



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/00110/2019

**THE IMMIGRATION ACTS**

Heard at Birmingham CJC  
On 21 January 2020

Decision & Reasons Promulgated  
On 05 February 2020

Before

UPPER TRIBUNAL JUDGE KEITH  
DEPUTY UPPER TRIBUNAL JUDGE HALL

Between

'R S'  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr A W Khan, Solicitor

For the Respondent: Mrs H Aboni, Senior Home Office Presenting Officer

**DECISION AND REASONS**

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

*Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.*

1. These are a written record of the oral reasons given for our decision at the hearing.
2. This is an appeal by the appellant in respect of a decision of Judge of the First-tier Tribunal Boylan-Kemp (the 'FtT') promulgated on 2 May 2019, in which she refused the appellant's appeal on the basis of an asylum and human rights application, which the appellant had made on 14 July 2018. The respondent had refused the appellant's application in a decision dated 7 December 2018.

### **Background**

3. The background circumstances are that the appellant is a national of Iran and he arrived clandestinely in the UK on 14 July 2018, when he claimed asylum. The gist of his asylum claim is that whilst it was accepted that he is an Iranian national of Kurdish ethnic origin, he also claims to have smuggled illegal goods, including alcohol, starting in 2010 with his father and then with a friend; and also, on two occasions, transported political material relating to the KDP with the friend. He transported KDP material successfully on the first occasion, but on the second occasion, he became aware that the Etilaat were looking for him. He was shot at by men in two vehicles and he managed to escape to Iraq.
4. In the respondent's decision, she rejected the appellant's claims to be a smuggler or to have come to the adverse attention of the Etilaat. She did not accept the reliability of photographs said to show smuggling. She regarded as inconsistent the appellant's account of what political materials he believed he was smuggling, and regarded as implausible, his account of escape from the Etilaat on foot, while being shot at by pursuers in vehicles; and other aspects of his account of fleeing to Iraq.

### **The FtT 's Decision**

5. In rejecting the appellant's application, the FtT was not impressed by the appellant's general credibility and also made specific adverse credibility findings. In relation his general credibility, at [16], she noted he failed to claim asylum in safe countries whilst en route to the UK, particularly Serbia and Greece, for the purposes of section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. She went on to consider photographs of the appellant, at [18], noting that they could be interpreted as showing the appellant as having been involved in smuggling activities, but she placed limited weight on them, as the dates on which they were taken and the places where they were taken was unclear, and she did not accept the appellant's explanation for how he had received the photographs from a friend.
6. She went on to say that although there were inconsistencies in the appellant's account of transporting political material, they were insufficient to significantly undermine his claim 'per se,' but in the light of the adverse credibility findings and 'other issues identified with his account' she was not satisfied to the lower standard of proof as to the credibility of his account.
7. At [22], she considered the plausibility of the appellant's account of escaping from men in two vehicles, who were shooting him. She concluded that he had given no

reasonable explanation as to how he had managed to escape his pursuers; how the authorities had become aware of him; or how he had been able to cross from Iran to Iraq on foot, whilst being pursued by the authorities. The FtT regarded neither of those accounts as plausible or credible. At [23], she noted that the appellant had not produced any written evidence of his father's claimed arrest; and she regarded his actions, in posting anti-government material on social media, as inconsistent with his claimed fears for his relatives.

### **Grounds of Appeal**

8. The appellant submitted grounds of appeal on 15 May 2019, in very general terms. First, he asserted that the FtT's assessment of his credibility at [16] to [18] of the decision was 'irrational'. When we explored with Mr Khan at the hearing today as to the basis of this ground, while he made no formal withdrawal of the ground, he did not wish to rely on it, stating that such a test was more appropriate to a judicial review application. The ground referred, in the paragraph references, to most of the FtT's findings of fact and were unparticularised. Mr Khan did not elaborate on them further.
9. Second, the appellant asserted that the FtT had erred in assessing inconsistencies in his account of transporting KDP material as being immaterial, but then attached weight to them because she did not accept other aspects of his claim. Mr Khan said that the reasoning at [20] was confusing and inconsistent.
10. Third, the appellant argued that the FtT had erred in assessing the appellant's credibility on his inability to produce documentary evidence in relation to his father's arrest. When we discussed with Mr Khan how it was said that the FtT had erred, when it was open to her, in the context of paragraph 339L(ii) of the Immigration Rules, to consider the absence of all material evidence at the appellant's disposal having been submitted; or a satisfactory explanation for the lack of such evidence. Once again, while Mr Khan did not withdraw this ground, he did not seek to make any further submissions on it.
11. Fourth, the appellant argued that the FtT failed to assess the material facts of the appellant's claim in accordance with the guidance at paragraph [73] of the authority of KS (benefit of the doubt) [2014] UKUT 552 (IAC). Whilst we considered that particular authority, the principle in it is very general, and the gist is that a First-tier Tribunal should consider all of the evidence holistically and not compartmentalise it and discount particular evidence, for example, because of adverse credibility findings, before reaching their final conclusion. However, while the ground asserted that the FtT had erred, the ground provided no specific details.
12. A final ground, included in an application by the appellant for permission to appeal to the Court of Appeal, asserted that the FtT had failed to consider the risk factors set out in the Country Guidance case of HB (Kurds) Iran CG [2018] UKUT 00430 (IAC). The FtT had failed to consider the risk to the appellant as an Iranian, of Kurdish ethnic origin, and who had posted highly critical comments about the Iranian authorities on social media. Even if contrived for the purpose of bolstering a

protection claim, it was said that the FtT had failed to consider the risk of adverse attention. If his political beliefs were genuine, he could not be expected to delete his social media posts and if not genuine, they would still risk discovery. While there was no application to amend the grounds on this last point, Upper Tribunal Judge Norton-Taylor had set aside a previous Upper Tribunal decision and relisted it for an error of law hearing in a decision dated 5 November 2019 on the basis that HB had not been considered.

### **Discussion and Conclusions**

13. We deal first of all with the grounds other than in relation to the authority of HB. We first deal with the grounds that were not pursued by Mr Khan. The first ground, that the FtT had reached irrational conclusions in her assessment of credibility, was not one that was pursued by Mr Khan beyond that generalised assertion. We dismiss that ground as it identifies no error of law with any particularity.
14. In relation to the third ground, namely an assessment of the appellant's credibility, by reference to the appellant not producing documentary evidence in relation to his father's arrest or an explanation for the absence of such documentation, once again that was not a ground to be pursued by Mr Khan. As we have identified, noting the provisions of paragraph 339L(ii) of the Immigration Rules, we concluded that the FtT was entitled to take into account the absence of any evidence other than the bare assertions about the appellant's father's arrest. The ground discloses no error of law and we dismiss it.
15. In relation to the fourth ground, namely the guidance set out in KS (benefit of the doubt), once again, this is not a particularised ground and has no merit. We have reviewed the findings at [16] to [27] of the FtT's decision, and it is clear that the FtT did not making findings in isolation and indeed in relation to [20], which was the subject of particular challenge by Mr Khan as being inconsistent, the FtT was at pains to stress that some inconsistencies, when considered individually, might not have merited adverse credibility findings, but when considered in their wider context, they did so.
16. In relation to the more detailed second ground, it was said that the FtT's findings were inconsistent and she had failed to decide whether photographic evidence was genuine or not. It is worth repeating [20]:

*"I also find that the identifying apparent inconsistencies in the appellant's claim that he had transported some political material from Halo are also insufficient to significantly undermine his claim on this matter per se, but in light of the evidence of credibility findings and issues identified with other aspects of his account I am not satisfied to the lower standard of proof as to the credibility of this aspect of his claim."*

17. It was said that this was potentially inconsistent, particularly when FtT had said at [19] that the photographs may depict the appellant as engaging in illegal behaviour.

18. However, we do not regard [20] as inconsistent or that the FtT could be obliged to make any definitive finding on the genuineness of the photographs. The finding of inconsistencies in the appellant's claim has to be read in the context of earlier references to the respondent's refusal decision at [10], which in turn listed in detail at paragraphs [38] to [39]. What the FtT did was to note the inconsistencies in the appellant's account; not dismiss the entirety of the claim on that basis, but instead consider the inconsistencies in the wider context, including photographic evidence; the lack of evidence about the appellant's father's arrest; the fact of his social media posts, despite claiming to fear for his family's safety; and the plausibility of his account of how he fled Iran on foot. At [18], the FtT had merely concluded, as she was entitled to do, that the photographs may or may not show claimed activities, but that given the lack of explanation of how they had been obtained; and the fact that the locations were unclear and the photographs were undated, she attached little weight to them. That was an analysis which was unarguably open to her to make and discloses no error of law.
19. Where we do find there has been an error of law was the FtT's analysis of the consequences of his social media posts. While she was entitled to find that they are motivated solely by a desire to bolster his asylum claim, and to find that the appellant would not be at risk solely on account of exiting Iran illegally (see: SB (risk on return – illegal exit) Iran CG [2009] UKAIT 0053) the combination of illegal exit and *sur place* activities, even if contrived, failed to take into account the risk factors 5 and 9 of the HB (Kurds) Iran authority. Paragraph [5] reads:

*“Kurdish ethnicity is nevertheless a risk factor, which when combined with other factors may create a real risk of persecution or Article 3 ill-treatment. Being a risk factor means that Kurdish ethnicity is a factor of particular significance when assessing risk. Those other factors will include the matters identified in paragraphs 6 to 9 below.”*

Whilst we do not exclude consideration of other factors, paragraph [9] in particular goes on to say:

*“Even low level political activity or activity that is perceived to be political such as or by way of example only, mere possession of leaflets espousing or supporting Kurdish rights, if discovered, involves the same risk of persecution or Article 3 ill-treatment. Each case however depends on its own factors and an assessment will need to be made as to the nature of the material possessed and how it would be likely to be reviewed by the Iranian authorities in the context of the foregoing guidance.”*

20. Ms Aboni accepts that the appellant will be returning, as someone of Kurdish ethnic origin, without a passport. In these circumstances, he is likely to be at particular risk of questioning. She also did not dispute that he is likely to be asked whether he has a Facebook or other social media account, which he does, and will be required to disclose his password for those accounts, as part of his questioning. The FtT did not consider whether, if he has posted material via his Facebook account or google email which, even if contrived for the purposes of his protection claim, is highly critical of the Iran regime and its spiritual leader, whether that would place him at significant

adverse risk. The FtT's failure to do so does, in our view, amount to a material error of law, such that the FtT's decision is unsafe and which we set aside.

### **Decision on error of law**

21. The FtT's decision contained an error of law such that is necessary to set it aside. In doing so, however, we preserve the following findings: that whilst the appellant is of Iranian Kurdish ethnic origin, but that he was not engaged in smuggling and distributing material for the KDP; and that he did not suffer adverse interest prior to leaving Iran, nor was such fear of persecution the cause of his leaving Iran. In addition, the appellant had posted material via his Facebook account, which even if since deleted has then been emailed to him, which is highly critical of the Iranian state and its spiritual leader.

### **The remaking decision**

22. Given the narrowness of the factual and legal issues which needed to be remade, we regarded it as appropriate and in accordance paragraph 7.2 of the Senior President's Practice Statements that the Upper Tribunal remakes the decision on the appellant's appeal.
23. Mr Khan submitted that even if messages via social media were contrived, the appellant is of Kurdish ethnic origin; would most likely be questioned upon his return to Iran; and would be obliged to disclose his social media and email passwords, which would reveal the anti-regime photos sent via email, even if deleted from the appellant's main Facebook account.
24. Ms Aboni accepted that the appellant continues to have a Facebook and email account. She did not refer to any other country evidence or guidance on the issue of contrived *sur place* activities.
25. We reviewed a number of the Facebook posts in the appellant's bundle, which had subsequently been emailed to him, including at [29], a cartoon appearing to show Iran's spiritual leader being pushed into flames. Other posts ([23]) referred to the 'Islamic republic of bloodshed' taking the 'lives of Kurdish people'. The posts, which we do not repeat in full, are highly critical and likely to be highly inflammatory to supporters of the Iranian regime.
26. Noting the risk factors in HB, the appellant would be returning as someone of Kurdish ethnic origin, without a passport. On the one hand, he has not engaged in political activity, even low-level, in Iran. On the other hand, there is a risk, to the lower standard, of his being questioned on his return, and being asked to disclose his Google and Facebook account details; there is the risk of what HB referred to as a 'hair trigger' approach: namely the threshold for suspicion being low, and the reaction of the authorities being extreme. In the circumstances, even where, as here, the material has been distributed for the purposes of bolstering a *sur place* claim, we have no reservation in finding that the Iranian authorities' view of the material we have seen would be extreme, given its inflammatory nature. In the circumstances,

the appellant does have a well-founded fear of persecution and his return would risk his rights under articles 3 and 8 being breached, the latter in terms of his inability to integrate into Iran.

**Remaking decision**

27. We remake the appellant's appeal by allowing his appeal on asylum grounds. We also conclude that his removal would breach his rights under articles 3 and 8 of the ECHR.
28. The appeal is refused on humanitarian protection grounds.

Signed *J Keith*

Date 4 February 2020

Upper Tribunal Judge Keith

**TO THE RESPONDENT**  
**FEE AWARD**

As we have allowed the appeal and because a fee has been paid, we have decided to make a fee award of £140.

Signed *J Keith*

Date 4 February 2020

Upper Tribunal Judge Keith