Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10058/2016

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 23rd February 2018	**On 9th March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

MFA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Draycott of Counsel instructed by Brodie Jackson Canter Solicitors
For the Respondent: Mrs R Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge Morris (the judge) of the First-tier Tribunal (the FTT) promulgated on 10th April 2017.

2. The Appellant is an Iranian citizen born in May 1990. He entered the UK illegally on 21st March 2016 and claimed asylum. He claimed that he

would be at risk because of illegal smuggling activities that he had carried out in Iran, he is Kurdish, and had left Iran illegally.

3. The Respondent refused the application on 8th September 2016 and the Appellant appealed to the FTT.

4. The judge heard evidence from the Appellant and did not accept that he had given a credible account. The judge found that the Appellant had not been engaged in smuggling. It was not accepted that the Appellant would be at risk if returned to Iran simply because he had exited illegally, which the judge accepted, and because he was a failed asylum seeker. The judge did not accept that the Appellant would be at risk simply because of his Kurdish ethnicity, and did not accept the claim put at the hearing, that the Appellant would be at risk of imprisonment as a draft evader. The appeal was dismissed on all grounds.

5. The Appellant applied for permission to appeal to the Upper Tribunal. Initially permission to appeal was refused by Judge Pullig, but a renewed application was subsequently granted by Upper Tribunal Judge McWilliam in the following terms;

> "The core of the Appellant's account, as identified by the judge, related to events in Iran when he was aged 15 (eleven years prior to the hearing).
>
> The Appellant is uneducated. The judge found that the evidence was inconsistent in a number of respects. The judge at [32] considered the submissions made by Counsel in respect of the Appellant's age, but the judge concluded that although a 15 year old may be excused for having forgotten certain events he was not satisfied that the discrepancies could be explained in this way. The judge took into account that the evidence (AIR, witness statement and that at the hearing) was given when the Appellant was aged 26 and he expected internal consistency from an adult. It is arguable that the age of the Appellant at the time of the events could impinge on his ability to accurately and consistently recall events that occurred when he was a child and that, at least to a degree, the guidance given by the Court of Appeal in **AM [2017] EWCA Civ 1123** should apply when an adult is recounting events that occurred when he was a child."

6. Following the grant of permission the Respondent lodged a response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) rules 2008. In summary it was contended that the judge had directed himself appropriately and not erred in law. It was contended that the Grounds of Appeal merely disagree with the judge's assessment of the evidence, and the judge gave full and cogent reasons for dismissing the appeal. It was contended that it was a striking feature of the evidence that the Appellant had evaded answering a simple direct question, and the clear import is that the Appellant had learned a fabricated script from which he was unable to deviate.

7. Directions were issued that there should be a hearing before the Upper Tribunal to ascertain whether the judge had erred in law such that the decision should be set aside.

Submissions

8. Mr Draycott relied upon the grounds, A to E, contained within the application for permission to appeal and expanded upon them in oral submissions. The submissions are summarised below.

9. Ground A contends that the judge erred in failing to apply the burden of proof in a flexible fashion due to the young age at which the Appellant left Iran. It was submitted that the judge should have applied the benefit of the doubt to a vulnerable Appellant and reliance was placed upon the Joint Presidential Guidance Note No.2 of 2010 which relates to a child, vulnerable adult and sensitive Appellants. It was submitted that the judge had failed, in making adverse credibility findings, to take into account the guidance that applied to assessing evidence given by children. It was accepted that the Appellant was not a child when giving evidence before the judge, but he was 15 years of age when involved in smuggling in Iran and the judge should have taken that into account.

10. Ground B criticises adverse credibility findings made by the judge at paragraph 31 of the decision. In particular it is submitted that the judge acted procedurally unfairly in relying upon answers given by the Appellant in his asylum interview dated 25th August 2016, when the following points were not raised with the Appellant in the course of his evidence before the FTT and therefore he did not have an opportunity to comment upon them.

11. Specific reference is made to the finding at paragraph 31(vii) of the FTT decision in which the judge notes an inconsistency between the answers given by the Appellant in his asylum interview (questions 101-104) and his witness statement. In his witness statement he claimed to have returned to a village in Iraq and stayed with Hama Saleh whereas in his interview there is no mention of Hama Saleh at all.

12. Also at paragraph 31(viii) the judge noted an inconsistency in that the Appellant stated in his witness statement and at the hearing that his family had sent him a letter telling him not to return home, whereas in his interview he stated that it was verbal message.

13. It was further contended that the judge had erred at paragraph 31(i) and (ii) by attaching adverse weight to the Appellant's witness statement dated 2nd February 2017 in which the Appellant had explained that he had known his fellow smuggler for a few months before his father left the family, when it was contended that the word "before" is plainly a typographical error.

14. It was further contended the judge had materially erred in law at paragraph 31(vi) by drawing an adverse inference in relation to the

Appellant's claim that following an ambush he was able to turn around and retrace his steps to Iraq in the dark, along tracks made by animals. It was contended that this had failed to engage with the Appellant's description of the relevant road in his asylum interview at questions 77-80 as a "hilly mountain area road and a footpath which would have been used for herding animals."

15. Ground C contends that the judge materially erred by relying upon section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, as this had not been raised in the Respondent's refusal decision, nor was it raised at the hearing.

16. Ground D submits that the judge erred when finding that the Appellant would not be at risk by reason of draft evasion. The objective evidence before the judge indicated that an individual who had been a draft evader for more than one year, and the Appellant had evaded conscription for approximately eight years, may face criminal prosecution. Prison conditions in Iran breached Article 3, and therefore the judge had erred in not finding that the Appellant would be at risk on that basis.

17. Ground E contends that the judge erred in relying upon the Appellant's demeanour and finding him to be an unreliable witness on the grounds of his demeanour. This referred to a finding by the judge that on numerous occasions the Appellant failed to answer fairly simple direct questions.

18. Mr Draycott submitted that the errors in the FTT decision meant that the decision should be set aside with no findings preserved, and remitted to the FTT to be heard again.

19. I then heard oral submissions from Mrs Pettersen. She relied upon the rule 24 response.

20. With reference to ground A it was submitted that there was no reference before the FTT that the Joint Presidential Guidance Note should be applied. There was no indication of any unfairness at the hearing. It was submitted that judge had not erred in law.

21. With reference to ground B it was submitted that the judge had not erred in considering the evidence and had made findings upon that evidence which were open to him to make and had given sustainable reasons for those findings.

22. With reference to ground C Mrs Pettersen submitted that the judge was entitled to make a finding on Section 8 of the 2004 Act.

23. With reference to ground D it was submitted that the judge had not erred in considering draft evasion, and again it was submitted that he had made findings open to him on the evidence and provided adequate reasons.

24. With reference to ground E Mrs Pettersen submitted that the judge had not made a finding based upon the Appellant's demeanour, but had made a

finding based upon his refusal to answer simple questions. It was submitted that the decision of the FTT should stand.

25. In response Mr Draycott pointed out that in his skeleton argument at paragraph 23, which was before the FTT, reference had been made to the fact that the events which caused the Appellant to claim asylum, had occurred when he was 15 years of age and a child. In relation to draft evasion, it was submitted that the judge had erred by not considering that the Appellant may be imprisoned which would breach Article 3.

26. At the conclusion of oral submissions I reserve my decision.

My Conclusions and Reasons

27. I consider firstly ground A. Mrs Pettersen is correct in pointing out that there was no specific reference on behalf of the Appellant to the Joint Presidential Guidance Note No.2 in the proceedings before the FTT, but it is clear from the skeleton argument submitted on behalf of the Appellant, that reliance was placed upon the fact that that the Appellant was a child when he claimed to have been taking part in smuggling activities in Iran, and the Appellant's case was that this should be taken into account when assessing credibility. The judge was clearly aware of this, and records in paragraph 32 the submission made by the Appellant's representative, that the benefit of the doubt must be liberally applied to someone who is a minor at the time of events giving rise to the claim. The judge noted that reliance was placed upon paragraph 351 of the Immigration Rules, and the Respondent's Asylum Policy Guidance which relates to children.

28. The judge commented at paragraph 32;

> "I accept that to an extent in that a 15 year old might be excused for having forgotten certain events or specifics of what occurred in events that he does remember. I am not satisfied, however, that certain of the above discrepancies can be explained on that basis:"

29. The judge considered the Appellant's account with considerable care and in my view gave adequate reasons for not finding that the discrepancies could be explained by the Appellant's age. The judge was entitled to note that the inconsistencies were internal, and resulted from accounts given by the Appellant at his asylum interview in August 2016, his witness statement in February 2017, and the hearing in March 2017. Those accounts had been given by the Appellant when he was an adult, and his witness statement was prepared by legal representatives, and he was legally represented at the hearing. The judge was entitled to find that the separate accounts given by the Appellant as an adult, contained relevant inconsistencies, which could not be explained by the fact that he was recounting events that occurred when he was a child. That finding was open to the judge to make, and I do not find that the judge materially erred in law on this issue.

30. With reference to ground B the judge found at paragraph 31(vii) that the Appellant's evidence was inconsistent when his interview record was compared with his witness statement dated 2nd February 2017. That witness statement was prepared by the Appellant's legal representatives. The Appellant and his representatives had a copy of the interview record, and had an opportunity to address any parts of the record which were felt to be incorrect and had an opportunity to clarify or address any inconsistencies. The evidence in the witness statement as to where the Appellant stayed in a village in Iraq differs from the evidence that he provided in his asylum interview. It is therefore the Appellant and his legal representatives who have provided inconsistent accounts to be considered by the Tribunal. The representatives must have been aware that the accounts were different, and could have provided an explanation but failed to do so. If the judge had had the opportunity of considering all of the papers in the Appellant's file, and he would not have had as much opportunity as the representatives to prepare, it was open to him to ask why the Appellant had given an inconsistent account, but in my view his failure to do so on this point does not amount to a material error of law. This is not something that the Appellant should have been unaware of, as it was the Appellant who had provided the inconsistent accounts.

31. I make the same point with the finding by the judge at paragraph 31(viii) which relates to a discrepancy as to whether the Appellant's family had notified him by letter not to return home, or whether the message was sent verbally as contended in his asylum interview. This inconsistency has been caused by the Appellant giving different accounts. The Appellant and his representatives had an opportunity to consider the accounts provided, and provide clarification if they though appropriate. Again this is not something about which the Appellant should have been unaware.

32. With reference to the points made about findings made by the judge at paragraph 31(i), (ii) and (vi), I find no substance in these challenges. I find that these challenges are disagreements with findings made by the judge. On these points, the judge made findings which were open to him to make on the evidence, and provided sustainable reasons for those findings.

33. With reference to ground C, I find that the judge erred in placing reliance upon section 8 of the 2004 Act. This is because section 8 was not raised in the reasons for refusal letter, and not raised at the hearing. Therefore, in my view, it is unfair to reach an adverse conclusion, without giving the Appellant an opportunity to offer an explanation. This point had not been addressed by the Appellant because he had no idea it was being raised against him. I do not however find this finding to be a material error in relation to credibility. It does not infect the other findings made by the judge. The judge at paragraph 33 accepts that a finding under section 8 that the Appellant travelled through safe countries without claiming asylum is not determinative.

34. With reference to ground D, the judge considers draft evasion at paragraphs 48-49 of his decision. The Appellant relied upon the Home

Office Country Policy and Information Note on military service in Iran, and the judge considered this report, which is summarised at paragraph 48. There is reference in the report to prison conditions in Iran likely to breach the Article 3 threshold. There is also reference at 2.4.11 that longer draft evasion (more than one year in peace time) may result in criminal prosecution. At paragraph 2.4.12 it is stated that the penalties are provided in law and there is no evidence to suggest that these penalties are being disproportionately applied.

35. The judge specifically considers whether there is reason to believe that the Appellant would be imprisoned on return to Iran. The judge finds at paragraph 49 "the Appellant's representative did not point to any particular country guidance or other case law to support his submission that the Appellant having evaded military service, upon return, a prison sentence will be highly likely."

36. In my view that judge was entitled to reach the conclusion, based upon the evidence before him, that it had not been proved that the Appellant would face a real risk as a result of draft evasion.

37. Lastly I consider ground E and find no error of law disclosed. I do not accept that the judge made any finding based upon demeanour. The judge found at paragraph 30, as a general point, that on numerous occasions the Appellant failed to answer fairly simple direct questions, despite the questions being repeated. The judge recorded that the questions were fairly simple and direct and invited an equally simple and direct answer, which the Appellant often failed to provide. The judge was satisfied that there was no confusion or misunderstanding, and therefore was entitled to note the Appellant's failure to answer those questions.

38. In conclusion, I find that the judge considered all the relevant evidence, did not take into account immaterial matters, made findings open to him, and provided adequate and sustainable reasons for those findings, and correctly applied country guidance case law. The grounds demonstrate a strong disagreement with the conclusions reached by the judge, but in my view do not disclose a material error of law.

Notice of Decision

The making of the decision of the FTT did not involve the making of an error of law such that the decision must be set aside. I do not set aside the decision. The appeal is dismissed.

Anonymity

I have made anonymity direction because the Appellant has made a claim for international protection. Unless and until a Tribunal or court directs otherwise the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify the Appellant or any member of his 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. This direction is made pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) rules 2008.

Signed Date 3rd March 2018

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

The appeal is dismissed. There is no fee award.

Signed Date 3rd March 2018

Deputy Upper Tribunal Judge M A Hall