**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: AA/09151/2012

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Determination Sent** |
|---|---|
| **On 25th September 2013** | **On 26th September 2013** |

**Before**

**UPPER TRIBUNAL JUDGE MARTIN**

**Between**

**MR BERWA MOHAMMEDI**
**(**ANONYMITY ORDER NOT MADE)

Claimant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr R Halim (instructed by Kesar & Co, Solicitors)
For the Respondent: Mr N Bramble (Home Office Presenting Officer)

**DETERMINATION AND REASONS**

1. This is an appeal to the Upper Tribunal, with permission, by the Appellant against a determination of the First-tier Tribunal (Judge Vaudin d'Imecourt) dated 11th December 2012 by which he dismissed the Appellant's appeal against the Secretary of State's decision to refuse him asylum and return him to Iran.

2. The Appellant arrived in the UK in July 2012 where he was apprehended. He claimed asylum. He claimed to be a minor and was placed in the care of Kent Social Services. His asylum application was rejected on 27th September 2012 and it is his appeal against that decision which was before Judge Vaudin d'Imecourt.

3. The grounds upon which permission to appeal was granted are three. Firstly, it is asserted that the Judge failed to treat the Appellant as a minor notwithstanding a Merton compliant age assessment report by Kent County Council, accepted by both sides as correct which made the Appellant a minor at the date of hearing. It is asserted in the grounds that the Judge made a finding contrary to the age assessment evidence accepted by both parties and in so doing erred.

4. Secondly, it is asserted that the Judge erred in failing to treat the Appellant as a minor thereafter and in failing to consider Section 55 of the Borders, Citizenship and Immigration Act 2009 and the best interests of the Appellant as he was required to do.

5. Thirdly and finally it is asserted that the Judge ought to have to found, on the basis of the Respondent's operational instruction dated August 2012 which confirmed that enforced escorted returns to Iran are suspended, that the impossibility of removing the Appellant to Iran meant that he would remain in the UK indefinitely and it cannot be in the best interests of a child to remain the UK in a permanent state of limbo.

6. I note that the Appellant was represented by Counsel before the First-tier Tribunal who was instructed by a different firm of solicitors than those who now act for him. Counsel and the solicitor who drafted the grounds seeking permission to appeal and Counsel before me are different from the Counsel who represented before the First-tier Tribunal.

7. With regard to the first ground, I find it is not made out. The paragraph of the determination in question is paragraph 35 where the judge said this:-

> "In assessing the Appellant's age I have considered the whole of the evidence before me including the Kent County Council age assessment report, which I read in detail and I found was a comprehensive and full assessment which was Merton compliant made with regards to the Appellant who was observed for lengthy periods of time by a number of social workers and educationalists in the house where he is staying at the moment. I have also had an opportunity of observing the Appellant in court through a relatively lengthy period of time and noted his quick responses to some of the questions that I posed to him. Having considered the whole of the evidence in this case in the round, I find that the Appellant is somebody who is around 18 years of age. I was satisfied that the age assessment provided by the Kent county council was correct."

8. It is not the case, as suggested in the grounds that the Judge found the Appellant to be an adult contrary to the age assessment report. The Judge found the Appellant to be somebody who is "around 18 years of age". That is absolutely correct. On the basis

of the age assessment report, at the date of the hearing he was 17 years and 10 months of age. That is around 18 years of age.

9. It is also not correct to say that the Judge has gone on to treat the Appellant as an adult in his consideration of the appeal. The judge has said specifically at paragraph 36 that he had given "the utmost and fullest care in assessing the evidence in this case bearing in mind at all times that it was likely to come a young person".

10. It is true, as suggested in the grounds that the judge has not specifically referred himself to section 55 nor did he specifically consider where the Appellant's best interests lie, which he was duty bound to do given the Appellant before him was a minor. However, while it was an error it would only lead to my setting aside the determination if it can be shown that the error was material, namely that if the Judge had not made the error it could have made a difference to his decision. Mr Halim in relation to that point argued that it would have affected the lens through which the Judge assessed the evidence as a whole. He referred me to KA v SSHD [2012] EWCA Civ 1014 which indicates that there is no bright line rule as to the age of majority. There is no dramatic change in an Appellant on his 18th birthday. It cannot be said that if there is a risk on the day before his 18th birthday it disappears the day after.

11. Mr Halim argued that the Judge ought not to have attached weight to the observations contained in the age assessment. While the conclusion of the age assessment was accepted, the observations ought not to have been relied upon by the Judge because they did not comply with the required safeguards of a contemporaneous note having been made. The primary function of the age assessment is to assess age and only that.

12. Mr Halim then submitted that the Judge had committed a clear procedural impropriety at paragraph 38 of the determination where he said:-

> "I was aware that the Appellant had claimed that he comes from the Kurdish area of northern Iran. He has given as his home address a village name which clearly is an untraceable. I bear in mind that in the age assessment report from the KCC, he is reported as having claimed initially that he was from Sardasht, before giving the name of a village near to Sardasht which cannot be traced. He has also given the number of villages apparently close to his own home village which also cannot be traced. Nevertheless, I note that he has stated that the closest city or town from where he lives is Sardasht in Kordestan. He clearly also speaks fluent Kurdish Sorani. I note that he was able to give the name of a broadcasting station in the area in which he claimed to live. Although I formed the view that the Appellant was not telling the truth about his village and that he had deliberately provided the name of a village which was not his and which did not exist in order to prevent his parents from being contacted, I find that the Appellant is without doubt from the Kordestan area and from Sardasht, which is where he had initially said he came from to social workers from the KCC who were considering a placement for him at that stage, before he changed his story."

13. Mr Halim argued that if the Judge was going to make that finding in relation to the villages then it ought to have been put to the Appellant during the hearing so that he

could have addressed the issue. It was not an issue that the Appellant was previously aware of.

14. I can deal with both of those submissions together. With respect to Mr Halim it is a nonsense in my view to state that the only part of a Merton compliant age assessment report that can have any evidential value is its conclusion. Its conclusion is based on the report itself; the enquiries and observations of the experts who are undertaking the task. Where they record things that have been said by the Appellant, if the Appellant says they are inaccurate it is for him to say so. In this case he did not. What is clear is that he said things to those experts which he later resiled from. In my view an age assessment report which is Merton compliant, as in this case, has the same weight as an expert's report and the Judge was entitled to take its contents into account along with all the other evidence in the case.

15. With regard to the alleged procedural impropriety I find that there was none. The Letter of Refusal states at paragraph 24:-

> "No village named Benarwe/Binawa has been located in Iran, and no information has been found to support the existence of the four villages you have named in the vicinity of your own village or the vicinity of Sardasht city."

16. The Secretary of State, at paragraph 25 of the Letter of Refusal, accepts that there is a city named Sardasht in Kordestan. At paragraphs 26 and 27 the Secretary of State refers to questions that the Appellant was asked about his area. At paragraph 28 the Secretary of State concludes:-

> "When considered in the round, it is doubted that you are an Iranian national as claimed. Consideration has been given to affording you the benefit of the doubt over this claim in view of your claimed age and level of education, however it has not been afforded you over this matter due to the lack of supporting evidence regarding the village you claim to come from and a lack of knowledge of the official language of Iran."

17. It cannot possibly be said on the Appellant's behalf therefore that he was taken by surprise by the issue of the existence of the villages named by him. It was clearly raised as an issue in the Letter of Refusal as was the lack of supporting evidence. Indeed contrary to Mr Halim's submission the Secretary of State went further than the Judge by disbelieving the Appellant's nationality. The Judge gave the Appellant the benefit of the doubt by accepting he was from Sardasht in Iran.

18. So far as the issue of s55 and the Judge's failure to consider the Appellant's best interests is concerned, I return to the issue of whether that failure could have made any difference. The Judge clearly had in mind the Appellant' youth when assessing the evidence. His factual findings in which I find there is no error can be summarised as follows

19. The Appellant came to the UK claiming to have been born in 1997 but later accepted he was in fact born in February 1995 after the age assessment report. The Appellant

therefore in accepting that acknowledged he lied when giving his date of birth as 1997 on arrival.

20. The Appellant claimed to have left Iran in July 2012 arriving in the UK on 26th July 2012. That was a lie because he was subsequently found by Eurodac documents to have been fingerprinted in Greece in June 2012; before he claims he left Iran.

21. The Appellant claims to be from a village that could not be traced in the area of Sardasht in Iran and was found to be from Sardasht itself. He lied about where he had lived.

22. The Appellant lied about being illiterate. The Judge found for numerous reasons including his ability in languages, mathematics and IT that he was educated to a high level and is an intelligent young man.

23. The Appellant lied about being a shepherd as his knowledge of sheep was distinctly lacking.

24. The Appellant lied about his inability to contact his family and lied about not having been in contact with any members of his family since he left Iran as he had been in contact with his brother.

25. In short, this Appellant had not told the truth about any aspect of his claim and was found by the First-tier Tribunal at paragraph 42 of the determination to have "made up his account to make a false claim for asylum and that there was no truth at all in his claim to be in need of international protection".

26. With regard to the Secretary of State's failure to trace his family, the Judge noted that in giving false addresses of villages which did not exist the Appellant had made it impossible for the British authorities to trace his family but that in any event there was no necessity to do so because he was in contact with them himself and could easily make contact with them now and on return.

27. In KA the Appellants had been granted leave until they were 17 and a half in line with policy. Shortly before reaching that age, each Appellant made an unsuccessful application for asylum. In each case, the Upper Tribunal approached the assessment of risk on return on the basis of the facts as at the time of the hearing before it, including the fact of the Appellant's recently attained majority. The Appellants relied on Council Directive 2003/9/EC of 27 January 2003 (the Reception Directive), Article 19.3 of which provided that "Member States, protecting the unaccompanied minor's best interests, shall endeavour to trace the members of his or her family as soon as possible. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis, so as to avoid jeopardising their safety." The appellants' factual case was that between 2006 and 2010 the SSHD had failed to discharge the duty to endeavour to trace and thereby undermined the Appellants' prospects of making good their asylum claims.

The Court of Appeal held certain principles emerged from the authorities, particularly DS(Afghanistan) v SSHD [2011] EWCA DS and HK & Ors (minors – indiscriminate violence – forced recruitment by Taliban – contact with family members) Afghanistan CG [2010] UKUT 378 (IAC) **:** (i) The duty to endeavour to trace is not discharged by merely informing a child of the facilities of the Red Cross; (ii) A failure to discharge the duty may be relevant to judicial consideration of an asylum or humanitarian protection claim; (iii) Such a failure may also be relevant to a consideration of the section 55 duty. The application of the principles is likely to be fact specific. At one end an applicant who gives a credible and cooperative account of having no surviving family in Afghanistan or of having lost touch with surviving family members and having failed, notwithstanding his best endeavours, to re-establish contact may, even if he has reached the age of 18 by the time his appeal is considered by the tribunal, depending on the totality of the established facts, have the basis of a successful appeal by availing himself of the Rashid principle and/or section 55 by reference to the failure of the Secretary of State to discharge the duty to endeavour to trace. At the other end of the spectrum is an applicant whose claim to have no surviving family in Afghanistan is disbelieved and in respect of whom it is found that he has been uncooperative so as to frustrate any attempt to trace his family. In such a case, again depending on the totality of established facts, he may have put himself beyond the bite of the protective and corrective principle. Whether one is considering asylum, humanitarian protection or corrective relief, there is a burden of proof on an applicant not just to establish the failure to discharge the duty to endeavour to trace but also that he is entitled to what he is seeking.

28. It is thus clear that there is a sliding scale of Appellants who may or may not benefit from the Secretary of State's failure to carry out her tracing obligations. On the one hand is the credible Appellant who has tried and failed to trace his family and at the other end of the scale is the Appellant who has been obstructive and consistently lied. This Appellant falls into the latter category. Therefore even had the judge considered section 55 and considered where the best interests of this young person lay the conclusion could not conceivably be other than that his best interests would be satisfied by his being returned to the bosom of his family in Iran. He had been in the UK less than six months and faced no risk whatsoever in his home country.

29. In short this Appellant's claim is wholly without merit and had no prospect of success. The Judge has made clear and devastating adverse credibility findings. The result was inevitable.

30. So far as Mr Halim's final point about the Secretary of State's policy to suspend enforced returns, it has long been established that the Tribunal is not concerned with whether or not there is a policy of actual return; rather it has to consider the appeal on the basis that an Appellant will be returned. That is the same principle that requires a Judge to assess risk on return as at the date of hearing for a minor who has claimed asylum even though he has discretionary leave and so will not actually be returned until he is an adult. It is also the same principle that required Zimbabwean cases to be determined on the basis of risk on return at the date of hearing even

though there were no returns to Zimbabwe. That is what the Judge has done in this case and that is correct in law.

31. The determination of the First-tier Tribunal does not contain an error of law that materially affected the outcome such that it should be set aside and accordingly the determination shall stand. The appeal to the Upper Tribunal dismissed.

Signed Date 25th September 2013

Upper Tribunal Judge Martin