OUTER HOUSE, COURT OF SESSION

[2017] CSOH 134

P504/17

OPINION OF LORD TYRE

In the petition

MA

Petitioner

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Petitioner: Winter; Drummond Miller LLP
Respondent: Maciver; Office of the Advocate General

24 October 2017

Introduction

[1] In this application for judicial review, the petitioner seeks reduction of a decision dated 9 March 2017 of the Upper Tribunal (Immigration and Asylum Chamber) refusing permission to appeal to itself against a decision of the First Tier Tribunal ("FTT"). Permission to proceed with the present application was granted by a Lord Ordinary on 27 July 2017. The matter came before me for a substantive hearing.

Factual background

[2] The petitioner is an Iranian national of Kurdish ethnicity who is presently aged 21. He arrived in the United Kingdom on 24 October 2015 and claimed asylum. His claim was refused on 18 February 2016. He appealed to the FTT and his appeal was refused on 4 December 2016.

[3] Before the FTT, the petitioner submitted that he had a well-founded fear of persecution if returned to Iran, on account of his support for, and activities carried out on behalf of, the Kurdish Democratic Party of Iran ("KDPI"). Those activities could be divided into activities in Iran before his illegal exit and *sur place* activities in the UK. The former consisted of working as a smuggler of goods which during the last two years had included KDPI leaflets, flyers and CDs in sealed packages. The petitioner was a supporter but not a member of the KDPI. There had been an incident in 2015 when the Iranian authorities had shot at a convoy of smugglers which included himself. He escaped in the dark by climbing a tree to hide. As regards activities in the UK, these consisted of involvement with the KDPI including in particular attendance at a meeting in Maryhill at which photographs of him were taken and posted on Facebook.

[4] The FTT's assessment of the petitioner's evidence in relation to his activities in Iran was as follows (Decision, paragraph 14):

> "I found the Appellant's evidence about his smuggling activity partly credible on the lower standard of proof but I am not prepared to accept that he was anything more than a carrier for the KDPI and he was of no interest to the Iranian authorities. In his oral evidence he said that he was never a member of the KDPI. At best, he was a supporter of the Kurdish cause in general terms … I accept that he might have been shot at by the Iranian security services during the second ambush because he was a part of a group of smugglers and I accept that he got away by climbing up and hiding in a tree … What the Appellant has not established is that the authorities knew who he was when they were shooting and when he was escaping especially given the fact that the alleged incident took place at night time under cover of darkness. I believe that to the authorities, he was no more than one of the many

> unknown smugglers whom they often encounter and who evaded capture. I have heard many appeals involving Iranian Kurds who were smugglers. Kurds smuggling goods and dissident material between Iran and Iraq is commonplace."

[5] As regards the petitioner's activity in the UK, the FTT began (paragraph 15) by quoting at length from the country guidance case *BA (Demonstrators in Britain – risk on return) Iran CG* [2011] UKUT 36 (IAC) before stating (paragraph 16):

> "The *sur place* activity that the Appellant has engaged in since arriving in this country is very limited as there is only one Facebook posting concerning his KDPI involvement and some photographs of him at a meeting. He is not a regular, let alone, prolific blogger and unlikely to have come to the notice of the Iranian regime for his Facebook posting. Turning to the meeting in Maryhill there is no evidence that he organised or even spoke at it. He simply attended as a participant. Given his very low-level *sur place* activity and involvement with the KDPI in this country, I think it is highly unlikely that he would be of interest to the authorities in Iran."

[6] On the basis of the foregoing findings, the FTT stated its conclusions in paragraph 17 as follows:

> "In view of my findings of fact I do not accept that the Appellant has established that he is a refugee or a person in need of humanitarian protection. His Article 2 & 3 ECHR claims insofar as they depend on the factual matrix of his asylum and humanitarian claims also fail. What risk would the Appellant face on return to Iran as a failed asylum seeker and as someone who probably left that country illegally? Does the fact that he is a Kurd have any bearing on the matter in assessing his risk on return? I am reminded that in *SSH and HR (illegal exit: failed asylum seeker) Iran CG* [2016] UKUT 00308 (IAC) the Upper Tribunal 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 ECHR 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 (ie of illegal exit and being a failed asylum seeker) has been established. In particular, there is not a real risk of prosecution leading to imprisonment. It is noteworthy that in *SSH and HR* both the appellants were Kurdish and there is no suggestion that being a Kurd in itself would put the Appellant at risk on return.

The petitioner's appeal on asylum/humanitarian protection and human rights grounds was accordingly dismissed.

Application to Upper Tribunal for leave to appeal

[7] In his application to the Upper Tribunal for leave to appeal, the petitioner contended that the FTT had erred in law when assessing the risk to him on return when questioned at the airport. The FTT ought, it was submitted, to have held (i) that he would be questioned and (ii) that in the light of its findings he would have been at real risk if he told the truth about his support for, and activities on behalf of, the Kurdish cause. Country guidance information, including the *BA* and *SSH and HR* country guidance cases and the respondent's own Country Information and Guidance note on Iran: Kurds and Kurdish political groups indicated that the Iranian authorities had no tolerance for anyone who supported or was perceived as supporting the KDPI. The FTT's conclusion that the petitioner was not at risk on return when questioned at the airport about his KDPI involvement was accordingly not supported by the evidence, and amounted to an error in law.

[8] By decision dated 9 March 2017, the Upper Tribunal refused permission to appeal for the following reasons:

> "… Contrary to what is argued, the judge considered all the evidence and gave full and clear reasons for his findings. He found the appellant to be a general supporter of the Kurdish cause who had never come to the attention of the authorities … The appellant's sur place activities were also fully considered and the risk of return assessed (at 15-18). As the judge noted, *AB* [2015] UKUT 257, also relied on in the grounds, is not country guidance.
>
> The judge's findings and conclusions are sustainable. No arguable error of law has been identified."

Home Office Country Information and Guidance

[9] In its guidance note on "Iran: Kurds and Kurdish political groups" (July 2016

edition), which was intended to provide guidance to its decision makers on handling protection and human rights claims, the Home Office stated *inter alia* as follows:

> "*2.3 Assessment of risk*
> …
>
> 2.3.2 … In general, the level of discrimination faced by Kurds in Iran is not such that it will reach the level of being persecutory or otherwise inhuman or degrading treatment. This was confirmed in the country guidance case of *SSH and HR* … where the Tribunal held that the evidence does not show that there is a risk to returnees on the basis of Kurdish ethnicity alone unless that person is otherwise of interest to the Iranian authorities …
>
> 2.3.3 The situation is different for those who become or are perceived to be involved in Kurdish political activities. The authorities have no tolerance for any activities connected to Kurdish political groups and those involved are targeted for arbitrary arrest, prolonged detention, and physical abuse. Even those who express peaceful dissent are at risk of being accused of being a member of a banned Kurdish political group …
>
> **3. Policy Summary**
> **…**
>
> 3.1.2 Those involved in Kurdish political groups are however, at risk of arbitrary arrest, prolonged detention and physical abuse from the Iranian authorities. Even those who express peaceful dissent or who speak out about Kurdish rights can be seen as a general threat and face a real risk of persecution.
> …
>
> 3.1.4 Where a person can demonstrate to a reasonable degree of likelihood that they are known or likely to be made known to the Iranian authorities on the basis of their membership or perceived membership of a Kurdish political group they should be granted asylum."

Argument for the Petitioner

(i) Error of law

[10] On behalf of the petitioner it was submitted that the Upper Tribunal erred in law by refusing to grant permission to appeal against the decision of the FTT. The Upper Tribunal had erred:

(i) by failing to appreciate that the FTT had misapplied the country guidance in *SSH and HR*, with the consequence that its conclusion that there was no risk to the petitioner was unsupported by the evidence. The petitioner would be questioned on return, and there was a real risk to him, given the FTT's findings in relation to his activities and the country guidance with regard to those who were associated with the KDPI;

(ii) by failing to appreciate that the fact that the petitioner had not come to the attention of the authorities was irrelevant in circumstances in which he will come to their attention as a result of questioning at the airport;

(iii) by failing to appreciate that the FTT's assessment of the (lack of) significance of the petitioner's *sur place* activities was not supported by the country guidance in the cases and in the Home Office publication.

[11] The Upper Tribunal ought to have appreciated that the FTT had failed properly to apply country guidance to the particular situation of the petitioner, ie a failed asylum seeker who was a Kurd who supported the KDPI and had carried out activities on its behalf, who would be questioned by the Iranian authorities at the airport and who would be expected to tell them the truth. The Upper Tribunal ought to have appreciated that if the FTT had not so failed, it could not reasonably have concluded that there was no real risk to the petitioner on his return. Accordingly the Upper Tribunal erred in law in refusing to grant permission to appeal. The case was distinguishable on its facts from *SSH and HR* in that there was no evidence in that case of positive activity on the part of the claimants. It was, however, indistinguishable from a recent application to this court for judicial review in which, leave to appeal to the Inner House having been granted, the parties agreed by joint minute that the Upper Tribunal had erred.

(ii) The Eba test

[12] Permission had been granted by a Lord Ordinary to proceed with this application. That being so, there was no need at the substantive hearing stage for the petitioner to satisfy the court that the test in *Eba* v *Advocate General* 2012 SC (UKSC) 1 (ie that the proposed appeal raised an important point of principle or practice, or that there was some other compelling reason for the court to hear the appeal) had been met. That was the position in England and Wales. Although the interlocutor in the present case referred only to section 27B(2) of the Court of Session Act 1988, it was implicit that the Lord Ordinary had been satisfied that the test in section 27B(3) had been met. Reference was made to *SA* v *Secretary of State for the Home Department* [2017] CSOH 117, in which Lord Boyd of Duncansby expressed the view, *obiter*, after hearing detailed submissions, that the authorities did not support the proposition that the second appeals test should be revisited at the substantive hearing.

[13] In any event, there was a compelling reason for the court to hear the application because (i) there was tension between the decisions of the FTT and Upper Tribunal and the country guidance in *SSH and HR*; (ii) the findings of the Upper Tribunal were inconsistent with country guidance case law (cf *Uphill* v *BRB (Residuary) Ltd* [2005] 1 WLR 2070, Dyson LJ at paragraph 24(1); and (iii) the Upper Tribunal had made errors of law which "leapt off the page", or at least were strongly arguable, with potentially drastic consequences for the petitioner.

Argument for the Respondent

(i) Error of law

[14] On behalf of the respondent it was submitted that no error by either Tribunal had

been identified. The question whether the Upper Tribunal had erred in law rested upon whether the FTT had failed to take into account the significance of the petitioner being questioned at the airport upon his return to Iran. The FTT had not so failed: it took *SSH and HR* into account, noting that a returnee would be questioned at the airport; it expressly found the petitioner not to be of interest to the Iranian authorities as a result of his activities in Iran; it took into account *BA Iran CG* , noting that regard must be had to the *sur place* activity and activity in Iran of a returnee such as the petitioner; and it expressly found that the nature of the petitioner's activity in the UK made it highly unlikely that he would be of interest to the Iranian authorities. That represented a complete assessment of the petitioner's claim in the light of the circumstances of his case and the country guidance case law. At paragraph 17 the FTT expressly considered whether risk lay from the petitioner being Kurdish and concluded that it did not. It was clear that the FTT had been aware that returnees would be questioned at the airport; in this regard the case was distinguishable from the recent judicial review application with which the petitioner had sought to draw a parallel.

(ii) The Eba test

[15] Despite the fact that permission had been granted to proceed with the application, the *Eba* test remained at large at the substantive hearing and required to be satisfied by the petitioner. Section 27B did not displace the common law; nor did it indicate that the permission stage was the only one at which the test required to be considered. A distinction fell to be drawn between assessing whether an application should be allowed to proceed and whether a remedy should be granted: the *Eba* test remained alive with regard to the latter. The permission stage did not provide for a full consideration of the merits. The case

was distinguishable from *SA* v *Secretary of State for the Home Department* in respect that the interlocutor in the present case referred expressly to section 27B(2) only (and not to section 27B(3)), indicating that there had been no decision at the permission stage that a "compelling reason" had been disclosed.

[16] In any event the test was not met. The petitioner founded upon there being "some other compelling reason" but none had been demonstrated. The FTT's decision was not "perverse" or "plainly wrong" (cf *Uphill* v *BRB (Residuary) Ltd* above). Prospects of success in an appeal could not be described as "very good".

Decision

(i) Error of law

[17] As the petitioner recognised, the error of law that must be established for the application to succeed is an error of law on the part of the Upper Tribunal in refusing leave to appeal to itself. Where, however, as here, the reason for refusal given by the Upper Tribunal is that no arguable error of law on the part of the FTT has been identified, attention will necessarily focus on the decision of the FTT, and in particular on whether, contrary to the view of the Upper Tribunal, there was an arguable error of law on the part of the FTT.

[18] Although the petitioner's submission was presented in the form of several grounds of appeal, it comes in essence to be that the FTT erred in failing correctly to apply country guidance to the whole of the petitioner's circumstances, taking into account not only that he was an asylum seeker who had left Iran illegally; not only that he was Kurdish; but also that he had carried out certain activities both in Iran and in the UK in support of the KDPI which he could be expected to disclose when questioned at the airport on his return.

[19] The FTT placed considerable emphasis on the country guidance in *BA* (above), and it is therefore necessary to examine whether the FTT's decision is consistent with it. What is clear from that guidance is that individuals who have engaged in political activity, whether in Iran before seeking asylum or in the UK, are not all regarded as likely to suffer ill treatment on return. Risk of persecution must be assessed having regard *inter alia* to (i) the nature of *sur place* activity including the theme of demonstrations and the applicant's role and political profile, the extent of his participation and the degree of publicity attracted; (ii) the risk of identification in the course of the activity; (iii) factors triggering inquiry or action on return; (iv) the consequences of identification; and (v) the risk of identification on return. Identification is not the only issue. Even if it is assumed that a person will be identified on return as having engaged in political activity, for example as a result of being questioned at the airport and telling the truth, the country guidance makes clear that it does not necessarily follow that he will be at risk of ill treatment if the activity has been at a low level. Whether the activity of a particular applicant has been at a sufficiently low level as not to attract the interest of the Iranian authorities is a matter for assessment by the FTT.

[20] *BA* was not concerned with persons of Kurdish ethnicity. The issue that arises in the present application is whether the FTT was entitled to find, having regard to the guidance in *BA* and in *SSH and HR* (which did concern Kurds), and to the published Home Office guidance specific to Kurds and Kurdish political groups, that the petitioner, being a Kurdish returnee who had participated in low level activity both in Iran and in the UK, was not at risk of ill treatment if such activities were disclosed in response to questioning at the airport. In my opinion, nothing in the country guidance precludes such a finding. The relevant facts found by the FTT were:

- that the petitioner has never been a member of the KDPI but was at best a supporter of the Kurdish cause;
- that his smuggling activities prior to leaving Iran were not such as to render him of interest to the Iranian authorities;
- that his *sur place* activity, consisting of contact with the KDPI and attendance at one meeting, was highly unlikely to cause him to be of interest to the Iranian authorities.

Those findings take into account the fact that the petitioner is Kurdish, and it is clear from paragraph 17 of the decision that the FTT was aware that the petitioner was likely to be questioned on return. The FTT may also be taken, from its reference to *SSH and HR*, to have been aware that it was to be presumed that the petitioner would respond truthfully to any such questioning and thus disclose the extent of his activities in support of the KDPI. The FTT's conclusion, however, was that the activities were of such a low level that even full disclosure would not create any interest in him on the part of the authorities. In my opinion that factual conclusion was one that was reasonably open to the FTT. It cannot be said to be so clearly contrary to country guidance as to amount to an error of law.

[21] That being so, the Upper Tribunal's decision that there was no arguable error of law on the part of the FTT was one that was open to it, and did not in turn amount to an error of law. The present application must accordingly fail.

(ii) The Eba test

[22] In the light of my finding that there was no error of law on the part of the Upper Tribunal, it is unnecessary for me to address the *Eba* test. In particular, it is unnecessary for me to express an *obiter* opinion on whether the test remains alive at the stage of a substantive

hearing. I see no value in doing so, but I would wish to provide my observations on two matters.

[23] Firstly, I reject the respondent's submission that the present case is distinguishable from *SA* v *Secretary of State for the Home Department* on the ground that the interlocutor in the present case is specific in referring only to section 27B(2). Where, as here, an application under section 27B for permission to proceed relates to a "relevant Upper Tribunal decision", the court has to be satisfied that the test in section 27B(3) is met. The petition and answers in the present case both fully addressed the section 27B(3) test. In order to accept the respondent's submission I would have to assume that, despite both the statutory obligation and the terms of the petition and answers, the Lord Ordinary who granted permission to proceed did so without applying his mind to the section 27B(3) test. I am not prepared to make any such assumption based solely upon the terms of the interlocutor. I assume rather, as did Lord Boyd in *SA*, that the Lord Ordinary was aware that the section 27B(3) test required to be addressed and did so. It may, however, be preferable in future, for the avoidance of doubt, for interlocutors in applications relating to "relevant Upper Tribunal decisions" to avoid specific mention of only one of the subsections of section 27B relevant to the granting of permission to proceed.

[24] Secondly, even if I were satisfied that the *Eba* test remained alive at the stage of the substantive hearing, I would not have found there to be a "compelling reason" demonstrated in the present case. It is important to note that the reference by Dyson LJ in *Uphill* v *BRB (Residuary) Ltd* (para 24(1)) to "a decision which is perverse or otherwise plainly wrong" is to the decision of the judge on the first appeal, that is, in the circumstances of the present case, to the decision of the Upper Tribunal and not the FTT. Failure to appreciate this is likely to lead to conflation of the criteria for granting permission for a first appeal, ie

whether the first instance decision is arguably wrong, with those which apply in relation to second appeals, ie whether the decision of the judge on the first appeal is perverse or plainly wrong. As Dyson LJ observed, it is important not to assimilate those criteria. The same point was made by the Inner House in *SA* v *Secretary of State for the Home Department* 2014 SC 1 at paragraphs 41-43.

[25] In the present case the petitioner's submissions in relation to "compelling reason", while making reference to the Upper Tribunal, are in reality focused upon whether the FTT's decision was consistent with country guidance. That, in my opinion, does not constitute a compelling reason for the purposes of the *Eba* test. It is relevant to the anterior question of whether error of law on the part of the FTT and hence on the part of the Upper Tribunal has been demonstrated. But to treat it also as the criterion for the purposes of the *Eba* test would, as the court pointed out in *SA* at paragraph 40, be tantamount to sustaining the argument that *Eba* has had no effect whatsoever.

Disposal

[26] For these reasons the petition is refused.