Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/00867/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21st January 2019	**On 4th February 2019**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

N L
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr T Aitken, of Counsel, instructed by Barnes Harrild & Dyer Solicitors
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Iran born in October 1991. He arrived in the UK in July 2016, and claimed asylum the day after he entered the UK. His asylum claim was refused on 10th January 2017. His appeal against the decision to refuse asylum was dismissed by First-tier Tribunal Judge Devittie on asylum grounds in a determination promulgated on the 15th March 2017.

2. Permission to appeal was granted by Upper Tribunal Judge Canavan on 23rd August 2017 on the basis that it was arguable that the First-tier judge had erred in law in failing to make a decision based on the report of Dr Joffe with respect to whether the appellant's Kurdish ethnicity enhanced his risk of serious harm if returned to Iran as a failed asylum seeker; and also on the basis that it was arguable that the credibility findings of the First-tier Tribunal were not reliable.

3. For the reasons set out in my decision at Annex A to this determination I decided that the First-tier Tribunal had erred in law in a decision sent to the parties on 23rd October 2017. The matter now comes back to me to remake the appeal. At the start of the hearing I admitted, with the consent of Mr Kotas, further evidence under Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. This consisted of recent Facebook posts by the appellant with certified translations and an updating witness statement from the appellant. I declined to admit a general report on Iran and Kurds written by Mr Joffe in 2017 as he had given expert evidence in the country guidance decision of HB (Kurds) Iran CG [2018] UKUT 00430 after the date of this report.

4. As set out in my error of law decision the remaking takes place within these parameters:

   - The finding that the appellant has not credibly shown himself to be a military service deserter and has not shown to the lower standard of proof that he is at real risk of serious harm as a result of military service is preserved.
   - The findings that the appellant has done military service and is of Kurdish ethnic origin are preserved.
   - The question of the credibility of the events and whether a real risk of serious harm arising out of playing music on a national day of mourning in approximately 2012, and being convicted of an offence for this, needs to be remade.
   - The question of the credibility of the appellant having made a political YouTube video and whether a real risk of serious harm arises out of this, if it is found to have taken place, needs to be remade.
   - The question of whether the appellant is at real risk of serious harm if returned to Iran as a failed Kurdish asylum seeker needs to be remade.

Evidence and Submissions - Remaking

5. In summary the appellant's evidence and submissions on his behalf seek to demonstrate that he would be at risk of serious harm on return to Iran for the cumulative risk arising out of his being an undocumented Kurdish Iranian combined with the following three factors.

6. Firstly, it is contended that he was arrested by the Iranian authorities for playing music in a car on a religious national day of mourning in 2012. He was sentenced to a fine of 20,000 Rials or six months imprisonment. His brother paid the fine so he was released from prison after one week. It is submitted that the appellant gives a detailed description of this incident at his asylum interview and it should be found to have taken place. It is also submitted that having this criminal conviction would mean that he would be subjected to additional scrutiny by the authorities on return to Iran.

7. Secondly, it is contended that he has made two political rap videos which were published on YouTube in May 2016, and these videos have had 992 and 374 views, and these would put him at risk as they express pro-Kurdish and anti-government views. It is said that he would be very likely to be asked about his social media activities when he is questioned by the Iranian authorities, which will occur if he is forced to return to Iran as he will have to apply for a temporary travel document, and with such a document will also be questioned on arrival at the airport in Iran. He will have to apply for a temporary travel document and return on one because he left Iran illegally without a passport in May 2015. As a result he would have to explain about these videos. Each video has the appellant's name and a picture of him, and they might therefore come up if an internet search was made under the appellant's name.

8. Thirdly, it is said that risk arises out of the appellant's sur place activities in the UK. The appellant has posted comments criticising the Iranian regime and supporting Kurdish nationalist organisations on his Facebook page over the past year having learned to use the internet since his asylum interview, and he has also attended four protests outside of the Iranian Embassy in London in the period May to September 2018 and posted about his attendance at these on Facebook with photographs. For the reasons set out above it is said that he would be very likely to questioned about his social media activities by the Iranian government. As a result, he is likely to be asked about Facebook and when he says he has an account for his Facebook password, and thus his return would lead to the disclosure of the content on this site to the Iranian authorities. The forwarding of material hostile to the regime and pro-Kurdish organisations, as well as posts about his own sur place activities demonstrating against the Iranian government, will therefore come to the notice of the Iranian authorities and place him at risk of serious harm. Although HB (Kurds) Iran CG does not provide country guidance on social media risk the appellant in that case was found to be at risk, in part at least, as a result of forwarding Kurdish political posts on Facebook.

9. So, although the appellant accepts that the Iranian authorities may not be currently aware of his activities it is contended that the return process would lead to a real risk that these would become known to them, and his Kurdish ethnicity would then be an aggravating factor

which would amount to a well founded fear of his being persecuted as a result of his political beliefs particularly as the Iranian authorities are very sensitive even to mild criticism.

10. The appellant relies upon HB (Kurds) Iran CG, which he asserts means that being of Kurdish ethnicity is a risk factor given that this is combined with pro-Kurdish political activity attending demonstrations in the UK and making posts on YouTube and Facebook. Reliance is placed on SSH AND HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 00308 which found that those who returned with a laissez passer will be questioned by the Iranian authorities; and on AB and Others (internet activity – state of evidence) Iran [2015] UKUT 00257 which found that: "There is clear evidence that some people were asked about their internet activity and particularly for their Facebook password." The conclusion in AB and Others (internet activity – state of evidence) Iran being that returnees are likely to be asked about their internet activity and that if it is less than flattering of the government that would lead to a real risk of persecution.

11. In summary the respondent's submission are that reliance is placed on the refusal letter and that the appellant is not at real risk of serious harm on return to Iran for the reasons set out below.

12. It is contended that he is not at risk due to the incident with playing music as it should not be accepted that this incident took place as the appellant could not explain much about the national mourning day in evidence to the Upper Tribunal; and even if it did take place then he paid his fine and the matter is over and of no significance.

13. Further it should not be accepted that anyone could access the YouTube videos as there is no evidence that they come up on an internet search particularly as they under a friend's name, and the appellant could not remember the lyrics of the raps, and the first one is not really political anyway, so for all of these reasons the rap videos could not be seen as leading to a real risk of serious harm from the Iranian authorities.

14. It should also not be accepted that the Facebook posts would pose a real risk to the appellant as the majority of them are forwarding other people's posts, particularly those of Ahmed Abdulrahmani, who is a person the appellant only knows through the internet and has never met in person. Some of the cartoons are not obviously critical of the Iranian regime, although it is accepted some of them could be seen this way.

15. Mr Kotas submitted that HB (Kurds) Iran does not provide country guidance on social media risk as this is clearly said to be outside the scope of the decision. Further there are big differences between the profile of this appellant and that in HB as the posts HB made were very political and are affiliated with political parties and derogatory of the Ayatollahs, and there were additional risk factors such as that appellant having spent time in the KRI and having political parents. These issues

do not apply to this appellant as he accepts in evidence to the Upper Tribunal that his parents are not political and has never contended he lived in the KRI. Mr Kotas accepts that opportunism cannot defeat this appellant's claim (although he contended that the posts were a cynical attempt to create an asylum claim) and also accepted that there is no need for the appellant to be a high level Kurdish political activist to succeed, but submits that in accordance with AB and Others (internet activity – state of evidence) Iran that simply having some internet activity is also not enough. This appellant had not shown sufficient political profile for this Facebook activity to put him at risk, and instead he would just be seen by the Iranian authorities as a nuisance and a ne'er-do-well.

Conclusions – Remaking

16. I am guided by HB (Kurds) Iran with respect to the issue of risk on return for ethnic Kurds being forcibly returned to Iran. The conclusions in that case are that the evidence does not support a contention that the discrimination that Kurds face in Iran is, in general, at such a level as to amount to persecution, and neither does the fact of being a Kurd who left illegally create a real risk of serious harm on return either. However, it is found that those of Kurdish ethnicity are reasonably likely to be subjected to heightened scrutiny on return to Iran. Further risk factors which may lead to a real risk of persecution or Article 3 ECHR ill-treatment are summarised as: a period of residence in the KRI; being a Kurd involved with political activity or groups which would include low-level activities such as leafleting supporting Kurdish rights; and Kurds involved with welfare or charitable activities on behalf of the Kurdish community. The Iranian authorities are described as "hair-trigger", meaning that: "the threshold for suspicion is low and the reaction of the authorities is reasonably likely to be extreme".

17. As set out at paragraphs 81 and 82 of HB (Kurds) Iran this case does not provide guidance on the potential risk for those whose internet activity/social media use may attract the adverse attention of the authorities. When determining the appeal of HB himself, for whom this was put forward as an issue, the Upper Tribunal relied upon the findings in the decisions in SSH & HR (illegal exit: failed asylum seeker) Iran CG and AB and Others (internet activity – state of evidence) Iran, that a returnee without a passport will be questioned and that it was routine to look at the internet profile and any Facebook of a returnee.

18. I have preserved the findings that the appellant is a Kurd, and it is accepted by all that he would face return as a person who left Iran illegally so would need to apply for an emergency travel document from the Iranian authorities were he to be going back.

19. I am satisfied that to the lower civil standard of proof that the appellant was convicted of playing loud music on a national day of mourning in Iran in 2012; that he features in two raps posted on YouTube in 2016;

and that he has the claimed Facebook page which is exhibited with translations in the appellants bundle. My reasons for so finding are as follows.

20. I find that the appellant's arrest and conviction for playing music in his car in 2012 took place because he provides a detailed description of the event at his asylum interview in response to questions 65 to 81. There is no attempt to make the incident out to be one in which he was subject to torture or elements which would arguably appear exaggerated. I do not find it relevant that he did not understand the details of the day of mourning which he explains to be an Iranian Shia rather than Kurdish Sunni event, which I find is in turn consistent with the fact that he was convicted of flouting the rules related to this event. I find this to be a matter which would not of itself be likely to cause any further problems for the appellant, but that cumulatively it is of relevance to how the Iranian authorities might view the appellant at the point when he applies for an emergency travel document.

21. I also accept that the appellant features on the two raps, which were made in Iran but posted on the internet in 2016 under another person's name, as his name and photograph appear on them. I find that they are political with reference to an executed Kurdish activist, the Kurds and to the establishment of a greater Kurdistan, and protests about injustice in Iran today. I find that the appellant does not have a good recall of the lyrics however, and that he has not shown that they will be brought up by an internet search under his name, as that would have been very easy to demonstrate by printing out a relevant search engine page. Whilst they have been viewed by quite a large number of people this does not mean that they would be found by the authorities conducting routine internet profile searches when he applies for an emergency travel document. As such I find the appellant has not shown even to the required lower civil standard of proof that he would have to answer questions about them.

22. Mr Kotas did not seek to argue that the appellant was not the author of his Facebook account or that he had not posted or forwarded the posts that are contended to be on that account and included in the appellant's bundle. I find that it is perfectly plausible that on 4th January 2017 at his asylum interview the appellant did not know much at all about the internet but a year later having lived in the UK he was able to discover how to set up and use a Facebook account. I find that the appellant does own this account, and has posted or reposed the items included in the bundle.

23. I do not find that there is any evidence that the appellant does not genuinely agree with the views set out in the articles he reposts or agree with the demands of the demonstrations he attended in London. I have accepted that he made the pro-Kurdish critical of regime raps whilst in Iran (although these were only posted on the internet once he had left Iran), and I find the posts are all consistent with that political

position. Further at his asylum interview in 2017 he said that he did not believe in the Iranian regime and regarded it as a dictatorship and filth, and gave examples of discrimination against Kurds. It follows that when questioned by the Iranian authorities this appellant cannot be expected to lie about his genuine political beliefs which include supporting rights for Kurds and against being against the current Iranian regime, applying RT (Zimbabwe) v SSHD [2012] UKSC 38.

24. I find that the posts include pictures of the appellant at demonstrations in the UK outside the Iranian Embassy against the Iranian government's detention and execution of political prisoners. He has also shared posts about the execution and ill-treatment of Kurds and raise the issue of cross-border Kurdish porters; about protests against the Iranian bombing of the Kurdish region and the occupation by the Iranian government of "eastern Kurdistan"; posts in support of the Democratic Party of Iranian Kurdistan (PDKI) and of the appellant attending the anniversary of this party being established in London; and posts and cartoons which called the Iranian army and government terrorists and dictators, with one such post stating the Iranian government is corrupt, a thief, the worst government on earth and a dictatorship.

25. As set out in all of the reported cases relied upon by both parties I am satisfied that the appellant will be at real risk of being questioned about his Facebook account if he were to apply for an emergency travel document and on arrival in Iran, and also that he would be required to provide his Facebook password to those authorities. I find that the material that such a search would reveal in this appellant's case would be very likely to lead the Iranian authorities to conclude that the appellant is a low-level supporter of organised Kurdish political activity and that he opposes and has no respect for the current regime in Iran. Following the guidance in HB (Kurds) Iran the fact that the reposts and pictures are indicative of peaceful dissent, opposing human rights violations and attending peaceful demonstrations, and the fact that the appellant's level of involvement is low does not mean that the appellant will not face a real risk of persecution on return. As stated in the guidance the Iranian authorities are "hair-trigger", so their threshold for suspicion is low and the reaction of the authorities is likely to be extreme. I also find that the fact the appellant already has a conviction for behaviour disrespectful to the Iranian regime, albeit a minor one, will be likely to be seen as confirmatory evidence that he is an opponent and increase the likely he would face a real risk of serious harm.

26. It follows that I conclude that the appellant has shown to the lower civil standard of proof that he is entitled to refugee status as I find he has a well founded fear of persecution if returned to Iran based on his actual and perceived political opinions, and it follows that his appeal should also be allowed on Article 3 ECHR grounds for the same reasons.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set aside the decision dismissing the appeal on asylum and human rights grounds, but preserve some of the findings as set out above.

3. I remake the appeal by allowing it on asylum and human rights grounds.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication 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. I do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of his protection claim.

Signed: *Fiona Lindsley* Date: 22nd January 2019

Upper Tribunal Judge Lindsley

Annex A: Error of law decision

DECISION AND REASONS

Introduction

- The appellant is a citizen of Iran born in October 1991. He arrived in the UK in

- July 2016 and claimed asylum the day after he entered the UK. His asylum claim was refused on 10th January 2017. His appeal against the decision to refuse asylum was dismissed by First-tier Tribunal Judge Devittie on asylum grounds in a determination promulgated on the 15th March 2017.

- Permission to appeal was granted by Upper Tribunal Judge Canavan on 23rd August 2017 on the basis that it was arguable that the First-tier judge had erred in law in failing to make a decision based on the report of Dr Joffe with respect to whether the appellant's Kurdish ethnicity enhanced his risk of serious harm if returned to Iran as a failed asylum seeker. Permission was also granted on the basis that it was arguable that the credibility findings of the First-tier Tribunal were not reliable.

- The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions – Error of Law

4. In his grounds of appeal the appellant contends that inter alia he would be at risk on return to Iran because of his illegal exit, his length of time out of Iran and his Kurdish ethnicity. The First-tier Tribunal was presented with this argument along with evidence from Dr Joffe, a country expert, going to the issue of risks as a Kurd on return and failed to make a decision on this evidence. The country guidance case of SSH and HR (Illegal exit: failed asylum seekers) Iran CG [2016] UKUT 00308 did not deal with whether being Kurdish exacerbated risk on return. It is submitted that this is credible fresh evidence not considered in the country guidance case and the First-tier Tribunal needed to engage with this, and erred by failing to do so. In his further submissions Mr Palmer argued that at paragraphs 14 and 15 of the decision there is insufficient reasoning to deal with Dr Joffe's report, and that reliance could not simply be placed on what was said in SSH and HR as the Upper Tribunal did not have full relevant information on this issue, and indeed was now preparing to hear a new country guidance case which will consider the risks on return for failed Kurdish asylum seekers.

5. The second ground of appeal is that the reasoning is inadequate relating to credibility, and that the First-tier Tribunal failed to look at all the documentation before coming to a conclusion on credibility and so did not look at all the evidence in the round. Mr Palmer added in oral

submissions that the decision was flawed in relation to the credibility findings in the following ways. He argued it was not open to the First-tier Tribunal to find that the history of military service desertion was not credible due to the dilatory fashion in which the Iranian authorities pursued the appellant at paragraph 10 of the decision. Further, it was not correct to find that the appellant had not been arrested for illegally playing music on a day reserved for national occasions due to an inconsistency about whether he was arrested by the military on the basis that the appellant could have corrected this at interview as the asylum interview record would have been read back to the him. This was not a factually correct position as "read-backs" had not been the Home Office practice for many years. The finding that the appellant was not credible was therefore based on an error of fact for which the appellant was not responsible. He also argued that the finding that the appellant's YouTube activities would not have come to the attention of the authorities at paragraph 11 was entirely unreasoned and irrational.

6. In a Rule 24 notice the respondent argues that the treatment of the report of Dr Joffe does not mean that the First-tier Tribunal judge erred in law in following the relevant country guidance case as this evidence was not strong enough to justify departing from that guidance. Mr Kotas added that country guidance decisions were to be seen as authoritative and in some instances binding, see Adam (Rule 45: authoritative decisions) [2017] UKUT 370. The First-tier Tribunal had followed what was said in SSH and HR, and that sufficed in all the circumstances of this case. Mr Kotas also submitted that all credibility findings relating to the appellant were open to the First-tier Tribunal and that they could only be overturned if they were irrational which, in his view, they evidently they were not.

Conclusions – Error of Law

7. It is accepted by the respondent and First-tier Tribunal that the appellant is of Kurdish ethnic origin, and further that he did service in the military in Iran, see paragraphs 3(ii) and 8 of the decision.

8. I find that the First-tier Tribunal has erred in failing to sufficiently consider the additional evidence from Professor Joffe regarding risk as a Kurd if the appellant was returned to Iran or to give sufficient reasons for dismissing the appeal and finding no risk in light of that evidence.

9. Material on this issue was presented to the First-tier Tribunal. Firstly, attention was drawn to the evidence of Dr Kakhi that being Kurdish is a societal disadvantage and can combine with other factors and be a factor of exacerbating interest to the authorities, see Appendix 1 to SSH and HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 00308. Secondly, this was taken further by submission of expert evidence from Professor Joffe in the form of a report on Kurds in Iran dated August 2016. This evidence had not been before the Upper Tribunal in SSH and HR . The conclusion of Professor Joffe's report with respect to risk on

return for failed Kurdish asylum seekers is that that there are at "significant risk of persecution". Professor Joffe is an extremely well qualified expert to provide such evidence and confirms his duty to the Court in his report. He provides extensive reasons for his position which relate to the worsening security situation in part of Iran and increasing domestic tensions, and also to the difficulties in obtaining laisser-passer documentation.

10. In the context of this evidence the First-tier Tribunal needed to look at the specific arguments and evidence of Professor Joffe in the context of the findings in SSH and HR and provide reasons why that evidence did not change the conclusion reached at paragraph 34 of SSH and HR that being Kurdish did not show a real risk of ill-treatment on return for a failed asylum seeker. This is all the more the case because at paragraphs 17 to 23 the skeleton argument for the appellant before the First-tier Tribunal sets this argument out, identifying the key parts of the Professor Joffe evidence and why this made the conclusion of that the appellant was not at risk as a failed Kurdish asylum seeker untenable. It is notable that the Upper Tribunal has appreciated that there is more evidence to be considered on the issue than was before them in SSH and HR as there is a forthcoming further country guidance case which will specifically address this issue, although this is not of course the reason why I find that this First-tier Tribunal erred in law. The error of law was the failure to look in some detail at the evidence of Professor Joffe and to explain why it took the issue no further than the conclusion reached in SSH and HR if that was their view.

11. With respect to the other contentions of errors of law in relation to the credibility findings I am satisfied that the First-tier Tribunal did not err in law in finding that the appellant had not deserted from the Iranian military and was not at real risk of any adverse attention from the authorities' due to his military service. He had not provided any country of origin evidence that suggested that these matters were pursued in a dilatory fashion, and it was open to the First-tier Tribunal to find that the history of long periods of lack of concern and failure to take action by the authorities showed that this was not credible.

12. However, I do find that it was erroneous to find that his history of arrest for playing music was not credible due to an inconsistency which the First-tier Tribunal found would have been identified on a read back at interview, see paragraph 10(vi) of the decision, when such read-backs do not (any longer) take place and thus basing the conclusion on an error of fact for which the appellant was not responsible. I also find that the conclusion that the YouTube videos would not have come to the attention of the authorities errs in law for want of reasoning. It would appear it is accepted at paragraph 11 that the appellant made the politically motivated YouTube video. The conclusion of the First-tier Tribunal on this issue is not consistent with the findings in AB and Others (internet activity – state of evidence) Iran [2015] UKUT 0257, and whilst this is not country guidance and thus is not authoritative or an

error of law not to follow the decision, it is indicative that the lack of reasoning can be seen as a material error of law

13. In these circumstances the appeal must be remade with the following parameters and in the following respects:

- The finding that the appellant has not credibly shown himself to be a military service deserter and has not shown to the lower standard of proof that he is at real risk of serious harm as a result of military service is preserved.
- The findings that the appellant has done military service and is of Kurdish ethnic origin are preserved.
- The question of the credibility of the events and whether a real risk of serious harm arising out of playing music on a national day of mourning in approximately 2012 and being convicted of an offence for this needs to be remade.
- The question of the credibility of the appellant having made a political YouTube video and whether a real risk of serious harm arises out of this, if it is found to have taken place, needs to be remade.
- The question of whether the appellant is at real risk of serious harm if returned to Iran as a failed Kurdish asylum seeker needs to be remade.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set aside the decision dismissing the appeal on asylum and human rights grounds, but preserve some of the findings as set out above.

3. I adjourn the remaking of the appeal.

Directions:

1. There will be a CMR hearing to set a date for the remaking hearing and for any other necessary directions at the first available date after 21st March 2018.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication 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. I do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of his protection claim.

Signed: *Fiona Lindsley* Date: 18th October 2017

Upper Tribunal Judge Lindsley