Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08432/2019

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 20 March 2020	**On 28 April 2020**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

T.A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr F Aziz, Solicitor, Lei Dat & Baig Solicitors
For the Respondent: Mr A McVeety, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of Judge of the First-tier Tribunal Malik ('the Judge') sent to the parties on 16 October 2019 by which the appellant's appeal against the decision of the respondent to grant him international protection was dismissed.

2. Upper Tribunal Judge Sheridan granted permission to appeal on all grounds.

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Anonymity

3. The Judge issued an anonymity direction and neither party before me requested that it be set aside. I confirm the direction in order to avoid any likelihood of serious harm arising to the appellant from the contents of his protection claim becoming known to the wider public. The direction is confirmed at the conclusion of this decision.

Background

4. The appellant is a national of Iran and an ethnic Kurd. He is presently aged 32. He is a civil engineering graduate and worked at his cousin's mine before travelling to this country.

5. In January 2019 he was present with his cousin when they saw an injured man who they feared would die from his wounds if they did not aid him. The injured man claimed to be a member of the Kurdish Democratic Party ('KDP') and Peshmerga. They took the man to the cousin's mine, rather than to the village, as they feared that a report would be made to the Iranian authorities. The appellant went to find help, whilst his cousin remained with the injured man. During a subsequent phone call between the relatives, the appellant heard a 'yelp' and then his cousin told him to run. The appellant hid in a relative's orchard. In the meantime, the Iranian authorities attended his family home and questioned his sister as to his whereabouts.

6. The appellant left Iran by car on 5 January 2019 and travelled to Turkey. He flew from Istanbul to London, arriving on 20 January 2019, and claimed asylum on arrival.

7. Whilst in this country, the appellant asserts that he has become an outspoken critic of the Iranian government, placing anti-government posts on his Facebook page, which he states is open to the public. He has also attended an KDP event in this country.

Hearing before the FtT

8. The appeal came before the Judge sitting in Manchester on 7 October 2019. The Judge noted the respondent's acceptance that the appellant is a citizen of Iran and of Kurdish ethnicity. The Judge found the appellant to be incredible as to his personal history:

> 21. The respondent accepts the appellant comes from Iran and is of Kurdish ethnicity. The respondent does not accept his account of being wanted by the authorities for assisting a KDP member or that he is at risk for having exited Iran illegally. Having considered the evidence, to the lower standard, in the round, I too do not find the appellant's account reasonably likely to be true for the following reasons:

I. The appellant did not actively or publicly participate in supporting the KDP or their activities in Iran – nor was he involved in any other Kurdish parties as he says it is an offence/illegal. This causes me to find it is not reasonably likely, when confronted with an injured Peshmerga, the appellant would place his life at risk by providing assistance. Whilst I accept the appellant, given he is of Kurdish origin, may feel sympathetic to the Kurdish cause, I do not find it reasonably likely he and his cousin would have taken the risk of picking up an injured Peshmerga on the road and take them to the mine owned by his cousin and where the appellant worked, knowing the implications to them both if caught – and in the circumstances where the appellant could have had no expectation whatsoever that he could flee to the UK for protection.

II. The appellant says the person they helped was a member of the KDP at AIR Q31, but then at AIR Q32 that he did not know he was a member. The appellant at AIR Q72 says the man took his coat off, he was bleeding and told them he was a Peshmerga for the KDP; the appellant says this man was wearing Kurdish clothing and had the KDP logo on his clothes. I do not find it reasonably likely that an injured Peshmerga and member of the KDP would, if dressed in clothes that would immediately identify him as a KDP Peshmerga, including a KDP logo, stand by the side of the road and flag down a random car, as this individual would not know who the occupants of the car were, if they were of Kurdish origin or supporters of the KDP, but the Iranian authorities themselves – and even though the appellant and his cousin are of Kurdish ethnicity, this individual could not have known they would not notify the authorities. This also causes me to find the appellant's account is not reasonably likely to be true.

III. I also do not find it reasonably likely that the appellant and his cousin would have considered it safe to take this individual back to the mine, if as the appellant says, it was a remote area and the only two things there were the village and the mine, as these would be the only two places then that the authorities would go looking for the injured Peshmerga. Further the appellant knew there was CCTV at the mine, together with the security guard; this CCTV footage would implicate him and his cousin assisting an injured Peshmerga. Whilst the appellant speaks of undertaking a humanitarian act, I do not find it reasonably likely he would have placed himself at risk from the authorities in the manner as described. Further the appellant says he left the injured Peshmerga at the mine with his cousin and went to get help, which effectively amounted to him ringing a friend and then making his way there. Yet there is no reasonable explanation as to why such phone call could not have been made from the mine and this I find is an attempt by him to explain away why, when he claims the injured Peshmerga and his cousin were found at the mine, that he was not there.

IV. I also do not find it reasonably likely that the appellant or his cousin would not at the very least asked the injured Peshmerga how he had come to be injured. Whilst the appellant says the man was in a bad way, this man did have the ability to tell them he was a Kurdish Peshmerga and had until the point the appellant claims they picked him up, been able to stand by the side of the road. Given the enormity and the inevitable risk the appellant and his cousin were placing themselves in by assisting this individual and given the appellant would have been aware of the consequences, I do not find his account credible that he would not at the very least ascertain what had happened as this would then inform both him and his cousin what action they should take next.

V. I also do not find it reasonably likely that the timescale the appellant has provided of when he says they picked up the injured Peshmerga by the side of the road, the claimed raid on his home and his claim to have then left Iran credible – even if as the appellant now claims it was midnight/1:00 am when he left Iran and not 10 p.m. – as whilst accepting the Iranian authorities would have taken swift action, I do not find it reasonably likely his father's cousin would have been able to source an agent within hours and I find the appellant's departure from Iran has all the hallmarks of a pre-planned trip and not one made in haste to escape the authorities.

22. Consequently, for all the reasons given above I find the appellant's account of the reasons he claims to have fled Iran are not reasonably likely to be true, even to the lower standard.'

9. As to the appellant's *sur place* activities with the KDP, the Judge observed that the appellant had possessed no political profile whilst he resided in Iran and determined that the appellant's activities in this country did not give rise to a well-founded fear of persecution on return to Iran:

'24. The appellant relies on an email of 18 September 2019 and a 'to whom it may concern' letter dated 10 September 2019 to his representatives from the KDP Organisation Department. The email says the letter is sent from the party's main organisation department in Kurdistan (Iraq). The letter itself says the appellant is a supporter of the party, cannot return home and if deported would be arrested and run the risk of being persecuted. Yet there is nothing to suggest in the letter that any enquiry has been made by the KDP organisation department to ascertain the appellant's account of what he claims occurred in Iran. The letter does not indicate one way or another that his account is accepted as credible, merely that he is a supporter of the party – this being after one attendance at one anniversary event in August 2017, as there is nothing to suggest from the letter that the author was aware of the appellant's Facebook posts given he did not start posting until after the anniversary event. The appellant was not formally interviewed and this leads me to find the weight I can attach to this evidence is low and it does not of itself, even to the lower standard,

suggest the appellant would be at risk on return to Iran for any of his claimed reasons.

25. There is no evidence before me, other than the appellant's say so, as to who the individuals are in the photographs he has posted on Facebook or any evidence to suggest his account is open to the public. Given the limited number of posts it cannot be said the appellant is prolific on Facebook; the posts were made after the date of the RFRL and this I find was an attempt to bolster his asylum claim. Nonetheless the onus is on the appellant to establish his claim and I find he has not shown there to be a real risk his posts have or will come to the attention of the Iranian authorities, or are open to the public. The appellant would also be able to delete his posts and/or close his account prior to returning to Iran and I do not consider it unreasonable for him to do so.

26. Further in BA (Demonstrators in Britain – risk on return) Iran CG [2011] UKUT 00036 (IAC) the Tribunal held that (i) Given the large numbers of those who demonstrate here and the publicity which demonstrators receive, for example on Facebook, combined with the inability of the Iranian Government to monitor all returnees who have been involved in demonstrations here, regard must be had to the level of involvement of the individual here as well as any political activity which the individual might have been involved in Iran before seeking asylum in Britain. Given his lack of involvement in Iran and minimal involvement here, I find the likelihood of him coming to the attention of the authorities in Iran is low and that he will not be of interest or a priority for them.'

Grounds of appeal

10. The unsigned and undated grounds filed on behalf of the appellant run to five pages. They are drafted in an unhelpful manner but have been summarised by Upper Tribunal Judge Sheridan who granted permission to appeal by a decision dated 11 January 2020:

'2. The appellant is a Kurdish citizen of Iran who, amongst other things, claims that his risk from the authorities stems from an incident in which he and his cousin assisted a KDP fighter that they came across whilst driving home from work who had a gunshot wound. In his witness statement (paragraph 6) the appellant states that he and his cousin decided to help the man because they are KDP sympathisers and because the man would likely have bled out and died from the wound or have been arrested and killed by the authorities. He also stated in his asylum interview (question 111) that the man reminded him of his brother who had died in a car crash and who would probably have survived if someone had helped him half-an-hour sooner. The judge found that it was not reasonably likely that the appellant, who had never been an active or public supporter of the KDP, would have taken the risk of assisting the injured man given the implications of being caught. It is arguable that the judge found it inherently implausible that the appellant would assist the injured man without taking into

consideration that the appellant's claim is that he believed that, absent his help, the man might die; and that, arguably, it is plausible that a person (especially one who had lost a family member in a car accident) would put himself at risk to assist someone he came across on the roadside who might die in the absence of such assistance.

3. It is also arguable that the finding at paragraph 28 that there was nothing to suggest that the appellant's Facebook posts would come to the attention of the authorities indicates that the judge may not have had adequate regard to the country guidance findings in HB (Kurds) about the extent of the sensitivity of the authorities to Kurdish political activity and their 'hair trigger' approach.'

11. No Rule 24 response was filed by the respondent.

Decision

12. Before me Mr Aziz confirmed that three grounds of appeal were being relied upon. Two concerned material errors of law, the first being that the Judge failed to lawfully consider the appellant's evidence and the second that the Judge failed to lawfully consider evidence as to the Facebook posts. The third ground is identified as the Judge not having placed any or any sufficient weight on photographic evidence.

13. Mr McVeety informed the Tribunal that the respondent continued to defend the decision of the First-tier Tribunal, but candidly accepted that there were problems as to the Judge's starting point of her credibility assessment. At [21(I)] the Judge determined, 'it is not reasonably likely, when confronted with an injured Peshmerga, the appellant would place his life at risk by providing assistance'. Mr. McVeety acknowledged that no reasoning was provided within this paragraph as to why a fear of risk to life was the only rational conclusion the appellant and his cousin could have reached in the few moments before they made their decision to help. I observe that no reasons are given for rejecting the appellant's evidence that he acted, in part, for altruistic reasons, being mindful that a relative had died after a road accident. Mr. McVeety further accepted that the Judge's conclusion strongly suggested a plausibility assessment, presented as a credibility assessment: *MM (DRC – plausibility) Democratic Republic of Congo* [2005] UKIAT 00019; [2005] Imm. A.R. 198.

14. Whilst it was open to Mr. McVeety to argue that at the very least certain elements of the claim may be difficult for a judge to accept when applying the correct standard and burden of proof, he accepted before me that it could not be said that no judge reasonably directing him or herself could find that the appellant and his cousin would attend upon an injured man lying in the road. In such circumstances, the lack of adequate reasoning at the outset of the credibility assessment infected the whole of the assessment at [21] which was built upon this initial assessment of adverse credibility as to the appellant willingly stopping to help an injured man.

15. Other elements of the appellant's challenge are significantly weaker and could be said to verge towards simple criticism of the Judge for not accepting the appellant's case. However, in the circumstances of this matter I am satisfied that the approach adopted by the Judge at the outset of the credibility assessment contained a material error of law and adversely flowed through considerations of this appeal as a whole.

16. In such circumstances I am satisfied that the decision of the Judge must be set aside.

Remaking the Decision

17. Both representatives confirmed that if this decision were to be set aside the most appropriate course of action would be for it to be remitted to the First-tier Tribunal because at this point in time there has been no fair consideration of the claim for international protection.

18. I agree that this is the appropriate course of action.

Notice of Decision

19. The decision of the First-tier Tribunal involved the making of an error on a point of law and I set aside the Judge's decision promulgated on 16 October 2019 pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

20. This matter is remitted to the First-tier Tribunal for a fresh hearing before any Judge other than the Judge of the First-tier Tribunal Malik.

21. No findings of fact are preserved.

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

22. 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 appellant. This direction applies to, amongst others, the appellant and the respondent. Any failure to comply with this direction could give rise to contempt of court proceedings.

Signed: D O'Callaghan
Upper Tribunal Judge O'Callaghan

Date: 3 April 2020

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days, if the notice of decision is sent electronically).

3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically).

4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days, if the notice of decision is sent electronically).

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email