Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/01491/2019

THE IMMIGRATION ACTS

Heard at: Field House	**Decision & Reason Promulgated**
On: 13th September 2019	**On: 27th September 2019**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

DAI
(anonymity direction made)

Appellant

And

The Secretary of State for the Home Department

Respondent

For the Appellant:	**Mr Spurling, Counsel instructed by Barnes Harrild and Dyer Solicitors**
For the Respondent:	**Mr Jarvis, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The Appellant is a national of Iran born in 2001. He arrived in the United Kingdom on the 17th June 2017 when he was fifteen years old. He was in the company of his elder brother P who was then seventeen.

2. Both boys claimed asylum on arrival. The substance of their linked claims was that they have a well-founded fear of persecution in Iran for reasons of their imputed political opinion. They claim to have been acting as smugglers

on the Iran-Iraq border, and to have come to the attention of the Iranian government, who believe them to have been involved in transporting banned opposition materials. The Secretary of State accepted as credible the assertion that the boys were smugglers, but rejected the claim that they faced persecution. They were refused protection on the 31st January 2019.

3. Both boys appealed. Their linked cases came before the First-tier Tribunal (Judge Rai) on the 18th March 2019 when both brothers gave evidence. Over three months later, on the 27th June 2019, the First-tier Tribunal promulgated a determination allowing the appeal of the Appellant's brother P, but dismissing his case. The Appellant now has permission to appeal against that decision, granted by First-tier Tribunal Judge Page on the 30th July 2019.

4. Before I turn to the issues in the appeal before me, it is appropriate that I mark the reasons the First-tier Tribunal gave for allowing the appeal of P. Under the heading 'sur place activity' the Tribunal records and accepts the evidence that since his arrival in the United Kingdom P has created a Facebook page onto which he has posted "very bad things about the Iranian government'. He has also participated in protests against the regime, including a demonstration calling for more rights for women in Iran. Applying the guidance and findings in AB and Others (internet activity – state of evidence) Iran [2015] UKUT 257 (IAC), BA (demonstrators in Britain – risk on return) Iran CG [2011] UKUT 36 (IAC) and HB (Kurds) Iran CG [2018] UKUT 430 (IAC) the Tribunal accepted that applying the lower standard of proof, it is reasonably likely that upon return to Iran P faced a real risk of serious harm arising from his activities in the United Kingdom.

5. In respect of the historical claim, if I may put it like that, the Judge made several findings in favour of the brothers. It accepted that the boys had been smugglers on the Iran/Iraq border [§22]. They were regularly shot at by officers of the Pasdaran [§23]. This was terrifying but they continued the work because they needed to support their family. The parties are in agreement about these findings. I note in passing that although not referred to, this aspect of the Appellants' case was entirely consistent with the country background material. See for instance the Special Rapporteur's report cited at paragraph 30 of HB:

> "80. The Special Rapporteur is seriously concerned about the alleged indiscriminate and blind use of lethal force towards Kurdish *kulbaran* (back carriers), which may be related to their ethnic affiliation. The *kulbaran* are Kurdish couriers who engage in smuggling commodities across the border. Due to the high rate of unemployment in Kurdistan provinces, this activity is generally the only way for them to provide for themselves and their family. In 2016, Iranian border security forces reportedly killed 51 *kulbaran* and injured 71 others, which is about twice as much as the previous year."

6. The parties diverge however, on the extent of the positive findings made thereafter. Mr Spurling submits that the Tribunal accepted a good deal more than that, specifically that the boys were followed by a stranger home to their village, and that the Pasdaran came to the family home. Mr Jarvis submits that in fact the findings on these matters are adverse to the brothers. I return to that dispute below. In any event the Tribunal was not, in the final analysis, satisfied that either boy would be at risk in Iran today because of anything they did or were suspected to have done as smugglers. The appeal was dismissed on these 'historical' grounds.

7. The Appellant now appeals on the grounds that in so concluding the First-tier Tribunal erred in law in the following material respects:

   i) It Made Errors of Fact

      The determination records that neither brother was actually involved in the smuggling of banned materials at §22: "they were asked to carry propaganda material such as newspapers but always refused". The Appellant submits that this is an error of fact, since it is his account that he did in fact smuggle newspapers, albeit in ignorance of their contents. This is said to be material because it was the brothers' total lack of involvement which led the Tribunal to reject the claim of adverse attention from the security services as implausible.

   ii) Impermissibly high standard of proof

      The Tribunal accepted much of the Appellants' account but not that they were wanted for smuggling propaganda or that they might come to the adverse attention of the Iranian authorities today. It is submitted that it was perverse/an imposition of too high a standard of proof to conclude that there was no risk to the Appellant.

   iii) Delay

      There was a three month delay in the promulgation of this decision. The Appellant submits that this delay renders the decision of the First-tier Tribunal unsafe: reliance is placed on the decision in Mario (1998) Imm AR 281 and Secretary of State for the Home Department v RK (Algeria) [2007] EWCA Civ 868.

Discussion and Findings

8. I am grateful for the realistic and helpful way in which both advocates approached their submissions. Although not in concert on everything, they were in agreement about two matters. First, that it was probably an error of law for the First-tier Tribunal to have failed to weigh in its final reckoning on D the fact that it had recognised P to have protection needs. Given what we

know about the returns process in Iran, and the fact that these boys are Kurdish, applying the 'hair-trigger' analysis in HB (Kurds), it was no doubt relevant to the risk assessment for this Appellant that his brother had been found to be posting "very bad things" about the Iranian government online. Second, the parties agreed that my assessment must be a global one, since each of the grounds in effect depended on the other.

9. Those preliminary observations aside, I turn to the decision. The passages that are in issue are between §24 and §34. Mr Jarvis submits that the Tribunal here rejected the crucial elements of the account. Mr Spurling submits that they were accepted. I find the truth of the matter is somewhere in the middle.

10. It is correct to say that paragraph 24 starts with the proposition "the first appellant *claims*" (my emphasis), and that nowhere in the passages that follow do we find an unequivocal finding such as "I accept that the appellants were followed". Mr Jarvis is correct to say that the Tribunal does identify what it perceives to be discrepancies in the account, for instance at paragraph 28. That said, I am unable to find any clear finding that the Appellants were not followed, or that the Pasdaran did not visit the family home. What the Tribunal instead finds is that it rejects the *interpretation* given to those events by the Appellants:

> [at §31] "they have given a credible account about being smugglers However the implausibility in their account comes from the lack of a connection between their activities and **the last shooting incident**"

11. It goes on at §32:

> "The first appellant has assumed that because there are other people who do smuggle propaganda newspapers that he might have been suspected of that. He has never been stopped or searched by the authorities or even questioned about what he is smuggling. His name and details were never known to the authorities. At its highest, the first appellant has assumed because the man walking behind them was unknown to them that he must have been a spy. None of them were stopped or even spoken to on that occasions, nor did the man proceed to search their house. The appellant said there were 6 of them and 1 of him and he may simply have been gathering information so that they could be arrested the following day. The following day there was no attempt to arrest them, but they were shot at. Something which the appellant says happens regularly in his statement. Without more than this mere assertion, I cannot accept this even on the lower standard of proof as evidence **for the reason that they were targeted the following day**"

12. It will be observed that far from rejecting the facts as asserted, it is implicit in this reasoning, in particular in the words that I have highlighted, that the Tribunal appears to accept that the brothers *were* targeted the day after they observed a man following them.

13. The Tribunal goes on at §34 to consider the evidence that the Pasdaran thereafter visited the family home. On the Tribunal's own analysis this was of some importance, since the incidents in which the brothers were shot at are dismissed as occupational hazard, rather than targeted persecution. It says this:

> "In relation to the document purported to be given to the maternal uncle by the Iranian guards, the first appellant [P] stated he did not see this document as he had fled to Amir's house. He was only told of the contents by his brother. The second appellant [the Appellant here] also did not see the document being given to his maternal uncle, **despite being in the house at the time they came**. The document itself, nor is a copy before me but the second appellant stated it was written in Farsi and required his uncle to read it. He said in his witness statement that he was not sure whether it was a summons or an arrest warrant but in interview he said that it was an arrest paper asking us to attend court. In cross examination the second appellant said that the document was an arrest warrant for the smuggling of goods, cigarettes alcohol and newspapers. This is inconsistent with the evidence of the first appellant who said in his witness statement that his uncle told him what the paper said and that the authorities wanted to arrest him and put him in prison. Given these inconsistencies and there being no evidence they were identified, I do not accept the uncorroborated evidence that there was an arrest warrant which if the appellants were told about, came solely from their maternal uncle".

14. Two points can be drawn from this passage. The first is that neither of the young appellants before the First-tier Tribunal had the first clue what was in the document given to their uncle by the Pasdaran. I interpolate that this is not at all surprising given their ages, lack of education or experience of the legal justice system, nor indeed the fact that neither actually saw the document itself. Second, what the Tribunal does not do, in my view, is reject the contention that the Pasdaran did in fact visit the family home. Had it rejected that evidence – in particular that of the Appellant before me who claimed to have been hiding in the house at the time – I would have expected that to be clearly articulated in the determination.

15. My reading of the decision is that the First-tier Tribunal accepted – albeit it implicitly – that the Appellants were followed by a stranger to their remote mountain village and that the following day they were shot at and the Pasdaran visited the family home looking for them.

16. That being so, what led the Tribunal to conclude that they had not come to the adverse attention of the Iranian authorities as claimed? The key reasoning, submits Mr Spurling, is found at §31 of the decision:

> "the implausibility in their account comes from the lack of a connection between their activities and the last shooting incident"

And it is here that ground (i) becomes relevant. Whilst his elder brother P had denied ever knowingly smuggling Kurdish separatist material, the Appellant's evidence had been that he had in fact carried newspapers, which he suspected to be political in nature: paragraph 3 of his witness statement dated 7th March 2019 refers. I am satisfied that in its summary of the case at its §22 the First-tier Tribunal overlooked this evidence. I am further satisfied that given the generally positive credibility findings, and the country background evidence indicating that Kurdish propaganda materials are indeed smuggled into Iran from Iraq, it is evidence which should be accepted, applying the lower standard of proof.

17. This then is what we are left with. The Appellant is a Kurdish teenager who earned a living in Iran by carrying contraband goods over the border from Iraq. These included newspapers which he suspects were political in nature. From time to time he was shot at by Iranian security officials. In the Spring of 2017 this routine was interrupted by an incident in which the brothers – and other smuggler friends – observed a man that they did not know following them along a path into their village. The following day they were ambushed and shot at. The Appellant ran into the woods and hid before making his way back to his house. Once home his mother observed a group of Pasdaran approaching; she made the Appellant hide whilst his uncle spoke with them. The Appellant's uncle advised him and his brother that the Pasdaran had left some official documentation indicating that they were wanted for questioning. The family advised the boys that they should leave Iran rather than answering to that summons/court document. The Appellant and his brother left the area and made their way to the United Kingdom. The Appellant's brother has since been found to have international protection needs because of the political material that he has posted online.

18. All of that was accepted by the First-tier Tribunal, although it should be noted it was not satisfied that the Pasdaran did in fact leave a document of some description. Even if it could be safely assumed that the Appellant's uncle was deceiving him – perhaps to convey the urgency of the situation – the Appellant is still a Kurd, who has smuggled banned political propaganda, and who has attracted the adverse attention of the security services. This is where ground (ii) becomes relevant. Mr Spurling submitted that those bare facts would be sufficient to discharge the burden of proof in establishing a real risk of harm, and it was perverse for the First-tier Tribunal to conclude otherwise. Applying the guidance in HB and SSH I would have to agree, particularly when the fact that P is now deemed to be at risk is factored in.

19. It follows that I need not address ground (iii) which in fairness Mr Spurling did not pursue before me.

Decisions

20. The decision of the First-tier Tribunal contains an error of law and it is set aside.

21. The decision in the appeal is remade as follows: "the appeal is allowed on protection grounds".

22. There is an order for anonymity.

Upper Tribunal Judge Bruce
18th September 2019