Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/01423/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 August 2019	**On 24 September 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SUTHERLAND WILLIAMS

Between

AA
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms K Pal, Home Office Presenting Officer
For the Respondent: Ms M Kelleher on behalf of Barnes, Harrild and Dyer Solicitors

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Tsamados ('the judge'), promulgated on 31 August 2018, dismissing the appellant's appeal against the respondent's decision to refuse his asylum, humanitarian protection and private life/human rights applications.

2. The appellant is a citizen of the Islamic Republic of Iran. He appealed against the decision of the respondent to refuse him asylum based upon his claimed well-founded fear of persecution as a result of political opinion and race; and in terms of there being substantial grounds for believing he would face a real risk of suffering serious harm on return from the UK under paragraph 339C of the

Immigration Rules; and under Articles 2, 3 and 8 of the European Convention on Human Rights and paragraph 276ADE of the Immigration Rules.

3. The matter has something of a protracted history. The judge made the following findings (which I do not understand to be in dispute):

> 'He is a citizen of Iran and arrived in the United Kingdom ('UK') on 12 October 2009 and claimed asylum. He was 16 years old at that time and was granted discretionary leave to remain. On expiry he renewed his claim for asylum, which was refused, and his appeal was dismissed by First-tier Tribunal ('FTT')) Immigration Judge ('IJ') Plumtree on 9 September 2010. Thereafter he made several fresh applications for asylum, the latest of which was on 23 September 2013. His solicitors made additional representations on 23 December 2013 and on 23 September 2014. The Secretary of State for the Home Department ('SSHD') again dismissed his application initially without a right of appeal. However, following a successful challenge by way of judicial review, the SSHD agreed to reconsider the decision. It is the further refusal of the appellant's application on 17 January 2018 which is the subject of this appeal.'

4. The judge heard the appeal on 21 August 2018, dismissing each element of the appellant's claim.

5. An anonymity direction was granted by Judge Simpson on 14 February 2018 and confirmed by the judge on 24 August 2018. I extend that direction for the purposes of these Upper Tribunal proceedings.

6. In granting permission to appeal, Upper Tribunal Judge Bruce identified two central points:

> 1. The grounds argue that the First-tier Tribunal failed to follow the applicable country guidance and risk assessment framework when it considered whether the appellant would face a real risk of serious harm upon return to Iran having regard, cumulatively, to the fact that he is a Kurd, a failed asylum seeker and that he has been convicted in the UK of crimes including being drunk and disorderly.
> 2. The relevant paragraphs of the decision are at 63 – 69. I grant permission because it is arguable that the tribunal here failed to consider the findings in *SSH & HR* to the effect that returnees will specifically be asked about whether they have criminal convictions abroad. It was not the appellant's case that the *UK authorities* would have told the Iranians about his convictions; it was his case that *he* would be asked about them and applying the ratio of *HJ (Iran)* he cannot be expected to lie in order to avoid serious harm.

7. It is against this background that the appeal is listed before me.

8. There is one matter I should address at the outset. The premise of the grant of permission to appeal suggests that *SSH and HR (illegal exit: failed asylum seeker)*

Iran CG [2016] UKUT 00308 (IAC) (*'SSH & HR')* found 'to the effect that returnees will specifically be asked about whether they have criminal convictions abroad'.

9. I am not persuaded about that. *SSH & HR* does establish that a person returning to Iran on a *laissez passer* (temporary travel document, which I understand to be the case here) will be questioned. The Upper Tribunal so finds at paragraph 9 of its judgement.

10. The tribunal further states:

> 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 in the United Kingdom or whichever 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 there would be no reason for ill-treatment, and questioning would be for a fairly brief period. That seems to us to sum up the position well, and as a consequence we conclude that a person with no history other than that of being a failed asylum seeker who had exited illegally and who could be expected to tell the truth when questioned would not face a real risk of ill-treatment during the period of questioning at the airport.

11. The Upper Tribunal concluded that the questioning of a returnee and their treatment will depend on the individual case. Its finding does not extend to the returnee being asked specifically about criminal convictions while they were abroad, and the appellant's representative has not sought to suggest that *SSH & HR* did make such a finding (although she does advance that the risk of being asked about activities abroad, and therefore previous offending, remains).

12. With the above caveat, I now turn to the substance of the appeal which centres upon whether the appellant's criminal convictions could lead to the type of protracted questioning and ill-treatment that the appellant's representative suggests and whether the judge, cumulatively, has taken into account the various factors in this matter, including that the appellant is a Kurd, a failed asylum seeker and has been convicted in the UK of crimes, including being drunk and disorderly.

13. The representative advances that the judge erred in the following ways:

    a. by concluding that the appellant would not have to tell the truth when questioned upon return about his illegal exit from Iran or his activities carried out abroad;
    b. by concluding that the Iranian authorities would not become aware of the appellant's criminal record in the UK upon his return to Iran and that this would not exacerbate his risk of persecution;

c. by failing to properly consider the combined risk factors of the appellant's ethnicity, his illegal exit from Iran and his criminal record in the United Kingdom as exacerbating the risk of the appellant suffering persecution, detention and potential ill-treatment upon return to Iran as a failed asylum seeker.

a. The expectation to tell the truth

14. The first limb of this appeal advances on the basis that the appellant would have to tell the truth when questioned upon return about his illegal exit from Iran and any subsequent activities carried out abroad (particularly his conviction involving alcohol).

15. There is more than one element to this.

16. First, the appellant was found not to be credible in his claims to be involved with political activities previously in Iran. In my judgement, it cannot be argued that he would be required to refer to political beliefs that two tribunals have held he did not hold and about activities in which two tribunals have held he was never involved in. There is no requirement for him to 'lie' in this regard unless he chooses to perpetuate the untruthful account he has given in the UK. The appeal cannot therefore succeed on this point.

17. Second, in terms of his illegal exit from Iran, the reasons he gave for leaving were found to be untrue. The judge correctly identifies that Kurdish returnees do not generally face prosecution. That not only accords with the country guidance, but also *SB (risk on return-illegal exit) Iran CG* [2009] UKAIT 00053 and paragraph 34 of *SSH & HR*. While counsel is correct that subsequent to the judge's determination a further country guidance case has been issued, namely *HB (Kurds) Iran CG* [2018] UKUT 00430 (IAC), the judge was required to consider the law as it was on the day. He cannot be criticised for not taking into account a case that had not been decided (per *SA (Sri Lanka) v Secretary of State for the Home Department* [2014] EWCA Civ 683). As a result, no error of law arises. (I observe, but no more, one of the findings in *HB* included that the mere fact of being a returnee of Kurdish ethnicity with or without a valid passport, and even if combined with illegal exit, did not create a risk of persecution or Article 3 ill-treatment.)

18. Third, there is the issue of what he would say about his previous convictions, in particular the offence of being drunk and disorderly. In this regard, his convictions were accepted by both parties as being 'spent'. The judge found that the first was dated 27 February 2014 and is a conviction for being drunk and disorderly, to which the appellant pleaded guilty and was given a six-month conditional discharge. The second is dated 26 February 2014 and was a conviction for failing to surrender to custody at an appointed time, for which the appellant pleaded guilty and was given a six-month conditional discharge.

19. This third element in terms of the expectation to tell the truth ties in directly with the second ground of appeal, namely whether the Iranian authorities would become aware of the appellant's criminal record.

b. *The Iranian authorities would become aware of the appellant's criminal record in the UK*

20. The judge summarises the argument before him as follows:

> 65. The appellant's counsel submitted that the nature of this offence is such that it would be taken very seriously in Iran because it involved the drinking of alcohol. He submitted that whilst these offences are spent convictions, a point made by the respondent's representative (in that they do not have to be disclosed to prospective employers in the UK), they will still remain on the appellant's criminal record and this record is something that the Iranian authorities could obtain or find out about. My view is that given that these records are strictly confidential except those with specific authority by which to obtain them and subject to data protection laws, I did not accept that it is likely that they would fall into the hands of the Iranian authorities.

21. The latter point is accepted for the purposes of these proceedings. In her written submissions, counsel for the appellant states that it was not the appellant's case that the British authorities would disclose his criminal record if returned to Iran, rather that if returned he will be questioned and that questioning would lead to him revealing his activities in the United Kingdom, including his criminal record (and that because one of the offences concerns alcohol, this would place the appellant at greater risk).

22. On this point, the judge concluded that it seemed unlikely that the need to voluntarily mention his convictions would arise. The judge states that he does not agree with the proposition that the appellant would be bound to tell the truth and thus 'reveal all about his past' to the Iranian authorities.

23. The force of this point rests on whether the judge was right in that conclusion.

24. The appellant's representative relies upon the case of *HJ (Iran) v the Secretary of State for the Home Department* [2010] UKSC 231 and *RT (Zimbabwe) v Secretary of State for the Home Department* [2012] UKSC 38 as authority for the proposition that returnees cannot be forced to lie or act against their conscience.

25. The above cases, and the case law that has developed from them, is directed towards characteristics or statuses that either the individual cannot change or cannot be expected to change because they are so closely linked to his or her identity or are an expression of fundamental rights.

26. The difficulty with the appellant's argument, as I see it, is that the above cases focus on what may be classed as something altogether more deep-rooted than what I am being asked to consider.

27. To be expected to lie about or conceal your sexuality or political and religious beliefs or membership of a particular social group in order to avoid persecution is established to be a breach of Convention rights, such as the right to freedom of thought, opinion and expression. For my part, however, I do not see that as being on all fours with the issue of whether an individual is required to disclose two spent convictions, in circumstances where it is accepted that the only way the authorities will find out about said convictions are from the appellant himself.

28. This gives rise to issues of fact. In the instant matter the judge determined that the appellant would not be bound to make such a disclosure or alternatively reveal the whole truth about his past.

29. I take the view that the judge has properly digested and dealt with the argument. The judge acknowledges the appellant has a memory problem. In terms of the appellant's initial recollection, the judge noted that the appellant did not even think he had such a record, he thought he had been arrested on two occasions but 'did not have any actual problems with the police'.

30. It therefore appears to me that the analogy with *HJ (Iran)* is misplaced and that the judge was entitled to come to the view he did on the previous convictions. I can find no requirement for the appellant to disclose two spent convictions, even if he is asked about them. I do not see this as impacting on the appellant being seen to be co-operating and providing information in other regards.

31. As a result, I cannot criticise the judge for his approach to the *Country Policy and Information Note ('CPIN') Iran: Fear of punishment for crimes committed in other countries ('Double Jeopardy' or re-prosecution) (January 2018).* His view was that the information in that notice was unlikely to arise because he concluded the Iranians would not obtain details of the appellant's offending. That was a matter for the judge, and I do not propose to interfere with that finding.

32. Those representing the appellant also make reference to paragraph 21 of *SSH & H* which states:

> 21. It is relevant at this point also to refer to the letter of 25 February 2016 from Mr Griffiths, the Assistant Director of Immigration Enforcement concerning the numbers of failed asylum seekers who have been returned to Iran. …. Mr Griffiths asked various questions of the FCO Chargé d'Affaires in Tehran, and was told, following the matter having been raised with the Director of the Ministry of Foreign Affairs Social Department, that Iranian nationals entering Iran on a *laissez passer* usually face minimal formalities at the airport. They were required to fill in a form which took around ten minutes and were then free to go. He said they would not be questioned unless they had been involved in or suspected of having been involved in a crime when overseas. He did not respond specifically to such questions as whether there is a special court at Tehran Airport to deal with undocumented returnees and whether there are lengthy

investigations into returnees which would involve them being bailed or imprisoned while investigation takes place. It may be that the latter can be seen to have been dealt with implicitly in the response.

33. The judge does not see this as being an issue as he does not accept that the appellant would be required to disclose his criminal convictions. Further, the tribunal in *SSH &HR* does not develop Mr Griffiths observations. It finds that returnees are likely to be questioned. It does not make specific findings as to what type of questions they may be asked, other than it will be dependent on the case. In my view, it is unclear what the reference to being 'involved in a crime when overseas' relates. If it is a reference to criminal activity while overseas that is perceived to be against the Iranian regime, such as propaganda against the State or against its national security, then that would be different to it being a reference to simply any crime committed when overseas. Later in *SSH&H* (para 29) the tribunal notes remarks made by Iran's Prosecutor General in 2011 that Iranians who have committed a crime outside the country while abroad *and act against their national security* could be prosecuted. That is not the situation here and I decline to speculate further.

34. Nor am I persuaded that counsel's submissions on the pinch-point in terms of entry into Iran adds anything in relation to a material error of law or approach. While counsel is correct to suggest that in *AB& Others (internet activity – state of evidence) Iran* [2015] UKUT 00257 (IAC), there is reference to the act of returning someone creating a pinch-point, so that returnees are brought into direct contact with the authorities in Iran who have both the time and inclination to interrogate them; that was in the context of people who engaged in internet (and political) activity. That is not the case in this matter. There is no finding that the appellant was involved in Kurdish political activities or supported Kurdish rights and there is no proper reason to assume he would be perceived to be.

35. As a result, I can find no material error of law on this second ground.

c. failing to properly consider the combined risk factors

36. The final part of this appeal rests on whether the judge dealt in an appropriate and adequate way with the cumulative aspects of whether the appellant would face a real risk of serious harm ('reasonable likelihood of persecution' *per R v Secretary of State for the Home Department ex parte Sivakumaran* [1988] AC 958).

37. The issue in the instant matter is of risk on return following illegal exit from Iran, being of Kurdish ethnicity, having been convicted in the UK and now being a failed asylum seeker. Risk in relation to these matters should be addressed both separately and cumulatively.

38. Having considered the determination in the round, it appears to me that the judge has gone to some lengths to deal with the arguments that arose, giving a reasoned explanation for why each failed and why a real risk of serious harm did not arise. The judge considers country guidance in relation to Iran: *Kurds and*

Kurdish political groups –July 2016, and *CG Iran: illegal exit version 4.0 July 2016,* together with the other guidance and information referred to in his decision. I reject the assertion that the judge has failed to follow the case of *SSH & HR (*which reinforces that Kurdish ethnicity might be an exacerbating factor for a returnee otherwise of interest). The judge makes extensive references to that case, takes proper account of the appellant's status as a Kurd and failed asylum seeker, acknowledges the appellant will be questioned on return and considers appropriately the case law in relation to risk on return.

39. As part of this exercise, the judge was entitled to consider the previous asylum claim; that no political activities had been identified; that the appellant had a low profile in Iran; that his Kurdish ethnicity had been considered previously; that more recent guidance suggested that illegal departure alone would not be enough to place him at risk; that in general, returnees were not prosecuted for illegal exit; and that there were voluntary return schemes available that would not place an individual at risk.

40. The judge has appropriately noted that the previous tribunal found the appellant to have fabricated his claim to be associated with the Party for a Free Life in Kurdistan ('PJAK') and had embellished at least one incident in relation to a stop, which the judge found, on the evidence, meant it was unlikely he had been stopped by soldiers with regard to smuggling alcohol and cigarettes, (going further than the original judge had in 2010).

41. The judge disbelieved the appellant's claim that the authorities went to his parents' home. He concluded that the appellant came from a poor farming family, which had no political involvement. It is plain that the judge viewed elements of the appellant's evidence with scepticism, as had the previous tribunal.

42. The judge acknowledges that Kurds in Iran face discrimination by reference to the county guidance available to him and that ethnicity was a risk factor, particularly for those involved in Kurdish political activities (which he found this appellant was not).

43. The judge adequately deals with the expert evidence. The judge does not refuse this claim on the basis of the reports being generic, or for that matter on the reports alone. There is far more to this claim than that. He considers those reports as one element of the evidence before him, simply noting that they are generic, as opposed to being appellant specific. He prefers the reasons given by the respondent in this respect. That was a matter for the judge and I cannot say that he erred in so doing.

44. It is apparent from, amongst others, paragraphs 89 and 90 of the decision, that the judge had all relevant factors in mind and was assessing them both individually and collectively.

45. As a result, I reject any suggestion that the judge did not approach this exercise cumulatively or with regard to the relevant law or country guidance. The evidence was highly fact specific and it appears to me the judge has considered the various aspects of this claim with anxious scrutiny, including the passage of time, finding, as the judge was entitled to do, that the risk factors were not made out.

Notice of Decision

The appeal is dismissed.

The decision of the First-tier Tribunal sitting in Taylor House, London on 21 August 2018 under reference PA/01423/2018 is upheld.

The anonymity direction made by the First-tier Tribunal is preserved in this appeal.

Signed 

Date 2 September 2019

Deputy Upper Tribunal Judge Sutherland Williams