



**Upper Tribunal
(Immigration and Asylum Chamber)
PA/02557/2017**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly

Decision and

Reasons

On 16 October 2017

Promulgated

On 23 October 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

F M R

(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Mohzam of Burton and Burton Solicitors

For the Respondent: Mrs Obomi Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.
2. The Appellant was born on [] 2001 and is a national of Iran of Kurdish ethnicity.
3. In order to avoid confusion, the parties are referred to as they were in the First-tier Tribunal.
4. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Asjad promulgated on 10 May 2017 which dismissed the Appellant's appeal against the decision of the Respondent dated 28 February 2017 to refuse his protection claim.
5. The refusal letter gave a number of reasons which were in essence that :
 - (a) The Appellants claim that he had worked as smuggler in Iran was undermined by a number of inconsistencies as between his Screening Interview (SI), his Asylum Interview (AI) and his witness statement (WS) and therefore this was not accepted.
 - (b) The Appellants credibility was undermined by his claim to have only been fingerprinted on one previous occasion when Eurodac showed he had been fingerprinted twice.
 - (c) The chronology of the Appellants account was undermined by the dates on which he was fingerprinted.
 - (d) The Appellant was not at risk on return as a Kurd.
 - (e) If it were accepted that the Appellant was a smuggler he was at risk of prosecution not persecution.
 - (f) If the Appellant smuggled guns and ammunition this is a serious crime and falls for exclusion for refugee protection.

- (g) Taking into account the Appellants age it was in his best interests to return to his family.
- (h) The Respondent had carried out their family tracing obligations.

The Judge's Decision

- 6. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Asjad ("the Judge") dismissed the appeal against the Respondent's decision.
- 7. Grounds of appeal were lodged arguing: that the Judge was in error in that :
 - (a) The Judge refused to consider whether the decision was unlawful as the Respondent failed to take into account that the Appellant was a minor.
 - (b) The Judge failed to take into account the best interest of the Appellant as a minor.
 - (c) The Judge failed to make a finding as to whether the Appellant was a smuggler.
 - (d) The Judge heard no arguments from either the Appellants representatives or the Respondent as to whether the Appellant would fall under the exclusion clauses of the Refugee Convention.
- 8. On 5 September 2017 First-tier Tribunal Judge Pedro gave permission to appeal.

Submissions

- 9. At the hearing I heard submissions from Mr Mohzam on behalf of the Appellant that :
- 10. He relied on his skeleton argument.
- 11. The Judges adverse credibility findings were central to her decision and she failed to take into account the age of the appellant in making that assessment and failed to properly engage with the background material.

12. He accepted that in relation to the exclusion argument this was raised in the refusal letter and that had been relied on by the presenting officer.
13. On behalf of the Respondent Mrs Obomi submitted that :
14. There was a Rule 24 notice and she relied on that.
15. The Judge made findings that were open to her.
16. The Judge took into account the appellant's age and it was referred to at paragraph 8 so was clearly at the forefront of her mind. She found there were numerous inconsistencies.
17. Mrs Obomi conceded that a younger appellant may be unable to recall detail but his account did not match the record of encounters with him.
18. The Judge went on to consider the alternative scenario where his claim to have been a smuggler was true and found that his risk on return was prosecution not persecution and that he was not at risk from that.

Finding on Material Error

19. Having heard those submissions I reached the conclusion that the Tribunal made material errors of law.
20. The Respondent conceded that the appellant in this case was an uneducated 15 year old Iranian Kurd at the time of the events relied on and 16 years old when the Judge heard his appeal. The sole issue in this case was one of credibility as it could not be argued that the claim that Iranian Kurds work as smugglers is inconsistent with background material.
21. The Judge records the Appellants age at the time of the events in issue but nowhere in the decision is there any reference to the relevance of his age in relation to the issue of credibility or indeed its

relevance to the assessment if the Judge accepted that he faced prosecution on return. Recording the Appellants age is not engaging with its significance. There is guidance in the Joint Presidential Guidance Note No 2 of 2010: Child, vulnerable adult and sensitive appellant guidance and caselaw which the Judge should have demonstrated that she had engaged with given the focus on issues of credibility, but such awareness is wholly absent from the decision.

22. In relation to the Judges consideration of the alternative scenario, that the Appellant was indeed a smuggler wanted by the authorities, the assessment by the Judge of the background material at paragraph 13 is wholly inadequate as it fails to take into account again the Appellant's age but also in suggesting that the system is not 'unduly harsh' given the punishment for smuggling alcohol as recorded in the 2016 COIS Smugglers at 5.3.2 is up to 74 lashes.
23. The failure of the First-tier Tribunal to address and determine the significance of the appellants to the issues of credibility and risk on return age constitutes a clear error of law. This error I consider to be material since had the Tribunal conducted this exercise the outcome could have been different. That in my view is the correct test to apply.
24. I therefore found that errors of law have been established and that the Judge's determination cannot stand and must be set aside in its entirety. All matters to be redetermined afresh.
25. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First Tier Tribunal if the Upper Tribunal is satisfied that:
 - (a) *the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or*
 - (b) *the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that,*

having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

26. In this case I have determined that the case should be remitted as I have found there was an error of law because the Appellant did not have a fair hearing due to the failure of the Judge to have regard to the appellants age in her assessment of the evidence. In this case none of the findings of fact are to stand and the matter will be a complete re hearing.
27. I consequently remit the matter back to the First-tier Tribunal to be heard on a date to be fixed to be heard by me.
28. I made the following directions for the resumed hearing:
- List for 3 hours
 - Kurdish Sorani interpreter

CONCLUSION

29. **I therefore found that errors of law have been established and that the Judge's determination should be set aside and the case remitted to the First-tier Tribunal.**
30. **Under Rule 14(1) the Tribunal Procedure (Upper Tribunal) rules 2008 9as amended) the Appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. An order for anonymity was made in the First-tier and shall continue.**

Signed

Date 20.10.2017

Deputy Upper Tribunal Judge Birrell