Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/12437/2018

THE IMMIGRATION ACTS

Heard at North Shields	**Decisions & Reason Promulgated**
On 28 June 2019	**On 05 July 2019**
Prepared on 1 July 2019	

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

A. K.
(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Pickering, Counsel, instructed by Freedom Solicitors
For the Respondent: Ms Pettersen, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a citizen of Iran, entered the UK illegally and then claimed asylum on 21 September 2016. His protection claim was refused on 4 May 2017, and his appeal against that

decision was heard, and dismissed on 17 July 2017 by decision of First-tier Tribunal Judge Hindson. There were three elements to Judge Hindson's decision; first he accepted that the Appellant was Iranian as claimed rather than Iraqi as asserted by the Respondent in the light of the language analysis evidence he had obtained upon the Appellant, second he rejected as untrue the Appellant's claim to have been involved in PJAK in Iran, and, third he rejected as untrue the Appellant's claim to have undertaken a genuine conversion to the Christian faith. The Appellant's appeal rights against that decision were exhausted on 1 August 2017.

2. The Appellant lodged further submissions on 4 September 2018 which were accepted by the Respondent as constituting a fresh protection claim, but this too was refused on 12 October 2018. The Appellant's appeal against this decision was heard on 26 November 2018, and dismissed by decision of First-tier Tribunal Judge Fisher dated 28 January 2018.

3. The Appellant was granted permission to appeal to the Upper Tribunal by decision of Upper Tribunal Judge Grubb of 23 April 2019. The grant was principally made on the basis it was arguable that the Judge erred in failing to consider the evidence in the light of the country guidance decision of HB (Kurds) Iran CG [2018] UKUT 430 which had been reported between the date of the hearing and the date of promulgation of his decision. The Appellant was however cautioned that it would be for him to demonstrate that there were sufficient risk factors beyond his undisputed Kurdish ethnicity, to constitute a real risk of persecution in the event of his removal to Iran. Permission was also given to advance two further grounds concerning the Judge's treatment of the posts made by the Appellant to his Facebook account, and, to the evidence of the Ministers of the Church that had accepted the Appellant for baptism in the light of the guidance to be found in TF & MA [2018] CSIH 58.

4. The Appellant applied in writing on 12 June 2019 pursuant to Rule 15(2A) for permission to admit further evidence in the remaking of the decision, should the decision of the First tier Tribunal be set aside. That evidence consisted of a witness statement of 12 June 2019, and screen shots of the posts placed by him upon a Facebook account in his name since the date of the hearing before the Judge.

5. The Respondent lodged no Rule 24 response to the grant of permission. Thus the matter comes before me.

Error of Law?

6. Neither of the representatives who appeared before me appeared below, and the following remarks are not therefore to be taken as personal criticism of either of them. It is

however common ground before me that the Judge was not assisted to the extent that he should have been by the way in which the appeal was presented on behalf of either party.

7. The decision in HB was reported on 12 December 2018, and the Judge's decision was not written and promulgated until 17 January 2019. It is accepted that neither party sought at any point to make written submissions upon HB to the Judge, or, to request that the hearing of the appeal be reconstituted to allow for further evidence to be taken, or oral submissions to be made upon it. Since both parties now accept that HB contained relevant country guidance, given the way in which the Appellant's case was put before the Judge, it is far from clear why neither representative was alert to the need to draw the reporting of HB to the Judge's attention and to seek further directions from him upon how its guidance would impact upon the appeal, and thus should be handled.

8. Ms Pettersen conceded on behalf of the Respondent that the Judge's decision makes no reference to HB and that this of itself constituted an error of law. On the other hand the Judge was plainly alert to the earlier decision in AB and Others (internet activity-state of evidence) Iran CG [2015] UKUT 257; the real concern is whether the appeal was presented in such a way as to highlight the correct issues, and thus whether the Judge was alert to the correct principles.

9. The second ground of complaint concerned the Judge's treatment of the evidence of the posts that had been placed by the Appellant upon his own Facebook account, by re-posting material originally posted by others. It appears to have been accepted by the Respondent that this was an account in his own name, and that the re-posts relied upon by the Appellant were still publicly visible at the date of the hearing, because no issue appears to have been taken by reference to this before the Judge. Ms Pettersen confirmed she did not seek to take such a point now.

10. The focus of the representatives for both parties appears therefore to have been upon whether the re-posts upon the Facebook account would have brought the Appellant to the adverse attention of the Iranian authorities before the date of the hearing. The Judge was not persuaded that they would have done so, and neither party suggests before me that this conclusion was flawed. Given the undisturbed findings of Judge Hindson, he had left Iran without having attracted any adverse attention from the Iranian authorities. There was nothing other than the Facebook re-posts that was relied upon to suggest he would have attracted any adverse attention subsequently.

11. The Respondent does not appear to have argued before the Judge that the Appellant had lied when he had denied upon arrival in the UK that he had ever been issued with an Iranian

passport, or retained any identity documents. Thus, for his removal to Iran to take place he would need to be issued with some form of travel document by the Iranian authorities. An approach from the Respondent for the issue of such a document would necessarily alert the Iranian authorities to his existence, and, it would be likely to create the perception that he was a failed asylum seeker. It is now accepted on behalf of the Respondent (although it would appear that no such concession was offered to the Judge below) that the Appellant would therefore not only face a real risk of enquiries into his identity prior to his removal, but also enquiries into his activities in the UK at the point of return; AB & Others (internet activit – state of evidence) Iran CG [2015] UKUT 257 [455-7], and, HB [114-20].

12. Although the vast majority of the re-posts to the Facebook account are indeed pictures inspired by the Christian faith which would give rise to a risk that the Appellant would be perceived as an apostate, it is now accepted before me that a few should properly have been characterised as political since they demonstrate opposition to the regime and support for Kurdish freedom, and indeed, accepted by the Respondent at the hearing below to have had such a character. Instead what appears to have happened is that both parties focused at the hearing upon whether the Appellant had genuinely undertaken a conversion to the Christian faith, and whether the re-posts of Christian images would place him at risk upon return in the event they were viewed by the authorities, presumably in the context of whether he would be viewed as an apostate.

13. In turn it would appear that the Judge's attention was not directed to the few re-posts that should have been characterised as political, and that no consideration was given to them at the hearing as a result. This appears to be the explanation for why they were not considered by the Judge in the course of his decision, and in turn for why they were not part of his assessment of what would be likely to be viewed at the point of return in the course of the enquiries that would be made into the Appellant's activities in the UK. It is accepted that this too constituted an error of law.

14. The third complaint advanced is that the Judge failed to give the appropriate weight to the evidence of the officers of the Church who gave evidence in support of the Appellant, and who asserted a belief that he had undertaken a genuine conversion of faith.

15. The Judge's starting point, correctly, was the rejection by Judge Hindson of the Appellant's claim to have undertaken a genuine conversion. Judge Hindson had found the Appellant to have lied about his experiences in Iran, and had noted that despite his claim to have already undertaken a conversion to Christianity, he had not been baptised into that faith. There

was no evidence before Judge Hindson from an ordained Minister of the Church to support the Appellant's claimed conversion, but there was evidence from a lay member of the management committee who advised that if and when the Church acquired an ordained Minister, is understanding was that candidates for baptism would be accepted at face value and without any enquiry into whether their faith was genuine. Thus the Dorodian guidelines were not followed. In the circumstances Judge Hindson was not satisfied that there had been a genuine conversion. Whilst he accepted the Appellant's regular Church attendance he concluded that this was no more than a device to bolster his asylum claim.

16. The new evidence placed before the Judge was however quite different, and thus Judge Hindson's finding required a re-evaluation in its light. The Appellant had now been baptised by an ordained presbyteral minister (roughly twelve months before the appeal hearing), who had given written evidence in support of the appeal confirming a belief that the Appellant's conversion was genuine. That presbyteral minister had been unable to attend the appeal hearing because of other commitments, but an ordained diaconal minister had attended instead, and she too had offered evidence of a belief that the Appellant's conversion was genuine, both on her own account, and to confirm the evidence of the presbyteral minister. Neither minister addressed in their written evidence the attitude towards baptismal candidates described in evidence to Judge Hindson.

17. The Judge concluded that only very limited weight could be given to the weight of the two ministers, partly because one had failed to attend the hearing so that their evidence was untested by cross-examination, partly because of the failure to address the evidence given to Judge Hindson no enquiry into faith was made of candidates for baptism, and, partly because the diaconal minister who did give oral evidence before him was unaware that the Appellant had been found by Judge Hindson to have lied.

18. As Ms Pettersen accepted, there was a failure by the presenting officer to explore with the diaconal minister in cross-examination what, if any, substance lay behind the beliefs held by both herself, and her colleague the presbyteral minister: that the Appellant was a genuine convert to the Christian faith. There was a failure to approach their evidence on the basis that as ministers they were in a position to offer the Tribunal opinion evidence concerning an individual's attitudes and beliefs, and not just factual evidence about when and how often an individual attended a Church or the role played within the congregation. Thus Ms Pettersen accepted that the analysis of the opinion evidence offered by the two ministers lacked the focus that was required in the

light of the guidance to be found in TF, and thus the Judge's assessment of whether the Appellant was indeed a genuine convert was in consequence flawed.

The decision remade

19. Ms Pettersen accepts in these circumstances that the decision upon the asylum and article 3 grounds of appeal should be set aside and remade, so that the appeal should be allowed on those grounds. I agree for the following reasons.
20. The further evidence from the minister who baptised the Appellant addresses the issue of why she believes his faith to be genuine. There is no reason to suppose that her own belief is not genuinely held, and it was not put to her on behalf of the Respondent that it was not. Thus, unless the Tribunal could be persuaded that she and her fellow minister, and the congregation, had all been cynically duped by the Appellant over an extended period of time, there would be no reason for her evidence not to be given weight, and indeed accepted. Ms Pettersen does not seek to pursue such an argument, and so there is no need to have a further hearing at which the minister can attend to give oral evidence to me. In the circumstances, in turn, it is accepted by the Respondent that the Appellant is indeed a genuine convert to the Christian faith.
21. The Appellant has failed to establish that he had any reason to leave Iran unlawfully. On the other hand there is no evidence that he has ever held a passport. To return him to Iran will require enquiries to be made by the Iranian authorities, at the instigation of the Respondent, into his identity prior to his removal, and in turn there is a real risk that he will be perceived to be a failed asylum seeker in the UK. Those enquiries will identify that he is a Kurd, although they will not establish that he had ever come to the adverse attention of the Iranian authorities prior to leaving Iran, because he had not done so. Thus any intelligence led enquiries into his activities in advance of his return to Tehran would identify no grounds for concern beyond his ethnicity, and the probability that he was a failed asylum seeker.
22. The available country guidance of HB, requires the conclusion that the Appellant would be temporarily detained and questioned at the airport upon return to Iran, and that this process would include questioning about his use of Facebook and require him to log onto his Facebook and email accounts. This process would allow the questioner to view his postings and his email activity.
23. This process of temporary detention and questioning upon return would not automatically mean a breach of his Article 3 rights. There is no proper foundation for that assumption to be

found in either HB or in AB and Others (internet activity-state of evidence) Iran CG [2015] UKUT 257, or, in SSH and HR (Illegal exit: failed asylum seeker) Iran CG [2016] UKUT 308. Had matters been otherwise, every Iranian national able to demonstrate that they would be perceived to be a failed asylum seeker upon return, would have been bound to succeed in an Article 3 claim. That has not been the Tribunal's approach to date, and it did not become the Tribunal's approach as a result of HB.

24. At the date of the hearing before the Judge there were only a few re-posts upon the Appellant's Facebook page of material that could be considered to be opposed to the Iranian regime or supportive of Kurdish rights movements. There were however some, and the homepage also displayed thumbnail photographs of the Kurdish flag [ApB pp30, 44, 45, 47, 49, 51, 57, 64].

25. Since that hearing the Appellant has continued, and indeed increased, the volume of his political postings [Article 1, 2, 5, 6, 8, 10, 11, 14]. He has also posted photographs of himself outside the Iranian Embassy in London participating in a demonstration and holding placards [SpBdl p130-2]. These are very recent, indeed dated 9 June 2019, but however cynically created, they exist, and it is accepted that they are visible today on his Facebook account, as is the material posted earlier.

26. Thus, whilst the Iranian authorities' intelligence enquiries into the Appellant prior to his return to Iran would have disclosed no adverse interest in him, because he has done nothing to give rise to such interest, there is a real risk that material would be disclosed in the course of questioning at the airport at the point of return that would alter their perception of the Appellant. If asked directly, upon return to Iran, the Appellant would not truthfully be able to confirm that he had never been engaged in any political activity outside Iran, however cynical that participation might have been. Thus without having to decide whether the Appellant genuinely held any political views that he would wish to continue to express, it is accepted that he would be placed at risk of persecutory ill treatment as a result of the questioning he would face at the point of return to Iran.

27. In all the circumstances, and upon due reflection, Ms Pettersen invited me by consent to allow the protection appeal on asylum and Article 3 grounds, which I do. The decision to dismiss the appeal on humanitarian protection and Article 8 grounds is not challenged before me, and is therefore confirmed.

DECISION

The Decision of the First Tier Tribunal to dismiss the appeal on all grounds which was promulgated on 28 January 2019 did involve the making of an error of law that requires the decision to be set aside and remade.

The appeal is allowed on asylum and Article 3 grounds.

Direction regarding anonymity – Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

> Unless and until the Tribunal directs otherwise the Appellant is granted anonymity throughout these proceedings. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.

Signed

Deputy Upper Tribunal Judge JM Holmes

1 July 2019