Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/03580/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 January 2019	**On 6 February 2019**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

MR A S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Dakora, Solicitor, Barnes Harrild & Dyer Solicitors
For the Respondent: Mr S Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. In this decision my task is to re-make the decision on the appeal made by the appellant, who claims to be a national of Iran. In a decision posted on 28 February 2018, Judge Obhi of the First-tier Tribunal (FtT) dismissed his appeal against the decision made by the respondent on 17 March 2017 to make a deportation order and to refuse his protection claim. In a decision sent on 2 July 2018, I set aside the decision of the FtT judge for material error of law. Despite rejecting five other grounds of appeal I was persuaded by a sixth ground that the judge had erred in not addressing a report produced by the

appellant from Professor Joffe. I stated that I consider this failure material because the Joffe report was essentially a critique of the country guidance case of **SSH and HR Iran CG** [2016] UKUT 00308 (IAC**)** in respect of the issue of risk to Kurds and needed to be considered.

2. However, I went on to conclude at para 13 that:

> "In light of my foregoing analysis of the appellant's case, I consider that the judge's findings of fact on the appellant's particular circumstances can be preserved. The judge's only error related to whether the appellant was entitled to succeed on the basis that he is Kurdish and someone who exited illegally. The former characteristic is not in dispute but the judge's decision contains no finding as to whether the appellant exited illegally. For that reason I do not consider I am in a position to re-make the decision without first affording the parties the opportunity to make written submissions confined to the issue of whether the appellant should be accepted as someone who left Iran illegally and whether, if he is accepted to have exited illegally, that would suffice to put him, a person of Kurdish ethnicity, at risk on return. I direct that such submissions be sent to the Upper Tribunal (FAO Judge Storey) within 14 days of this decision being sent to the parties."

3. Subsequently I had to re-issue further directions following a CMR on 7 December 2018, as the respondent had not yet replied to my directions, in part because it had been hoped that the Upper Tribunal would have issued its decision in the anticipated country guidance case of **HB** (see below).

4. On 28 January 2019 the respondent responded in the following terms.

> "Firstly, in view of the adverse credibility findings made by Judge Obi who saw no reason to depart from the negative credibility findings made against the appellant by the tribunal in 2008, the Upper Tribunal should not, therefore, accept the appellant as someone who left illegally. In essence, the burden of proof still remains on him to substantiate that part of his claim, and his general lack of credibility must still extend to the manner of his departure.
>
> However, in view of the newly reported country guidance case of **HB(Kurds) Iran (legal exist: failed asylum seekers**) CG [2018] UKUT 430, the Upper Tribunal is nevertheless invited to consider the appellant's case on the alternative hypothetical case that he did exist illegally.
>
> The only residual point left to determine was whether the appellant being Kurdish and having existed illegally, would put him at risk. **HB** disposes of the appellant's claim in this regard. Paragraph 4 of the headnote provides:
>
> > "(4) However, the mere fact of being a returned of Kurdish ethnicity with or without a valid passport, and even if combined with illegal exist, does not create a risk of persecution or Article 3 ill-treatment".
>
> In light of the above, the SSHD invites the Upper Tribunal to remake the decision of the FtT dismissing the appellant's appeal. "

5. I heard submissions from both representatives. Mr Dakora submitted that even in the light of **HB** the fact of being a Kurd continues to be an important factor requiring

individual scrutiny. The appellant had been involved in the UK in pro-Kurdish activity and he could not be expected to tell lies on return. Mr Kotas submitted that the guidance in **HB** directly applied against the appellant as he had been found to be a failed asylum seeker. The appellant could not now turn round and ask for the individual circumstances of his case to be decided afresh as the adverse findings of Judge Obhi had been preserved and in addition the appellant's representatives had not sought to re-open them before the hearing. Mr Dakora responded that he was not seeking to re-open the case, only to emphasise that sur place activity was always a factor that had to be considered and Kurds continued to be scrutinised much more than in the past.

My assessment

6. As noted above, the findings of fact made by Judge Obhi have been preserved. This means that the appellant's account of his past experiences in Iran has been found to lack credibility. It also means that the appellant has failed to establish that he left Iran illegally. On the issue of whether he should be taken to have left illegally, I concur with Mr Kotas that the burden of proof still remains on the appellant to substantiate that part of his claim, and his general lack of credibility must extend to the manner of his departure. In my judgement, the appellant has not discharged that burden. The approach I take in this regard is consistent with that taken by the Supreme Court in **MA (Somalia) v Secretary of State for the Home Department** [2010] UKSC 49 (24 November 2010

7. Mr Dakora submits that even basing myself on the findings of fact made by Judge Obhi, I should allow the appellant's appeal. He said that this was for two reasons: first, the appellant was Kurdish; and second, because he had been found to have a level of sur place activity.

8. I deal first with the accepted fact of the appellant's Kurdish ethnicity. It follows from the terms of my directions when dealing with the error of law decision, that I must also consider the appellant's case by reference to the report that was submitted by Professor Joffe, insofar as the latter took issue with the Tribunal country guidance in ***SSH and HR (illegal exit: failed asylum seeker) Iran (CG)*** [2016] UKUT 308 (IAC).

9. I consider that the new country guidance case of **HB** fully considered Professor Joffe's expert evidence to this effect. I see no reason to depart from the conclusions it went on to reach on Professor Joffe's position (insofar as it had been stated in his past reports such as the one produced for this appeal and was still stated in part in the proceedings in **HB)**, namely that Kurdish ethnicity sufficed to put returnees at real risk of persecution. The Tribunal's conclusion was:

> "59. The appellant's skeleton argument states at [99] that Professor Joffé accepts that Kurdish ethnicity does not create a risk of persecution *per* se. However, we do not think that that accurately captures his view in the light of what he says at [124] of his report which we refer to above, and in the light of his oral evidence to which we have also referred.
>
> 60. If Professor Joffé does take that view, we are not satisfied that the evidence supports a contention that Kurdish ethnicity alone creates a risk of persecution or Article 3 ill-treatment on return. That is not a view supported by the background

evidence, it is inconsistent with Ms Enayat's evidence and indeed we are not asked on behalf of the appellant so to conclude.

61. We note Professor Joffé's evidence in his report at [113] that he is substantially in agreement with the conclusions in *SSH and HR* "if it were not for two further considerations". He wonders whether the Tribunal in that case overlooked two general aspects of the "current situation" in Iran: the worsening security situation in parts of the country occupied predominantly by one of the many ethnic or religious minorities and the increased domestic tensions. He states that in his view the Tribunal "has under-estimated the potential difficulties connected with the acquisition of laissez-passer documentation."

62. His report then expands on those issues, concluding that there is intensified repression of Kurds and that if a Kurdish returnee has given rise to suspicions of anti-regime behaviour, either abroad or in Iran before they left, "his prospects of avoiding persecution upon return will have been significantly diminished". He goes on to state that he does not feel that the decision in *SSH and HR* has paid sufficient attention to those considerations which would now be intensified by Iranian Kurdish reaction to the independence referendum in Iraqi Kurdistan. He also suggests that those considerations have been neglected in the latest edition of the COI [CIG].

63. Those views led to Professor Joffé's conclusions which we have set out at our [52]-[54] above and which we have rejected.

64. However, we have returned to Professor Joffé's evidence on this in order to explain why, in so far as Professor Joffé suggests it, we reject the contention that *SSH and HR* is wrong in terms of its country guidance. In the first place, we do not consider that Professor Joffé's reasons provide a sufficient basis for us to reconsider the guidance in *SSH and HR*. Secondly, that is not a position argued for on behalf of the appellant and was not the basis upon which the appeal before us was presented by either party.

65. Thus, in the appellant's written submissions at [8] it states that the appellant does not seek to disturb the country guidance findings in *SSH and HR* and at [11] that it is the country guidance case for assessing asylum claims that rely upon the unparticularised fact of having claimed asylum abroad. In addition, we have already referred to the appellant's suggestion that *SSH and HR* is the starting point for the assessment of the appellant's claim, a suggestion which we have rejected for the reasons given. Lastly, at [12] of the written submissions it is expressly stated that the appellant is not seeking to go behind the country guidance in *SSH and HR*.

66. We are firm in concluding that the country guidance given in *SSH and HR* remains valid."

10. I turn then to Mr Dakora's only other ground, namely that the appellant would be at risk by virtue of his accepted sur place activities in the UK.

11. It follows from the terms of my error of law decision that the appellant's sur place activities must be assessed on the basis of the judge's findings of fact regarding them at para 42 that:

> "In relation to the sur place activities, he started appearing in demonstrations and having photographs taken in order to enhance his claim, he is not a political activity as he portrays himself, he has little knowledge, interest or commitment to any political cause, his involvement in these demonstrations is for no genuine political motive. The Iranian authorities will see that the appellant has done this for his own personal reasons and that in reality he is of no interest to them'"

12. In addressing a submission made by Mr Dakora at the error of law hearing (contending that the judge failed this in paragraph to consider whether the appellant's sur place activities would put him at risk, irrespective of whether they were contrived), I stated at para 10 of my decision:

> "10. Ground (5) focuses on the judge's treatment of the appellant's sur place activities at paragraph 42. It is true that in paragraph 42 the judge does count against the appellant's claim that in his assessment the appellant undertook these activities to enhance his claim. But that in itself is not an error. Article 4(3)(d) of the Qualification Directive requires that decision-makers take into account "whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection …". The judge would only have fallen into error if she had not gone on to consider whether (to complete the wording of Article 4(3)(d)) "these activities will expose the applicant to persecution or serious harm if returned to that country"). But the judge did go on. The final sentence is the judge's answer to this question: such activities will not expose the appellant to risk because "[t]he Iranian authorities will see that the appellant has done this for his own personal reasons and that in reality he is of no interest to them". The grounds assert that such a finding was contrary to the Tribunal's decision in **AB and Others (internet activity – state of evidence) Iran** [2015] UKUT 257 (IAC**)**, which found at paragraph 464 that it is not relevant if a person has used the internet in an opportunistic way. However, **AB and Others** is not a country guidance case and the head note acknowledges that the panel had insufficient evidence before it to issue such guidance. The judge's finding in the last sentence was consistent with background COI highlighting the sophisticated nature of Iranian intelligence and the evident fact that only a relatively small percentage of bloggers are targeted on return."

13. I consider that Mr Dakora is right to submit that the judge's acceptance of some level of sur place activity on the part of the appellant is something that I must consider when re-making my decision; they differentiate him from a mere failed asylum seeker of Kurdish ethnicity. However, I am not able to accept that such activities would put the appellant at risk. The background country evidence before me in this case continues to highlight the sophisticated nature of Iranian intelligence. The Upper Tribunal in **HB** at para 82 made very clear that their guidance did not address the issue of sur place activities. Further, their identification of risk factors arising for those of Kurdish ethnicity all concerned persons whose political activity was genuine. They do not address at all whether the Iranian authorities would take an adverse view of sur place activities on the part of a person who they would be ab le to see was clearly seeking to manufacture a political profile that was not genuine.

14. Mr Dakora did not seek to adduce any further evidence to indicate that the Iranian authorities would take an adverse view of returning Kurds who had manufactured sur place activities.

15. For the above reasons the decision I re-make is to dismiss the appellant's appeal.

To summarise:

The decision of the FtT judge has already been set aside for material error of law.

The decision I re-make is to dismiss the appellant's appeal.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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 both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed: Date: 4 February 2019

H H Storey

Dr H H Storey
Judge of the Upper Tribunal