



**Upper Tribunal  
(Immigration and Asylum Chamber)**  
PA/05109/2018

Appeal Number:

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 17 December 2018**

**Decision &  
Promulgated  
On 30<sup>th</sup> January 2019**

**Reasons**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN**

**Between**

**MR D O  
(ANONYMITY ORDER MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Ms E Fitzsimons, counsel instructed by Duncan Lewis

For the Respondent: Ms K Pal, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a national of Iran and is a Sunni Kurd, born on 11.2.99. He arrived in the United Kingdom and claimed asylum on 2.3.16. This application was refused in a decision dated 4.4.18 and his appeal against this decision came before First tier Tribunal Fox

for hearing on 23.7.18. In a decision and reasons promulgated on 19.9.18, he dismissed the appeal.

2. An application for permission to appeal to the Upper Tribunal was made in time, on the basis that the Judge erred materially in law: (i) in his erroneous approach to expert evidence; (ii) in having regard to irrelevancies; (iii) in failing to have regard to relevancies and give reasons; (iv) in unlawfully relying on plausibility and making findings based on no evidence and (v) in having regard to irrelevancies.

3. Permission to appeal to the Upper Tribunal was granted by First tier Tribunal Robertson in a decision dated 31.10.18 on the basis that:

*“There is some arguable merit in ground 2, para 11 because it is not identified by the judge when the Appellant’s previous account was given. There is also some arguable merit in ground 3 because the Judge does not in fact give any reasons for rejecting the explanations offered by the Appellant for gaps in his knowledge; it may well be because although the Appellant was a minor, he was not a young child and therefore could have been expected to know more. However, no reasons were given by the Judge. There is also some arguable merit in the grounds at para 4 because the context of the arrest does not appear to have been considered.*

*However, there is little arguable merit in the other grounds ...However, as permission has been granted, all grounds are arguable.”*

#### *Hearing*

4. At the hearing before the Upper Tribunal, Ms Fitzsimons submitted in respect of Ground 2 of the grounds of appeal, that the Appellant is a former unaccompanied asylum seeking child, whose father was a Kurdish smuggler. At [50] the Judge found that the expert report did not engage with whether the investigation into smuggling was legitimate, but this is not the point, but rather if a person is investigated as a suspected smuggler, the issue is that they are perceived to be opposed to the regime, given that these are predominantly Kurdish separatists: AB 12 and AB 16 refers, which is the expert evidence from Dr Kakhki. The expert also deals with this as part of imputed political opinion. In finding at [54] that the Appellant’s account conflicts with a previous account, the Judge does not state where this previous account is from and this is erroneous when the Appellant has always given the same account: see asylum interview at Q’s 77-79. The Appellant’s account is that his uncle has told him that his father had been arrested. Thus [54] is without foundation and it is unclear what previous account the Judge is referring to there and thus the Judge has had regard to material irrelevancies.

5. In respect of Ground 3, it is material that the Appellant was a child witness at the time of his interview, however, the Judge does not accept gaps in his knowledge: see [53] and [66]. The Appellant's account is set out in his witness statement at [3] page 2 where he explained he did not ask his father about the specifics because they had a very formal relationship and it would be contrary to cultural norms. The Judge was directed to UNHCR and the policy on interviewing children. The Judge does not give any reasons for rejecting the Appellant's account and in light of *AM (Afghanistan)* [2017] EWCA Civ 1123

and the guidance in respect of children, it was incumbent upon him to at least engage with this given the Appellant was at the material time, a child.

6. In respect of Ground 4 of the grounds of appeal, the Judge unlawfully relied on plausibility and made his findings without any evidential basis. At [49] the Judge makes a finding that the Appellant's maternal uncle would not be arrested, however, this was not a point taken by the Respondent in the refusal decision. Thus the expert cannot reasonably be expected to deal with it: the expert did deal with the family arrest policy but not the maternal uncle (check expert evidence on this). The Appellant left very soon thereafter and is no longer in touch with his family. There is no suggestion of an intelligence led operation, contrary to caselaw *cf HK* [2006] EWCA Civ 1037.

It was submitted that it was not reasonably open to the Judge to make findings as to what was in the mind of the Iranian authorities at the time.

7. In respect of Grounds 1 and 5 of the grounds of appeal, no express permission has been granted. However, for the sake of completeness, Ms Fitzsimons submitted that Ground 1 is a challenge to the fact that at [47] *JL China* [2013] UKUT 00145 (IAC) was applied in relation to Dr Kakhki's report dated 25.3.18, but it is not clear what the Judge means by this. At [49] the expert report is criticized, however, the purpose of the report was to give an objective context to the evidence, particularly given that the Appellant is a child. She submitted that the Judge has approached this from the wrong angle, in that expert reports are not supposed to comment on credibility. Dr Kakhki was the expert in *SSH CG* [2016] UKUT 00308 (IAC). In respect of Ground 5, the document before the Judge was a transcription of the interview by the Appellant's solicitors. The point is that it was not the Appellant who gave the date in the Gregorian calendar but the interpreter as the Appellant can only give approximate dates.

8. In her submissions, Ms Pal asked for a finding that the Judge made adequate findings of fact and gave adequate reasons. At [66]

he properly applied the correct burden of proof. She submitted that the Judge properly engaged with the expert's report and took into account the Appellant's own evidence in respect of circumstances regarding his father being a smuggler: see [53] through to [56]. She submitted that the Judge had properly assessed the core of the Appellant's claim taking into account Dr Kakhki's expert evidence. The Judge was entitled to find that the Appellant is not credible, for the reasons given in his decision. Ms Pal submitted that there was no material error of law in the decision and the findings of the Judge should stand.

9. In reply, Ms Fitzsimons submitted that the Appellant's account is that his uncle told him his father had been arrested. At the time of events the Appellant was 15 or 16 and reliant on adults around him to give him a context. She submitted that the expert report is important for this reason. Ms Fitzsimons submitted that the Judge should have done more as per grounds 2-4 and that the findings at [54]-[56] were vitiated by error.

10. I reserved my decision in order to read the expert report of Dr Kakhki.

#### *Findings and reasons*

11. It is asserted in Grounds 2-4 of the grounds of appeal that the Judge made a number of factual errors in his decision and reasons; failed to take account of material considerations; failed to give proper or adequate reasons and made findings absent any evidential basis *viz*

(i) at [50] in concluding that there is no suggestion that the Appellant or his father would be the subject of false allegations by the Iranian authorities, when the expert evidence states that smugglers and their family members are at risk of false allegations by the Iranian authorities, including false allegations of involvement with Kurdish political group and are at risk of serious harm;

(ii) at [54] in concluding that [8] of the Appellant's witness statement conflicts with a previous account made by the Appellant, when no previous account is identified and the Appellant's witness statement was submitted with his SEF and thus there is no previous account as such;

(iii) at [53] and [56] in relying upon gaps in the Appellant's knowledge as undermining his credibility without having regard to or engaging with the Appellant's explanations, which was clearly material to any assessment of credibility particularly given that the Appellant was a minor;

(iv) at [49] in suggesting that it is implausible that the Appellant's uncle was not also arrested and criticizing the

expert for not addressing this in his report, the Judge failed to have regard to the expert's evidence and the fact that the Appellant left Iran very shortly after the relevant events and has had no contact with his maternal uncle since, such that he does not know whether or not he remains at liberty;

(v) in finding at [55]-[56] that it was not plausible that the authorities would pursue a suspected smuggler at an unknown location but make no attempt to inspect his retail premises, the Judge assumed without evidence that his arrest resulted from an intelligence led operation rather than an encounter on the border during a smuggling operation and assumes without evidence that, having arrested the Appellant's father and visited his home it was an operational priority to search his business premises at the same time.

12. Whilst permission was neither granted nor refused in respect of Ground 1 - erroneous approach to the expert evidence and Ground 5 - erroneously having regard to irrelevancies (the incorrect conversion of the Gregorian calendar rather than the quality of interpretation) I consider that these arguments are of a part with grounds 2 to 4.

13. I have concluded that the grounds of appeal do raise errors of law in the decision of the First tier Tribunal Judge with the effect that, when considered cumulatively, the decision is unsafe. Whilst the issues raised in Grounds 2-4 are relatively minor points, when considered alongside the challenge to the safety of the Judge's approach to the expert evidence of Dr Kakhi, at [48] criticising him for not entering into an assessment of the Appellant's credibility, I have concluded that the Judge's approach to the case as a whole contained material errors of law, particularly bearing in mind that the Appellant was a minor when he arrived in the UK and claimed asylum.

14. I am also mindful of the fact that since the promulgation of the Judge's decision and reasons, the Upper Tribunal have issued further country guidance *viz* HB (Kurds) Iran CG [2018] UKUT 00430 (IAC), promulgated on 20.12.18, where the Upper Tribunal found, *inter alia* that Kurdish ethnicity was Kurdish ethnicity is nevertheless a risk factor which, when combined with other factors, may create a real risk of persecution or Article 3 ill-treatment. The Appellant's claim will therefore need to be assessed in light of this decision.

### *Decision*

15. I find material errors of law in the decision of First tier Tribunal Judge Fox. I set that decision aside and remit the appeal for a hearing *de novo* before a different Judge of the First tier Tribunal.

Rebecca Chapman  
Deputy Upper Tribunal Judge Chapman

17 January 2019