



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/01520/2018

THE IMMIGRATION ACTS

Heard at Manchester CJC
On 5 September 2018

Decision & Reasons Promulgated
On 20 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MR B A R
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Holmes, counsel instructed by Greater Manchester
Immigration Aid Unit
For the Respondent: Mr Tan, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Iran born on 7 May 1994. He arrived in the UK on 23 September 2017 and claimed asylum. This application was refused in a decision dated

16 January 2018. The basis of his claim is that he was a Kurdish national who was a supporter of the KDPI, that he had come to the adverse attention of the authorities and had left Iran illegally as a result of which he will be at risk on return.

2. The appeal came before First tier Tribunal Judge Shergill for hearing on 1 March 2018, when the Appellant was unrepresented. A key issue was that his date of birth was disputed, the Appellant claiming to have been born on 29 July 2000 and the Respondent asserting that he was born on 7 May 1994. In respect of that issue, whilst there was no formal age assessment carried out by the local authority before the Judge, the Judge proceeded to find that the Appellant was an adult and then proceeded to determine his appeal on that basis, finding that the Appellant's evidence was not credible and dismissing the appeal in a decision and reasons promulgated on 14 March 2018,
3. Permission to appeal was sought in time on the basis that First-tier Tribunal Judge Shergill had erred materially in law in six respects relating to the issue of the Appellant's age. Firstly, that he speculated as to whether or not there was an age assessment. Secondly, that the judge proceeded under a mistake of fact, i.e. that the Appellant's age had been determined by way of a Merton compliant age assessment. Thirdly, that that finding was simply not open to him on the evidence. Fourthly, in failing to recognise that the question of age is a matter of precedent fact to be decided objectively, see AA [2016] EWHC 1453 (Admin). Fifthly, in failing to give adequate reasons for rejecting the Appellant's evidence at [19] that he was involved with social services in respect of which appended to the grounds were documents relating to a referral to Lancashire Social Services and pre-action correspondence from the Appellant's community care solicitors. Sixthly, in making unfair findings or perverse findings in respect of [22] in relation to the age gap between the Appellant and his older siblings, if indeed he were 17 rather than 23; further in finding that the challenge to the Appellant's age had been procedurally abandoned and at [36] in finding that the Appellant's ability to express sophisticated ideas in his own language which had been translated into English did not sit well with the claim that the Appellant was illiterate.
4. Permission to appeal was granted by First-tier Tribunal Judge Mailer in a decision dated 16 April 2018 in the following terms:

"The grounds assert that the judge speculated and ultimately inferred that a Merton assessment was carried out. This was impermissible speculation. He thus proceeded under a mistake of fact. It also appears to be asserted at paragraph 13 that no age assessment in fact exists. It is arguable as contended in the grounds that the assumption that such an assessment had taken place formed the basis of his rejection of the Appellant's evidence. Accordingly if no such assessment was undertaken the judge's subsequent findings may be flawed."
5. The Respondent lodged a Rule 24 response dated 14 June 2018 opposing the appeal, however acknowledging that the drafter of the Rule 24 was without sight of the Home Office file and was unable to confirm whether or not a Merton compliant age assessment had been completed but asserting that in any event it was still incumbent

upon the judge to resolve the issue of the Appellant's age. It was asserted that the judge had directed himself appropriately and that the burden was upon the Appellant to establish that he was a minor.

Hearing

6. At the hearing before the Upper Tribunal, Mr Holmes on behalf of the Appellant expanded on the grounds of appeal, stating that it was axiomatic that cases are to be decided upon the evidence rather than on the basis of speculation, conjecture or innuendo. He informed the Upper Tribunal that an age assessment had been served albeit had not been received on the Upper Tribunal file. He submitted that at [4] the judge had erred in stating as follows:

"There was an apparent dispute as between his claimed date of birth of 29 July 2000 and that asserted by the Respondent of 7 May 1994. I have inferred that there was an age assessment carried out by the local authority which related to the earlier date of birth being assigned (see further below)."

He submitted that there was no evidential basis for the judge's finding and it was thus impermissible.

7. The evidence before the judge was a document at D1 of the Respondent's bundle which is a letter from Chief Immigration Officer at Dover to the Appellant dated 23 September 2017. It contains a pro forma stating:

"You have applied for asylum in the United Kingdom. You have claimed that your date of birth is 7 May 2000. However you have failed to produce any satisfactory evidence to substantiate this claim. Furthermore (and a box is crossed) your physical appearance/demeanour very strongly suggests that you are significantly over 18 years of age. In the absence of any credible documentary evidence to the contrary the Secretary of State does not accept that you are a child and from this point therefore you will be treated as an adult applicant for asylum ... The Home Office's determination of your age does not prevent you from approaching your local authority's children's services department with a view to them undertaking their own assessment of your age."

8. Mr Holmes submitted that it was clear in light of the Home Office policy guidance that in fact there was no Merton compliant age assessment but in light of the policy entitled assessing age dated 23 February 2018 at page 10:

"A decision should only be made to treat the claimant as an adult if either (a) a local authority Merton compliant age assessment has been completed by a local authority finding the claimant to be 18 or over which the Home Office has agreed with after (b) two Home Office members of staff have independently assessed that the claimant is an adult because their physical appearance and demeanour very strongly suggests that they are significantly over 18 years of age."

Mr Holmes pointed out that there are two options and the Respondent had in fact decided to treat the Appellant as an adult on the basis of the latter option which was clear from the refusal decision. He submitted there had never been any suggestion

that a lawful age assessment had been carried out and in any event no such age assessment was before the judge at the hearing. However D1 was the basis upon which the judge's age assessment had been made.

9. The judge addressed the issue of the age assessment issues at [15] through to [26]. Mr Holmes took issue with a number of points therein. At [15] the Judge found that the Appellant did not positively assert that his date of birth was 29 July 2000 but it has to be borne in mind that he was illiterate and in effect it is what he claims he was told by his mother. Mr Holmes submitted that no-one knows their date of birth and invariably would rely on what they have been told by a family member. In respect of [16] the judge noted the Respondent's assertion at D1 and held:

"It was unclear on what basis this assessment was made but as I understand it the usual approach is that if a person is encountered by the immigration authorities and claims to be a child he is usually assessed by the local social services very early on in the process ... Although conversely the content of the letter at D1 may imply this could not happen."

Mr Holmes submitted this should have struck a warning bell with the judge in that it was unclear on what basis the assessment had been made. At [17] the judge noted:

"I have not been provided with a copy of any age assessment or any further evidence as to how the Appellant was assessed but in light of what is known of the usual process and the legal safeguards that are in place in terms of how assessments are undertaken and the fact that the Appellant was represented up until very recently I decided that it would have been highly implausible that a Merton compliant age assessment has not been carried out at some stage."

10. Mr Holmes submitted that the Presenting Officer should have clarified that either he did not know if an age assessment had been carried out or that it had not been carried out. He submitted that these findings are clearly impermissible as it was based on speculation and was also factually wrong.
11. At [19] the judge states as follows:

"The Appellant stated that social services had been to see him and that they would assess his age. He stated that this was a couple of months ago but in my assessment that cannot be right. It must have been closer to the time that he arrived in the UK because he now lives in Preston which is a significant distance outside the catchment area for Manchester City Council Social Services. I am therefore not satisfied to the lower standard that there has been any recent further age assessment or that there is any social services involvement with the Appellant."

Mr Holmes submitted that this finding was flawed in that the judge dismisses the Appellant's evidence solely on the basis of his own speculation. He further took issue with the judge's reference to the phrase that a challenge to the Appellant's age had been "*procedurally abandoned*" as that has no basis in law and was also factually incorrect.

12. At [22] the judge found that it made more sense that the Appellant was 23 years old rather than 17 years old, given the ages of his older siblings who were in their 20s and 30s. Mr Holmes submitted that the judge was essentially imposing his view of sensible family planning which was again impermissible because it was speculative. He submitted that subsequent events have shown that the judge was wrong but what the Appellant had told the judge at the hearing was correct, he had been referred to social services earlier in the year and an age assessment had been carried out which accords with the date of birth put forward by the Appellant at the hearing.
13. Mr Holmes submitted in terms of materiality that it was clear from [26] that the judge's treatment of this aspect of the claim is clearly material. The judge held as follows:

"Having decided that the Appellant is an adult with a date of birth in 1994 clearly all of the events claimed to have happened to him had occurred since he was aged 18. In those circumstances there are no grounds to give due allowance to his evidence because he was an adult during the entire relevant period of time relied upon in his evidence."

Mr Holmes submitted consequently the Appellant had not had a fair hearing in terms of the judge's assessment of his credibility and his account of the reasons why he had fled Iran and claimed asylum in the UK. He further sought to rely on the judge's finding at [39] which again he submitted was impermissible, that the Appellant's aspiration to become a doctor or teacher was inconsistent with him being illiterate.

14. In his submissions Mr Tan relied on the Rule 24 response dated 14 June 2018 and the fact that the judge has the onus of deciding the age assessment point. He submitted there was an absence of evidence to support the Appellant's assertion that he was born on 29 July 2000. In respect of the documentation before the judge D1 contains the Immigration Officer's conclusion that the Appellant is over the age of 18. He submitted that there was not really anything put forward in rebuttal by the Appellant or his former representative and there was not much more the judge could be expected to do. He submitted that all the information in relation to social services is post-hearing and the judge cannot be faulted in relation to that. Whilst he acknowledged that the judge's observations at [15] to [17] were speculative and observations, he submitted at no point does the judge state that there must have been a Merton compliant age assessment. Mr Tan submitted that the judge went on to consider various factors as part of that assessment and in the absence of anything to bolster the Appellant's case in relation to his age it was open to the judge to come to the conclusion that he did. He submitted that even taking the Appellant's account of his age, the events he described were in 2016 at which stage he would have been 16 and so not a young child. Mr Tan submitted the judge had made detailed findings as to the Appellant's credibility which were not specifically challenged in the grounds of appeal.
15. In reply, Mr Holmes submitted that he was very surprised the appeal had been contested in the way it has. He submitted it was important to note that whilst the Appellant bears the burden of demonstrating his date of birth, in this particular the case the Respondent had asserted a positive alternative date of birth and in those

circumstances the burden was on the Respondent to prove his assertion i.e. that the Appellant is six years older than he claimed to be. He reminded the Upper Tribunal that the issue of age is a precedent fact and cannot fairly be determined simply on the basis of what is contained in the letter at D1. Mr Holmes refuted the assertion that all the evidence of age was post-hearing given that the Appellant clearly told the judge that he had been in contact with social services yet the judge records in his conclusions that he had no evidence of this.

Findings

16. I find a material error of law in the decision of First-tier Tribunal Judge Shergill in his approach to the issue of the Appellant's age. I find for the reasons set out in the grounds of appeal, in particular that the judge's findings, which are extensive at [15] through to [26] are largely based on speculation and the judge's perception of what or would not be plausible. The judge records at [19] that the Appellant stated that social services had been to see him and his age would be assessed yet the judge rejected that evidence without giving proper or adequate reasons for so doing, apart from his own assumption that a Merton compliant age assessment had already been carried out.
17. In light of the fact that the judge is dealing with a disputed minor who was unrepresented, more in my opinion was required in order for the Appellant to have a fair hearing.
18. I set the decision of the First-tier Tribunal Judge aside and remit the appeal for a hearing *de novo* before the First-tier Tribunal.

DIRECTIONS

- (1) The appeal should be listed for three hours.
- (2) A Kurdish Sorani interpreter will be required.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed *Rebecca Chapman*

Date 18 September 2018

Deputy Upper Tribunal Judge Chapman