Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/04467/2016

Heard at Birmingham Employment Tribunal
on 13 September 2017

Decision promulgated
on 23 November 2017

THE IMMIGRATION ACTS

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SZ
(Anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Tetty instructed by Parker Rhodes Hickmotts Solicitors.
For the Respondent: Mrs Aboni - Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. This is an appeal against a decision of First-Tribunal Judge E. M. M. Smith, promulgated on 1 February 2017 following a hearing at Stoke, in which the Judge dismissed the appellant's appeal on protection and human rights grounds.

Background

2. The appellant is an Iranian national born on 1 November 1989. Having considered the evidence the Judge recognised at [16] that much turned upon the credibility of the appellant in terms of his account for the reasons why he fled Iran.
3. The Judge records at [18] that the respondent's assertion that the appellant was not from Iran was not made out and it was found that the appellant had established to the lower level of proof that he is an Iranian citizen.
4. The Judge thereafter identified a number of credibility issues stated to be relevant when considering whether the appellant's account as to why he left Iran can be relied upon [19 (a)-(d)] leading to it being found by the Judge that the appellant is an untruthful witness whose account was incredible. It was not found the appellant had established any links with the KDP, had not established that he smuggled goods or that he was wanted for smuggling, or that there had been any hearing before a Court or the imposition of a sentence in Iran. The Judge was satisfied the appellant is an economic migrant [20].
5. The Judge considered the appellant's sur place activities and the question of whether an unlawful departure from Iran put him in danger. In relation to the sur place issue the Judge records:

> 29. In relation to his Sur Plac activities the appellant produced two photographs (RB p18/19) taken at the same event. The appellant explained where he was on the photographs and is next to the man holding the black umbrella. The appellant states that he then had a full beard and a white open shirt. I asked the appellant who took the photograph and he said members of the demonstration which was in London. The appellant didn't take any photographs of his own and is not seen to be holding any placards. He explained that the photographs have been put on the Internet and are, therefore, freely available. I asked if he had obtained copies of any of those photographs on the Internet that show him. He had not. When asked why he said he hadn't been asked to. I asked him if he had joined the KDP in the UK, and he confirmed he had but he had no registration documents, identity cards or evidence from any person connected to the KDP to confirm that he was a supporter. In that regard, I, have taken note of **TK (Burundi) v SSHD (2009) EWCA Civ 4009** where the CA said that where there were circumstances in which evidence corroborating the appellant's evidence was easily obtainable, the lack of such evidence must affect the assessment of the appellant's credibility. It followed that where a judge in assessing credibility relied on the fact that there was no independent supporting evidence where there should be and there was no credible account for its absence, he committed no error of law when he relied on that fact for rejecting the account of the appellant. I am satisfied the appellant could have obtained evidence from his wife or other members of his family and friends corroborating his account. This was, in my view, easily obtainable. The lack of supporting evidence damages the appellant's account. I have also taken note of the decision in **YB (Eritrea) v SSHD [2008] EWCA Civ 360** the CA sounded a note of caution in relation to the argument that, if an appellant was found to have been opportunistic in his sur place activities, his credibility was in consequence low. Credibility about what, said the Court of Appeal. If he

had already been believed ex hypothesi about his sur place activity, his motives might be disbelieved, but the consequent risk on return from his activity sur place was essentially an objective question.

30. I am satisfied bearing in mind the appellant showed no interest whilst in Iran for joining or promoting KDP that his conduct in the UK has been opportunistic and there is no evidence before me that the appellant was anything other than a bystander in London during the demonstrations or that he is a member of KDP or has attended any other functions in the UK involving KDP. I, therefore, reject his claim that he has any reason to fear of returning upon this basis.

6. The Judge found there was nothing in the appellant's background that prevented his return to Iran and that he was capable of obtaining documentation to do so. It was not found the appellant had discharged the burden upon him in relation to any protection claim. The Judge dismissed the appeal on human rights grounds but noted that was not pursued in argument by the appellant's representative, in any event.

7. Permission to appeal was initially refused by another judge of the First-tier Tribunal but granted on a renewed application to the Upper Tribunal on limited grounds relating to Ground 2 only. The operative part of the grant being in the follows terms:

9. However, in Ground 2 the Appellant argues, in summary, that notwithstanding that the Judge held that the Appellants attendance at an Iranian demonstration in London was only as a 'bystander' and 'opportunistic' (para 30), that the Judge failed to consider as per para 23 of SSH and HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 00308 (IAC) whether there may nonetheless be 'any particular concerns' during the Appellants questioning on return to Iran as a result of that attendance, that may result in further questioning and a consequent risk of detention and potential treatment. The Judge held at para 31 that there will be no risk to the Appellant as a person who had left illegally and will be returning as a failed asylum seeker; but that does not, without more, answer the question raised in the present Appellant's case.

10. I am persuaded, narrowly, that this point requires further consideration, in particular because in BA (Demonstrators in Britain - risk on return) CG [2011] UKUIT 36 (IAC), the Upper Tribunal held at para 65 that the fact that an individual's participation may be opportunistic was not likely to be a major influence on the perception of the regime. The Judge arguably erred in failing to deal with this issue in way put by the Appellant. Whether there was in fact any error of law, and whether any such error was material to the outcome of the appeal, of course be a matter for the Upper Tribunal hearing the appeal.

Preliminary issue – application to seek permission to appeal to the Upper Tribunal on Ground 1

8. Mr Tetty referred the Upper Tribunal to the decision in *SSH* regarding the process on return which established that a failed asylum seeker will be questioned and that if other concerns arise this may create a situation in which the failed asylum seeker faces a real risk of harm.

9. Mr Tetty stated that he intended to renew the application regarding the finding the appellant had opportunistically pursued a claim regarding his being agnostic as he was not religiously observant.
10. It was submitted that the appellant, as a Kurd, will be questioned at the airport and personal details obtained which could "raise eyebrows" which could place him at risk. It was argued that the first ground on which permission to appeal was sought could give rise to the appellant being questioned.
11. In relation to the first ground, permission to appeal was not granted by the Upper Tribunal for the following reasons:

> 5. I am of the view that there is no arguable error established in the first ground. Although, according to paragraph 4 of the original grounds, the judge permitted the Appellant to argue that his removal to Iran would result in serious harm as a result of his agnosticism, this claim can rightly be described as a bolt on element of his claim for protection, and I note that it was not relied upon in the notice of appeal from the Respondent's decision to the First-tier. The quotations of the Appellants evidence in paragraph 3 of the original grounds on this point are with respect incomplete and misleading; the Appellant did not merely say that he was agnostic, but also specifically said at screening question 1.12 that he believed in God, and at question 9 of the SEF that he was sure there is a God; he simply did not practice any specific religion. It is in fact doubtful, in light of the evidence, that the Appellant could be described as agnostic at all.
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> 6. It is right to state that the Judge came to no particular finding as to whether the Appellant believed in God/or whether he was agnostic, or whether any risk of harm arose as a result of either scenario.
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> 7. However, the grounds of appeal failed to identify any country evidence which would establish that a person being agnostic, or believing in God but not following the Islamic faith, would give rise to a real risk of serious harm. The Appellant cannot expect the Tribunal to take judicial notice that there merely being some question as to an individual's adherence or non-adherence to the Islamic faith would of itself, give rise to a risk of harm in Iran. There is no country guidance to that effect; the grounds refer to no country information; and the Appellants bundle consisted principally of materials relevant to the issue of risk arising from illegal exit and the return of failed asylum seekers, rather than evidence relating to religion.

12. It was also submitted by Mr Tetty that the Judge failed to deal with the perception point and that the combination of the evidence and case law more than justified finding in the appellant's favour on this point.
13. The application to amend the grounds was opposed by Mrs Aboni on the basis this element was adequately dealt with by the Judge refusing permission to appeal on Ground 1. It was argued it was not clear whether the issue of risk arising from the appellant's alleged religious beliefs was ever pursued before the First-tier Tribunal. It was accepted it does not appear in the decision under challenge that the First-tier Tribunal say that religious views meant the appellant was not at risk on return and did not specifically refer to this issue, although did find

that nothing had been established that prevented the appellant being returned.

14. Mrs Aboni also referred to the fact the evidence indicated that the appellant had left Iran previously and returned with no evidence of adverse interest being shown in him. It was also submitted that a risk arising from religious beliefs had not been pursued at the hearing.

15. Mr Tetty, in response, stated the motivation claim was not accepted by the Judge but not all the evidence was rejected and the appellant's case was not simply a case that not being a Muslim would get him into trouble, as this issue was considered in *SHH,* but recognition of the situation that the government in Iran did not want people to oppose them. It was not accepted this was a "bolt on" element of the claim but a characteristic that was identified which should have been given more prominence by the Judge.

16. My finding on this issue was that the appellant has failed to establish that it is appropriate in the circumstances to grant permission at this stage to pursue Ground 1, relating to the appellant's alleged agnosticism, as the appellant has failed to establish any realistic prospects of success in relation to this issue. The Judge refusing permission to appeal on this ground has given adequate and sustainable reasons for why no arguable legal error is made out justifying a grant of permission.

Error of law

17. In relation to the matter on which permission to appeal was granted, it was submitted by Mr Tetty that the Judge erred when assessing real risk due to the nature of the demonstration attended by the appellant. It is not disputed the appellant is not a leader of any opposition group but it was submitted that if the appellant attends something which leads to a perception he is advancing the cause of a separatist movement this could give rise to challenge. The appellants presence was at a rally relating to a sensitive issue and the Judge should have assessed differently the risk arising as a result of the appellants presence and the situation. Photographs provided were black and white and not very clear and did not assist, but the type of demonstration was not an issue.

18. On behalf of the Secretary of State, Mrs Boney submitted that there is no material error in the decision. The evidence was considered relating to the appellant's account but rejected as not being credible. The sur place activities had been considered and taken into account, the photographs are not in the public domain, and adequate reasons have been given to support the conclusion the appellant is a bystander. It was submitted there was nothing in the background to the case that would raise suspicion and no arguable error had been made out.

19. Mr Tetty submitted that the fact the judge made a finding the appellant as a bystander is a finding that he was at the demonstration which was a demonstration relating to Kurdish issues.

20. In *SSH and HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 00308 (IAC)* it was held that (i) An Iranian male whom it is sought to return to Iran, who does not possess a passport, will be returnable on a laissez passer, which he can obtain from the Iranian Embassy on proof of identity and nationality; (ii) An Iranian male in respect of whom no adverse interest has previously been manifested by the Iranian State does not face a real risk of persecution/breach of his Article 3 rights on return to Iran on account of having left Iran illegally and/or being a failed asylum seeker. No such risk exists at the time of questioning on return to Iran nor after the facts (i.e. of illegal exit and being a failed asylum seeker) have been established. In particular, there is not a real risk of prosecution leading to imprisonment.
21. A case from the European courts is *MA v Switzerland (Application no. 52589/13)* in which it was held that removal to Iran, where the appellant claimed to face a sentence of seven years imprisonment and flogging for his participation in anti-regime demonstrations breached Article 3 of the ECHR. However, at paragraph 57 the ECtHR also said that "Whilst being aware of the reports of serious human rights violations in Iran as set out above, the Court does not find them to be of such a nature as to show, as they stand, that there would be as such a violation of the Convention if the applicant were to return to that country". The decision to allow the appeal was taken on the specific facts claimed by the Appellant and not on the basis that removal to Iran per se would breach Article 3.
22. In *BA (Demonstrators in Britain – risk on return) Iran CG [2011] UKUT 00036 (IAC)* the Tribunal held that Iranians returning to Iran are screened on arrival. A returnee who meets the profile of an activist may be detained while searches of documentation are made. However, there is not a real risk of persecution for those who have just exited Iran illegally or are merely returning from Britain. The conclusions of the Tribunal in the country guidance case of SB (risk on return -illegal exit) Iran CG [2009] UKAIT 00053 are followed and endorsed.
23. It was held in *SB* that Iranians facing enforced return do not in general face a real risk of persecution or ill-treatment. That remains the case even if they exited Iran illegally. Having exited Iran illegally is not a significant risk factor, although if it is the case that a person would face difficulties with the authorities for other reasons, such a history could be a factor adding to the level of difficulties he or she is likely to face.
24. This tribunal also takes note of the decision of the Outer House, Court of Sessions, citation EZ v Secretary State for the Home Department [2017] CSOH 29. The appellant in that case, an Iranian national, based a claim for asylum uncertain political activities namely online postings to his Facebook page and his membership of and attendance at the meetings of the National Movement of Iranian Resistance (“NAMIR”) a body said to be critical to the Iranian regime and a claim based upon article 8 ECHR.
25. At [31] the Court right:

> 31. The second difficulty for Mr Forrest is that the passage founded on from *AB* does not support his contention. Miss Smith is correct that *AB* is neither a country guidance case nor binding on this court. More to the point, the Tribunal in *AB* was identifying the difficulties in making any recommendations as a generality as to how to approach the assessment of the risk of political activities carried on fire the Internet outside Iran. The import of *BA* was to counsel caution in drawing any conclusions in this area and, as such, is the reverse of a country guidance case. The sentence quoted, in context, is no more than a cautionary statement that a lot of activity is not necessary to create the relevant level of visibility to the authorities in Iran. However, that sentence is not support for a wholly different proposition, but only very little activity of such activity will suffice. While Mr Forrest appeared to accept that these were distinct conclusions and that the first did not lead to the second, he did not follow through the logic of this. He presented no other argument.

26. The conclusion by the Judge that the appellant did not have a profile that will place him at risk on return was only made after the Judge considered the evidence with the required degree of anxious scrutiny. The issue is not whether the appellant's attendance at the demonstration per se creates a real risk as unless notice of that comes the attention of the Iranian authorities they will be unaware of such activities. The issue is whether the appellant is likely to be perceived as being an activist, i.e. a person who campaigns to bring about political or social change: the conduit of adverse interest in Iran being a perceived threat to either Islam or the Iranians state.
27. The conclusion by the Judge is not that the appellant is a person who campaigns in an adverse manner but a person who was no more than a bystander at the event in question. There is logic in Mr Telly's submission that that finding means that the appellant must have been at or within the location of the demonstration but that is not the specific issue and the country guidance does not support a finding that mere presence at a demonstration will create a real risk.
28. The Judge was clearly aware of the facts of this matter and the relevant country guidance cases. The Judge clearly assessed the factual aspects of the case and it has not been made out that the conclusions in relation to the lack of credibility in the claim were not reasonably open to the Judge on the evidence.
29. The appellant had not demonstrated that any interest in the KDP represented a genuinely held political belief or that his activities were in any way representative of the same. There is therefore arguable merit in the argument that an *HJ (Iran*) point does not arise in relation to the expectation that the appellant can deny any 'political' involvement.
30. The appellant fails to establish any arguable legal error material to the decision to dismiss the appeal.
31. On an unrelated matter, the appellant was not present at the hearing as it was believed he had not attended. At 12:20 the appellant came into court claiming that he had arrived at 9:30 AM but had not been called in. The Tribunal clerk had no record of the appellant having arrived at this time. The appellant was advised that Mr Tetty had

represented him and pleaded his case and that he was advised to contact his solicitors.

32. The Upper Tribunal does not consider it necessary to reconvene the Error of Law hearing to allow the issues raised be repeated in the appellants presence as the appellant was represented by an experienced barrister in the field of immigration and asylum law and it is a hearing in relation to which no evidence from the appellant was required or would normally be taken.

Decision

33. **There is no material error of law in the Immigration Judge's decision. The determination shall stand.**

Anonymity.

34. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Judge of the Upper Tribunal Hanson

Dated the 16 November 2017