IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002062
First-tier Tribunal Nos:
PA/51206/2023
LP/01335/2024

Extempore decision

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 25 July 2024

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

HC (Iran)
(ANONYMITY ORDER IN FORCE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms F Faran, Counsel, instructed by Middlesex Law Chambers
For the Respondent: Ms S McKenzie, Senior Home Office Presenting Officer

Heard at Field House on 3 July 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. By a decision dated 29 March 2024 First-tier Tribunal Judge Sangha ("the judge") dismissed an appeal brought by the appellant, a citizen of Iran, against a decision of the Secretary of State dated 15 February 2023 to refuse his asylum and human rights claim. The judge heard the appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002.

2. The appellant now appeals against the decision of the judge with the limited permission of First-tier Tribunal Judge Boyes.

3. The judge made an order for anonymity. I maintain that order in light of the appellant's protection claim, which remains pending.

Factual background

4. Following his arrival in the UK, appellant's date of birth was assessed by a local authority to be 25 April 2005. That date of birth is the date of birth which was adopted by the Secretary of State in the course of deciding the asylum claim made by the appellant and which is a significant feature in these proceedings to which I shall return.

5. The appellant arrived in the United Kingdom on 31 May 2022. On his assessed date of birth, he would have been 17 at the time. He claimed asylum the next day, on 1 June 2022. The basis of the claim was that the appellant was a Kurdish *kolbar*, or smuggler, working on the Iran-Iraq border. He claimed that he had been the target of the authorities' attention on account of his illicit activities, and that he would be persecuted through disproportionate punishment and inhuman treatment upon his return, as a result of his Kurdish ethnicity.

6. The claim was refused by a decision dated 15 February 2023. The Secretary of State accepted the appellant's claim to be a Kurdish citizen of Iran, but did not accept the *kolbar* part of his narrative. She did not accept that he been intercepted by the authorities, along with a number of others, nor that he faced the risk of being punished and subject to reprisals on account of his Kurdish ethnicity, as he had claimed.

7. The Secretary of State considered that the objective evidence suggested that the enforcement of anti-smuggling laws was not a priority for the Iranian authorities. Smugglers were generally officially tolerated, the decision contended, since so many members of the Iranian population relied on smuggled goods to evade the sanctions to which Iran is subject. Smuggling was in the interests of the Iranian elite. Only 370 kolbars had been killed during Iranian border police law enforcement activities over the preceding year, against an estimated total of 170,000 kolbars operating in the region. The appellant would not be at risk.

8. The Secretary of State also concluded that the appellant's claim was internally inconsistent in a number of material respects. This related, in particular, to the

number of individuals with whom he claimed to have been arrested and related details.

9. Part of the appellant's claim had been that he had lost contact with his family. The Secretary of State also rejected that aspect of the claim. The decision referred to *HB (Kurds) Iran CG* [2018] UKUT 430. In summary, the country guidance given in *HB (Kurds)* was that, while Kurdish people in Iran face discrimination, that did not amount to mistreatment constituting persecution for the purposes of the Refugee Convention. That being so, the appellant's general status as a Kurdish returnee would not place him at risk of being persecuted. The Secretary of State also concluded that the appellant would not face an Article 3 risk and the criteria for humanitarian protection were not met. Any Article 8 claim that the appellant may have advanced was also refused.

10. For present purposes, it is important to note that, in the course of refusing the appellant's asylum claim, the Secretary of State addressed whether section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 ("the 2004 Act") was engaged. The decision concluded that it was not, because the appellant was a minor when he passed through safe European countries *en route* to the United Kingdom. That is a point to which I shall return.

The proceedings before the First-tier Tribunal

11. The appellant appealed to the First-tier Tribunal. The appeal was heard by the judge on 26 March 2024, and later dismissed.

12. In the section of his decision entitled "*Findings*", at para. 10, the judge set out the Secretary of State's position as adopted by the refusal letter. The judge analysed what he considered to be a significant number of inconsistencies in the appellant's account. The inconsistencies related to the number of people who were arrested with the appellant, whether he had been shot, and whether the appellant and his accomplices had managed to escape. On account of those inconsistencies, the judge considered that the appellant's claim lacked credibility. The appellant had also claimed not to be in touch with his family. The judge found that claim to lack credibility, on account of the fact that during his age assessment interview, the appellant had informed the assessing social workers that he had been contacted by his brother while passing through Rome in Italy by text message. Accordingly, it could not be the case that the appellant was no longer in contact with his family. The judge found that he must have had some contact.

13. Against that background the judge found that the appellant did not face a real risk of serious harm on account of his claimed experiences as a kolbar. He also found that the claim, even taken at its highest, would not engage under the Refugee Convention. The appellant could not succeed under Article 8 of the European Convention on Human Rights. The judge dismissed the appeal.

Issues on appeal to the Upper Tribunal

14. Pursuant to the limited grant of permission to appeal by Judge I D Boyes, the appellant holds permission to appeal only in relation to ground 1. Judge I D Boyes refused permission to appeal on grounds 2 to 5. There has been no renewal application in relation to those grounds, and Ms Faran confirmed she did

not seek to renew the application at the hearing. Accordingly, there is only a single ground of appeal.

15. On a fair reading of the sole ground of appeal there are three issues.

16. First, the judge failed to address the generic risk faced by the appellant as a returning Sunni Kurd who had exited the country illegally. Ms Faran submitted that that was an issue which had been raised by the appellant in the course of his witness statement. It was not clear, Ms Faran accepted, whether the First-tier Tribunal had expressly been invited to consider that facet of the appellant's case, but it was incumbent upon the judge in her submission to have done so in any event, not least because the appellant's own witness statement expressly raised that as an issue. Ms Faran submitted that *HB (Kurds),* when read with *HJ (Iran)* [2010] UKSC 31, militated in favour of the conclusion that the appellant would be at risk on account of his status as a returning failed asylum seeker of Sunni religious faith and Kurdish ethnicity having left the country illegally, and he could not lawfully be expected to suppress that part of his identity and past. In her submission, the judge's failure to address that point expressly meant that the decision involved an error of law.

17. Secondly, the judge failed to take account of the appellant's age at the relevant times. When he claimed asylum he was still a child, namely aged 17. More significantly he began his work as a kolbar when aged only 16. In Ms Faran's submission, the appellant's age was a highly relevant factor which should have been taken into account in the course of the judge's analysis of the appellant's credibility. By failing expressly to do so, the judge made an error of law.

18. Thirdly, aspects of the judge's findings of fact were insufficiently reasoned and wrong. It was nothing to the point that the appellant said his brother contacted him by text message when he was in Italy. The message could have been sent to someone travelling with the appellant who *was* in touch with his brother.

19. For the Secretary of State Ms McKenzie relied on a rule 24 notice dated 19 June 2024. That document focused on the issues identified in the grant of permission to appeal, in particular the issue of whether it was an error of law for the judge not to deal expressly with the appellant's claimed risk of return arising from his status as a Kurdish Sunni Muslim sharing the characteristics outlined above. Ms McKenzie submitted that the judge addressed the findings he needed to take into account. It was not for the judge to dig out obscure references buried deep within the appellant's witness statement; it was incumbent on the appellant expressly to rely on all factors in his favour. It was inappropriate that he now sought to raise such issues for the first time expressly in this Tribunal. Ms McKenzie relied on the Presidential authority recently reported in this Tribunal of *Lata (FtT: principal controversial issues)* [2023] UKUT 163 (IAC). Pursuant to para. 4 of the judicial headnote to that authority the following guidance is given:

> "It is a misconception that it is sufficient for a party to be silent upon, or not make an express consideration as to, an issue for a burden to then be placed upon a judge to consider all potential issues that may favourably arise, even if not expressly relied upon. The reformed appeal procedures that now operate in the First-tier Tribunal have been established to ensure that a judge is not required to trawl though the

papers to identify what issues are to be addressed. The task of a judge is to deal with the issues that the parties have identified".

The law

20. The Joint Presidential Guidance Note No 2 of 2010 entitled Child, vulnerable adult and sensitive appellant guidance contains the following guidance at paragraphs 13 to 15:

> "13. The weight to be placed upon factors of vulnerability may differ depending on the matter under appeal, the burden and standard of proof and whether the individual is a witness or an appellant.
>
> 14. Consider the evidence, allowing for possible different degrees of understanding by witnesses and appellant compared to those who are not vulnerable, in the context of evidence from others associated with the appellant and the background evidence before you. Where there were clear discrepancies in the oral evidence, consider the extent to which the age, vulnerability or sensitivity of the witness was an element of that discrepancy or lack of clarity.
>
> 15. The decision should record whether the Tribunal has concluded the appellant (or a witness) is a child, vulnerable or sensitive, the effect the Tribunal considered the identified vulnerability had in assessing the evidence before it and thus whether the Tribunal was satisfied whether the appellant had established his or her case to the relevant standard of proof. In asylum appeals, weight should be given to objective indications of risk rather than necessarily to a state of mind".

21. The former Senior President of Tribunals gave additional guidance in relation to the application of the Joint Presidential Guidance Note. In *AM (Afghanistan) v Secretary of State for the Home Department* [2017] EWCA Civ 1123 the then Senior President said this:

> "The joint Presidential Guidance Note No 2 of 2010 was issued by the then President of UTIAC, Blake J and the acting President of the FtT (IAC), Judge Arfon-Jones. The directions and guidance contained in them are to be followed and for the convenience of practitioners, they are annexed to this judgment. Failure to follow them will most likely be a material error of law".

22. I remind myself that the First-tier Tribunal is a specialist Tribunal. In performing its role it has a degree of expertise which not only reflects the pre-eminent position that a trial judge will be in in order to assess or perform multifactorial assessments of the sort involved in these proceedings but, in addition the expertise of this specialist Tribunal means that it probably got its analysis right.

Discussion

23. I commence my analysis with paragraph 351 of the Immigration Rules. Para. 351 deals with the approach that should be taken by the Secretary of State to

asylum claims made by children. In my judgment, those principles apply equally in relation to assessing the narrative of an asylum claim given by a person in relation to a time when the person was a child:

> "Account should be taken of the applicant's maturity and in assessing the protection claim of a child more weight should be given to objective indications of risk than to the child's state of mind and understanding of their situation".

In my judgment, notwithstanding the considerable deference which this Tribunal extends to the First-tier Tribunal in general, and this experienced judge in particular, it was nevertheless incumbent upon the judge expressly to address the extent to which the appellant's age, and therefore his vulnerability, was a relevant factor in the course of reaching the credibility analysis I outlined above. The appellant's maturity at those times, combined with any additional vulnerability arising from the trauma he may well have experienced on account of his journey to the United Kingdom, were matters which have expressly to be addressed even notwithstanding the judge's extensive credibility concerns. It is precisely because the judge expressed his findings primarily by reference to the appellant's personal credibility arising from the inconsistencies in his account that the appeal was dismissed.

24. I find that it was an error of law to fail expressly to follow or apply the Joint Presidential Guidance Note No 2 of 2010, or the spirit embodied by it, when assessing this appellant's credibility. It may well be, of course, that the judge did take that into account. However, if that is so, the judge did not say so and it is not possible for this Tribunal first to have confidence that the judge did indeed adopt that approach. Secondly, the judge *did* adopt that approach, is not clear as to whether the judge ascribed any weight to the appellant's age at the relevant times in the course of conducting his credibility analysis. I readily accept that the appellant's age was at the more mature end of the spectrum; he was at the very youngest stage in his claimed life as a kolbar in Iran only three weeks short of his 17th birthday. By the time the appeal was heard before the judge he had reached the age of majority based on his assessed age. The question is finely balanced.

25. I have considered whether to assume that the approach taken by the judge incorporated assessment of this issue in any event. In my judgment, it would be speculative to adopt that approach. It was incumbent upon the judge both expressly to direct himself concerning the impact of the appellant's age at the material times on the assessment of his credibility, and to explain how, if at all, such factors were assessed in the course of the analysis of the appellant's evidence, in particular the analysis which may be found at para. 11 of the judge's decision and following.

26. In my judgment, the judge failed to explain the extent to which, if at all, the appellant's age affected the analysis of his inconsistencies. I note that the Secretary of State herself took the appellant's age into account at para. 26 of the decision when declining to invoke section 8 of the 2004 Act. However that did not obviate the need for this judge to conduct his own assessment of that issue. In my judgment, therefore, this appeal must be allowed on the basis of that aspect of ground 1. As the then Senior President of Tribunals, Sir Ernest Ryder, said in *AM (Afghanistan)*, a failure to follow the guidance will be an error of law.

27. In light of those findings I do not need to consider the remaining issues identified above for resolution in these proceedings. The judge's analysis that the appellant did not face a risk on return was premised on the footing that the appellant had not been a kolbar, and had not been involved in any form of smuggling. I set aside the judge's credibility analysis of that issue and direct that no findings of fact should be preserved.

28. The only course open to this Tribunal in those circumstances, bearing in mind paragraph 7.2 of the Practice Statement, is to remit the appeal to the First-tier Tribunal to be heard afresh by a different judge with no findings of fact preserved.

29. I reach that conclusion mindful of the submissions of the Secretary of State through Ms McKenzie that this matter would be suitable for retention in the Upper Tribunal. In my judgment that is not so. The extent of the findings of fact required are such that it is necessary for the First-tier Tribunal to conduct its own assessment of the appellant's credibility while taking sufficient account of his age-based vulnerability.

30. I stress in conclusion that nothing in this judgment should be taken as meaning that inconsistencies in an account such as those in the different accounts given by this appellant on different occasions means that an error of law would always be made out (or that the appellant's age necessarily renders the inconsistencies in his account to be irrelevant). However, bearing in mind the nature of the issues at stake in these proceedings, in my judgment it is appropriate for a full factual assessment to be conducted afresh, by a different judge.

31. I therefore remit this matter to the First-tier Tribunal to be heard by a judge other than Judge Sangha.

Notice of decision

The appeal is allowed. The decision of the First-tier Tribunal involved the making of an error of law and is set aside with no findings of fact preserved.

I remit the appeal to the First-tier Tribunal to be heard by a different judge.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Transcript approved 22 July 2024