



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: PA/07859/2016

**THE IMMIGRATION ACTS**

**Heard at Liverpool**

**Decision & Reasons  
Promulgated**

**On 27<sup>th</sup> September 2017**

**On 28<sup>th</sup> September 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MANDALIA**

**Between**

**YM  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms. C Warren, instructed by ADL Solicitors

For the Respondent: Mr. G Harrison, Home Office Presenting Officer

**DECISION AND REASONS**

1. An anonymity order was made by the FtT. It is appropriate to continue that order, pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269). I also make an anonymity order. 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, all parties.

Any failure to comply with this direction could give rise to contempt of court proceedings.

2. This is an appeal against the decision of First-tier Tribunal Judge Shergill promulgated on 25<sup>th</sup> January 2017. The underlying decision that was the subject of the appeal before the First-tier Tribunal (“FtT”) was the decision of the respondent dated 14<sup>th</sup> July 2016 to refuse the appellant’s protection and human rights claims.
3. It is uncontroversial that the appellant is an Iranian national of Kurdish ethnicity. The appellant’s claim for international protection is based on his imputed political opinion. Broadly stated, the appellant claims that he was involved in a plan to threaten a local Mullah who had been preaching to the local population and encouraging them to fight in Syria. The appellant’s account was rejected by the respondent for the reasons that are set out at paragraphs [10] to [24] of the respondent’s decision. The respondent identified a number of matters that lead her to reject the account of the appellant that he and his friend hatched a plot to frighten or threaten a local Mullah, that the appellant’s friend was arrested, and that the Iranian authorities raided the appellant’s home and are actively seeking to arrest him. A summary of the appellant’s claim as it was advanced before the FtT is to be found at paragraph [5] of the decision of the FtT Judge.
4. The Judge’s findings of fact and reasons for dismissing the appeal are to be found at paragraphs [15] to [40] of his decision. The Judge notes at paragraph [15] that the appeal hinges on the credibility of the appellant. The Judge correctly records at paragraph [16] that he is obliged to consider s8 Asylum and Immigration (Treatments of Claimant’s, etc) Act 2004. At paragraph [21] of the decision, the Judge stated:

*“ I am satisfied when looking at all of the evidence in the round that the appellant’s credibility is damaged because he has failed to take advantage of a reasonable opportunity to make an asylum claim in another safe*

*country. Therefore, the claimant credibility is damaged under section 8 of the 2004 Act.*

5. At paragraphs [23] to [32] of his decision, the FtT Judge notes a number of areas of the appellant's account that the Judge considers are unexplained, or to be implausible. At paragraphs [33] to [34] of his decision, the Judge states;

*"33. I do not consider the claimed events to be plausible when considering all of the matters in the round to the lower standard.*

*34. Looking at all of the matters in the round I am satisfied that the appellant has put forward an account which has a number of significant discrepancies. Whilst I do not necessarily endorse all of those discrepancies as set out in the refusal letter, the key ones have been set out above with my reasoning as to why I consider them to be appropriate to be relied upon. I have looked at the documentary evidence put forward by the appellant and considered his oral evidence and I am not satisfied here adequately counted the concerns for forward."*

6. The Judge concluded, at [41], that the appellant has not discharged the burden of proof to show with a reasonable degree of likelihood that he has a well-founded fear of persecution for a reason recognised by the Geneva Convention. The appeal was dismissed on protection grounds and human rights grounds.
7. The appellant advanced four grounds of appeal. First, the Judge erred in his assessment of the appellant's credibility and his application of s8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. Second, the decision of the FtT Judge is tainted by procedural unfairness in that many of the adverse credibility findings made by the Judge are based upon matters that had not been raised by the respondent and were not raised during the course of the hearing of the appeal. The appellant was therefore given no opportunity to respond to any of the concerns that the FtT Judge may have had. Third, it was irrational for the Judge to conclude that the appellant's credibility is damaged because of the evidence as to

the funding of the appellant's appeal. Finally, the purported discrepancies identified by the Judge are not in fact discrepancies, but a failure by the Judge to direct himself to the evidence that was before him, and to have proper regard to it.

8. Permission to appeal was granted by Upper Tribunal Judge Blum on 17<sup>th</sup> July 2017. The matter comes before me to consider whether the decision of the FtT involved the making of a material error of law, and if so, to remake the decision.
9. Before me, Ms Warren relied upon the Grounds of Appeal and submitted that viewed from a number of angles, the Judge's assessment of the credibility of the appellant is flawed. When taken together, it is plain that the decision of the FtT Judge is tainted by procedural unfairness, and the way in which the adverse credibility findings were reached disclose a material error of law that infected the Judge's consideration of the appeal.
10. Ms Warren submits that the Judge started his consideration of the credibility of the appellant by making a strong adverse credibility finding against the appellant at paragraph [21] of his decision, because the appellant had failed to take advantage of a reasonable opportunity to make an asylum claim whilst in another safe country. She submits that having made that adverse credibility finding, the Judge went on to make further adverse credibility findings against the appellant in respect of matters that the appellant was given no opportunity to address, are based upon speculation, or are considered by the Judge to be implausible. For example, at paragraph [29] of his decision, the Judge states that the majority of Kurdish people are Sunni, a matter upon which he takes "judicial notice of" from his experience in the FtT.
11. In reply, Mr Harrison adopted the Rule 24 response filed by the respondent and dated 2<sup>nd</sup> August 2017. He conceded, rightly in my judgement, that within the decision of the FtT Judge, there are a number of paragraphs in which the Judge appears to speculate. For example, at paragraph [23] of his decision, the Judge found it implausible that the

appellant was capable of fleeing Iran in the short period of time that he claimed. The Judge stated that it was implausible that the significant amount of money that would be required in order for the appellant to have a safe passage to the United Kingdom could be raised in such a short period of time. At paragraph [24] of his decision, the judge found it implausible that the appellant would be able to fund a case privately without additional financial support. It appears that the Judge considered the lack of candour as to where the financial support and came from, as a matter that cast doubt upon the appellant's general credibility.

12. The principles relating to the impact upon proceedings of unfairness arising from error of fact were reconsidered by the Court of Appeal in **R & ors (Iran) v SSHD [2005] EWCA Civ 982**. The Court of Appeal held that before the Tribunal can set aside a decision of a Judge on the grounds of error of law, it has to be satisfied that the correction of the error would have made a material difference to the outcome, or to the fairness of the proceedings. A finding might only be set aside for error of law on the grounds of perversity if it was irrational or unreasonable in the *Wednesbury* sense, or one that was wholly unsupported by the evidence.
13. I have carefully read through the decision of the FtT and noted the many criticisms cited in the appellant's grounds of appeal. If the only criticism of the decision was that the Judge had treated the appellant's failure to take advantage of a reasonable opportunity to make an asylum claim whilst in another safe country, as a matter that damages the credibility of the appellant, I would have dismissed the appeal. However, I accept the submission made by Ms Warren that the Judge's assessment of the credibility of the appellant viewed from different angles is flawed, and when taken together, the findings made by the Judge are unreasonable in the *Wednesbury* sense, or wholly unsupported by the evidence. Similarly, I am satisfied that in many places, the Judge appears to have made adverse findings against the appellant upon matters that were not raised in the reasons for refusal letter, or at the hearing of the appeal before the FtT. They are matters therefore, that the appellant had no opportunity of

properly addressing either in his witness statement, his oral evidence or in the closing submissions made to the Tribunal.

14. In **MM (unfairness; E & R) Sudan [2014] UKUT 00105 (IAC)** the Upper Tribunal held that where there is a defect or impropriety of a procedural nature in the proceedings at first instance, this may amount to a material error of law requiring the decision of the FtT to be set aside. The authorities referred to by the Upper Tribunal make it clear that upon an appeal such as this, the criterion to be applied is fairness and not reasonableness. The Judge's conduct of the hearing and his decision is not to be evaluated by reference to a test of reasonableness or fault.
15. I accept the submission made by Ms Warren that when the decision of the FtT Judge is read as a whole, it is clear that in a number of respects the Judge made findings and reached conclusions upon matters that had neither been raised in the reasons for refusal letter, nor it appears, were raised at the hearing of the appeal before the FtT. To that end, they were adverse findings made in circumstances where the appellant was afforded no opportunity to respond to any concerns that the Judge had. The resulting unfairness to the appellant is apparent from the findings made by the Judge and the conclusions reached.
16. I am satisfied that the decision of the First-tier Tribunal involved in the making of an error on a point of law and the decision of the First-tier Tribunal is set aside.
17. I must then consider whether to remit the case to the First-tier Tribunal, or to re-make the decision myself. As the Upper Tribunal did in **MM (unfairness; E & R) Sudan [2014] UKUT 00105 (IAC)**, I consider that where a first instance decision is set aside on the basis of an error of law involving the deprivation of the appellant's right to a fair hearing, the appropriate course will be to remit the matter to a newly constituted First-tier Tribunal for a fresh hearing.

## **Notice of Decision**

18. The appeal is allowed and the decision of FtT Judge Shergill is set aside.
19. The appeal is remitted to the FtT for a fresh hearing of the appeal with no findings preserved.

Signed  
2017

Date

27<sup>th</sup> September

**Deputy Upper Tribunal Judge Mandalia**

## **TO THE RESPONDENT**

### **FEE AWARD**

I have allowed the appeal and remitted the matter to the FtT for hearing afresh. In any event, no fee is payable and there can be no fee award.

Signed

27<sup>th</sup> September 2017

**Deputy Upper Tribunal Judge Mandalia**