mr Govan pointed out that this decision had not been promulgated when the First-tier Tribunal had made its decision in the present appeal. Judge Hanson's decision was concerned with the use of social media

by an Iranian asylum-seeker and he had heard expert evidence on the likelihood of the Iranian authorities accessing social media. The respondent had, however, sought to lodge this decision only the day before the hearing before me. Ms McCallum pointed out with justification that if this unreported decision was to be taken into consideration she would need time to take instructions in relation to it and, if appropriate, to instruct expert evidence.

9. At this point in the hearing it became clear that it would not be feasible for me to re-make the decision on the day of the hearing. Mr Govan had produced a recent decision of the Upper Tribunal which appeared to be relevant and material to the issue before me. Out of fairness, the appellant was entitled to time to consider the implications of this decision.
10. If the decision was not to be re-made straightaway on the issue of risk on return, it was appropriate to look in more detail at the credibility finding made by the Judge of the First-tier Tribunal and whether this was sustainable. As already mentioned, in the grounds of appeal it was contended that the judge had misapprehended the appellant's evidence and found a discrepancy where none existed.
11. Ms McCallum acknowledged that she had not lodged any note of the proceedings before the First-tier Tribunal in support of this ground of appeal. Mr Govan indicated that the file notes left by his colleague who had attended the hearing were not helpful on this issue. I noted, however, that the Judge of the First-tier Tribunal had very properly left a clear and almost entirely legible note of the evidence in the Tribunal's appeal file.
12. The issue concerns the evidence recorded by the judge at paragraphs 19-20 of the decision and the related credibility findings at paragraphs 21-23. The record of the evidence was as follows:

"19. The Appellant states that his first difficulty with the Authorities in Iran was in late 2008 whilst a university. He states that he had vocalised support for Kurdish rights and had come into conflict with a lecturer whom he names as Dr Moqaddaasi. The appellant claims that the lecturer was a member of Ettela'at. This in itself does not make much sense. The Appellant claims that the lecturer referred his conduct to a branch of the Authorities working within the university carrying out monitoring called Herasat.
20. In his oral evidence, the Appellant states that when interviewed by Herasat members that they were unaware of his vocalisation of Kurdish rights. This, of course, makes absolutely no sense at all. They were notified due to this very fact apparently."
13. The grounds of appeal to the Upper Tribunal contend that the record of the appellant's oral evidence made by the judge at paragraph 20 of the decision, as quoted above, is incorrect. The appellant stated in his oral evidence that it was Etelaat, not Herasat, which was not aware of his vocalisation of Kurdish

rights. He further explained that Herasat did not report him to Etelaat. According to the grounds, once this error is corrected the facts recounted by the appellant make sense. It is further contended that by making this error and using it to support a negative credibility finding the First-tier Tribunal erred in law.

14. The relevant part of the cross-examination of the appellant before the First-tier Tribunal, as recorded from the foot of page 7 of the judge's note, reads as follows:-

"Etalatt aware? No do not think so
but vocal - v - professor? [tick]
aware vocal? No
Why did Etalatt come to University then? branch
not Etallatt
- in University itself
Herasat"

15. The cross-examination continued with the appellant stating that he had had a discussion with the Herasat branch at the university. The professor who reported him was asked to leave the discussion but the branch took the appellant's laptop. Shortly afterwards in cross-examination the appellant was asked if Herasat had reported him to the authorities and he replied: "No".
16. Despite underlining the word "Herasat" in the note of evidence as quoted above, the judge made the mistake in the decision, at paragraph 20, of stating that according to the appellant's evidence Herasat members were not aware of his vocalisation of Kurdish rights. According to the judge's note of evidence, however, it was Etelaat, not Herasat, which was unaware of the appellant's activity. On the basis of this misapprehension of the appellant's evidence, the judge went on to make an adverse credibility finding.
17. Mr Govan submitted that even if the judge had made a mistake on this matter the mistake was not material, given the judge's other findings. In particular, the judge rejected the appellant's evidence of his alleged KDP activities.
18. I consider that the judge's misapprehension of the evidence was material to the overall adverse credibility finding. The judge's reasoning arising from the misapprehension is recorded at paragraphs 19-20 of the decision right at the start of the judge's credibility assessment. The finding on this point colours and influences the judge's further findings and cannot safely be severed from them. Given this important error in assessing credibility, I can see no alternative but that the decision be set aside and the appeal reheard by a differently constituted First-tier Tribunal with no findings preserved, in accordance with paragraph 7.2(b) of the Practice Statement.

Conclusions

19. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
20. The decision is set aside.
21. The appeal is remitted to the First-tier Tribunal to be re-made at a hearing before a differently constituted tribunal with no findings preserved.

Anonymity

The Judge of the First-tier Tribunal did not make a direction for anonymity. In order to preserve the positions of the parties until the appeal is decided I make an anonymity direction in the following terms. Until a court or tribunal directs otherwise no report of these proceedings shall identify directly or indirectly the appellant or any member of his family. This direction applies to the appellant and the respondent. Breach of the direction may lead to contempt of court proceedings.

M E Deans
Deputy Upper Tribunal Judge

13th August 2018