



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/00556/2018

**THE IMMIGRATION ACTS**

Heard at Liverpool  
On 25 June 2018

Decision & Reasons Promulgated  
On 17 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MR R S

Appellant

v

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mrs Johnrose, Broudie, Jackson & Canter

For the Respondent: Mr. C. Bates, Presenting Officer

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**DECISION AND REASONS**

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1. The Appellant is a national of Iran, born on 10.6.96. He arrived in the United Kingdom on 28.9.17 and claimed asylum, on the basis that he was of Kurdish origin and had (inadvertently) been involved in smuggling alcohol and other prohibited goods as a result of which he would face arrest, imprisonment and punishment in the form of lashes if returned to Iran.

2. His asylum application was refused in a decision dated 17.12.17. The Appellant appealed against the decision and his appeal came before First tier Tribunal Judge Alis for hearing on 12.1.18. In a decision and reasons promulgated on 21.2.18 he dismissed the appeal. The Appellant sought permission to appeal in time to the Upper Tribunal on the basis that the Judge had materially erred: (i) in failing to make a clear or any finding on the core issue of whether or not the Appellant's driver, Raza hid alcohol in the vehicle without the Appellant's knowledge and whether it was reasonably likely that the events described by the Appellant took place and (ii) in failing to give adequate reasons for rejecting the Appellant's claim on the basis that the Iranian authorities did not visit the Appellant's home until 2 days after the incident which led to Raza's death and (iii) in finding that the Appellant's claim did not fall for consideration under the Refugee Convention.

3. Permission to appeal to the Upper Tribunal was granted by First tier Tribunal Judge Mailer in a decision dated 19 March 2018, on the basis that all the grounds are arguable.

#### *Hearing*

4. I heard submissions on behalf of the Appellant from Mrs Johnrose, who stated that the Respondent had accepted quite substantial parts of the account, most of which, but not all, were highlighted by the Judge at [51], but he did not deal with the fact the Respondent accepted the Appellant was a smuggler and the fact he had a smuggling partner but did not accept he was killed.

5. She submitted that the foundation of the Judge's reasons for dismissing the appeal was the delay of two days by the authorities in coming to the Appellant's family home, but in so doing the Judge fails to take into account it was the authorities themselves who killed Raza and were not investigating a murder but the illegal smuggling of alcohol and there was no urgency as they knew where the Appellant lived and there was no evidence that they would have visited the Appellant's address the same day or sooner. However, the Judge anchors his reasons for rejecting the claim on this basis and this renders the decision unsafe.

6. Mrs Johnrose submitted that the core issue is whether or not it is likely that the driver hid the alcohol without the Appellant's knowledge and nowhere in the determination does the Judge ask that question. Given it was accepted that the Appellant did have a driver it was incumbent on the Judge to ask this question. Mrs Johnrose submitted that the preliminary matter set out by the Judge at [17] is erroneous in that the issue is not whether he smuggled alcohol or other goods as this was accepted by the Respondent. At [44] the Judge found that smugglers do not constitute a particular social group but this is erroneous *cf.* Fornah [2006] UKHL 46 at [66]. The Appellant's particular social

group is identified by ethnicity and the Judge materially misdirected himself in focusing on the smuggling aspects.

7. Mrs Johnrose sought to distinguish the Judge's finding at [42] on the basis that SSH & HR CG [2016] UKUT 00308 (IAC) was only concerned with illegal exit and the risk on return as a failed asylum seeker. She submitted that in this case it is the other adverse factors eg being a smuggler as well as being a Kurd. The country evidence before the Tribunal at that time, set out at page 31at [80] of the special report is that there is wide use of lethal force against Kurdish smugglers, which may be related to ethnic affiliation. She submitted that the Judge did not engage with that and whether the Appellant forms a particular social group. She did not agree the particular social group is "Kurdish smuggler" but said it was not the primary ground and not definitive.

8. In respect of the absence of an arrest warrant or summons, the Appellant was asked whether he had any documentation and the Judge then fell into speculation, whereas the Appellant's evidence is that he did not ask and never contacted his family after fleeing Iran. In his witness statement at [18] he threw away his mobile after being told to do so. The Judge hinges a lot of weight on the fact the Appellant was given a SIM card by the agent. There is no evidence the Appellant did not contact his father for any particular reason, except he was afraid to: he said at C1 that phones are monitored by the Iranian authorities, yet the Judge makes adverse findings on this at [60] and [61]. She submitted that the Judge provided insufficient reasons for his findings. At [62] Mrs Johnrose submitted that the Judge misdirects himself in that the penalties set out here are not in respect of alcohol and it is clear from the Home Office CPIN at 6.1.8 that alcohol is clearly prohibited. She submitted that the Judge had made material errors of law.

9. In his submissions, Mr Bates stated that the Judge helpfully sets out at [57] what aspects of the claim the Respondent had accepted and what the Respondent had accepted as credible and accepted the plausibility of the background material, but the issue is the credibility of what took place. If the incident was not credible then the Appellant would not be at risk as a returning Kurd who exited illegally. He submitted that the point the Judge is making is nothing to do with the fact that someone has been shot and killed for smuggling: at [24] he sets out the evidence. But the question is why was the Appellant's father not arrested as the registered keeper of the vehicle? And why was there no evidence of an arrest warrant and why had the Appellant not tried to find out, as the Judge found at [60]. The Appellant could have called someone else and it was not credible that the Appellant has not directly tried to find out what happened.

10. In respect of the background material, the Judge had to make findings on these issues and did so. The Appellant's credibility was in issue and the Judge

was entitled to find at [59] that it was not credible that the Iranian authorities would have waited for two days before coming to the family home.

11. In respect of the Refugee Convention reason, the Judge made the finding on credibility and did not find Article 3 was made out on the evidence, bearing in mind that if it is a prosecution case in Iran it arguably does reach the threshold because of prison conditions. So, he submitted, this issue stands or falls with the credibility findings and whether the authorities were aware that the Appellant was a porter/smuggler. The Judge has tried to deal with matters at their highest but has given reasons why he did not find the Appellant's account to be credible.

12. Mr Bates acknowledged that in some ways it is a very simple claim and the issue is whether the Appellant came to the attention of the authorities. The Judge picked on two key issues and it was open to him on the evidence to do this. The issue of whether or not there was alcohol was not known by the authorities at the time they fired at the vehicle and they did so because it did not stop. He submitted that the decision was adequately reasoned and the Judge was entitled to find the Appellant would not be known on return as a smuggler, but simply as a Kurd and he would not be at risk for this reason.

13. In reply, Mrs Johnrose submitted that there is an error in the submission that the authorities did not know the Appellant was a smuggler because he had a permit to import goods. Mr Bates accepted this. She also made reference to [10] and [11] of refusal letter where this is set out. Mrs Johnrose submitted that the Judge has not made a clear finding on this issue. Given the circumstances of the incident the Appellant was not able to collect the goods with Raza on that occasion and Raza picked the Appellant up on his way back. Raza must have taken the opportunity to collect the alcohol. Mrs Johnrose referred to Q52 of the AIR where the Appellant said he has only smuggled the goods he was entitled to and did not know whether alcohol had been smuggled previously.

14. Mrs Johnrose further submitted that there was no evidence the authorities would have acted more quickly nor how they operate nor how many incidents they were investigating nor that they act the same day as receiving information. She submitted that the vehicle was registered to the Appellant and not to his father and the Appellant did not drive it because he could not drive. She referred me to the Screening Interview at O5 4.1. where the Appellant stated that they told his father alcohol had been found in a vehicle registered to him and they wanted him.

15. With regard to the submission that the Appellant could have found out about the warrant and could have contacted other people, she submitted that there was no-one who he could be expected to contact. She submitted that there was no evidence of this or that he had contact numbers for anyone nor has this been disputed. Mrs Johnrose drew attention to the fact that in his

witness statement at [18] the Appellant said he threw his mobile away in a bush. He was given a SIM card by the agent but did not memorise his own number. His evidence is that the phones are tapped and it is a well known fact the Iranian authorities monitor phone lines and the Appellant has consistently maintained he is frightened. At B17-B18 it is recorded that the agent spoke to the Appellant's father and the Appellant did not speak to him directly. Given the seriousness of the consequences for the Appellant with regard either to Article 3 or the Refugee Convention, the Judge did not give good reasons based on cogent evidence to support the findings he has made and does not deal with the core issue.

16. I found a material error of law for the reasons set out in first two grounds of appeal and remitted the appeal for hearing *de novo* before the First tier Tribunal. I now give my reasons.

### *Findings*

17. It is clear from the refusal decision of 17 December 2017 that the Respondent substantially accepted the Appellant's account of being a Kurdish smuggler from the Sardasht region of Iran, including the fact that it was plausible that he was involved in smuggling alcohol across Iran although there was nothing to link him to this offence apart from ownership of the vehicle [9]-[15]. The Respondent's position, however, at [28] of the refusal decision is it was not accepted that the Appellant's smuggling partner (Raza) was killed by the authorities, nor that the authorities apprehended his vehicle carrying a quantity of alcohol nor that the authorities raided his home looking for him.

18. The Respondent did not accept the claim that the authorities chose to raid his home two days after the vehicle had been captured on the basis that it was inconsistent with the COIS report on Iran dated September 2013 at 9.04. [16] and that: "*the behaviour of the Iranian authorities is deciding to raid your home after you fled some days after the vehicle was apprehended is considered inconsistent with external evidence on the modus operandi of those same authorities in apprehending those they target in Iran. Given the ruthless efficiency of the Iranian authorities in apprehending dissidents at home and abroad as per above, your claimed account is inconsistent.*" [17].

19. I find that the Judge materially erred in his assessment of the case at [17] as being "*whether the appellant smuggled alcohol or other prohibited goods*" which is an incomplete assessment of the core issue which was rather that set out by the Respondent at [28] of the refusal decision. Whilst at [61] the Judge rejected the Appellant's claim in these respects, I find that he failed to provide clear and adequate reasons for so doing in respect of the first two issues and that that the Judge failed to engage sufficiently with these key aspects of the claim in his finding that: "*Accordingly, whilst aspects of his claim are plausible I am not satisfied that the account he has provided is credible. I do not accept the appellant is*

*wanted for smuggling alcohol or that R was killed by the authorities. I do not accept his evidence on this evidence. The fact the respondent accepted aspects of his claim as plausible has to be read alongside those aspects rejected as lacking credibility."*

20. I further find that the Judge erred in adopting the position set out by the Respondent at [17] of the refusal decision, given that the COIS report relied upon has no bearing on the treatment of smugglers by the Iranian authorities but rather is concerned with the treatment of those opposed to the regime eg political dissidents. The Respondent considers the position of smugglers and refers to the CIG July 2016 at 5.2.12, which provides that "*Iranian soldiers and border guards deliberately shoot to kill*" smugglers "*across border areas.*" I find that those the Appellant claims to fear are likely to be the soldiers and border guards rather than the intelligence services and thus the Respondent failed to provide any meaningful evidential basis for asserting at [17] of the refusal decision that it was not credible that the authorities would have waited for two days before raiding the Appellant's family home. Consequently I find that the Judge erred at [59] in upholding this issue in the Respondent's favour, on the presumed basis that the local authorities would have checked for the registered owner of the vehicle and sought to arrest the Appellant straightaway, absent any evidential basis for so finding.

21. I find that the Judge further erred at [60] in respect of the second of the two findings provided as reasons for rejecting the credibility of the claim *viz* that the Appellant did not know whether or not an arrest warrant had been issued, because the Judge did not believe he had had no contact with his father or anyone else in Iran. Whilst on the face of it this was a finding open to the Judge on the evidence, my concern is that the absence of an arrest warrant was a new issue not raised in the refusal decision but appears to have been raised for the first time in the Respondent's submissions, recorded at [31] of the decision and reasons and there is no indication that the matter was put to the Appellant in cross-examination. Thus it was procedurally unfair to take the point against the Appellant.

22. Whilst it is not, strictly speaking, necessary to decide the point, I further find in light of the judgment in Fornah [2006] UKHL 46 at [66] that the Appellant's case may fall for consideration under the Refugee Convention on the basis that he is a member of a particular social group *viz* smugglers in the context of the Kurdish region of Iran.

#### *Decision*

23. For the reasons set out above, I find material errors of law in the decision of First tier Tribunal Judge Alis. I set that decision aside and remit the appeal for a hearing *de novo* before the First tier Tribunal.

*Rebecca Chapman*

Deputy Upper Tribunal Judge Chapman

16 July 2018