Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/09807/2016**

THE IMMIGRATION ACTS

Heard at Stoke on Trent	**Decision Promulgated**
On 1 August 2017	**On 2 August 2017**

Before

Deputy Upper Tribunal Judge Pickup

Between

SM
[Anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Mr R Sharif, instructed by Fountain Solicitors
For the respondent: Mr G Harrison, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, SM, date of birth 21.3.96, is a citizen of Iran.
2. I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal made an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014. Given the circumstances, I continue the anonymity order.

3. This is the appellant's appeal against the decision of First-tier Tribunal Judge Ghani promulgated 27.1.17, dismissing his appeal against the decision of the Secretary of State, dated 6.9.16, to refuse his protection claim. The Judge heard the appeal on 18.11.16.

4. First-tier Tribunal Judge Kelly granted permission to appeal on 18.5.17.

5. Thus the matter came before me on 1.8.17 as an appeal in the Upper Tribunal.

Error of Law

6. For the reasons summarised below, I found an error of law in the making of the decision of the First-tier Tribunal, such as to require the decision of the First-tier Tribunal to be set aside.

7. In granting permission to appeal, Judge Kelly found there was no arguable error of law on grounds 3, 4 and 5. However, he found it arguable that notwithstanding the judge's self-direction on the standard of proof at [4] of the decision, the judge applied a too high standard of proof by making adverse findings at [22] which were said to be established "in all probabilities."

8. Judge Kelly also considered it arguable that having accepted that the appellant was 'associated' with the KDPI, the Tribunal failed to assess the risk on return of becoming known to the Iranian authorities by reason of that fact alone.

9. In respect of this second ground of appeal I find no material error of law. The judge disbelieved the appellant's claim to have distributed KDPI leaflets in his Kurdish village, with the result that the Border Force came looking for him at home. The judge noted that the appellant was not a member of any political party when he lived in Iran, but claimed to have helped the KDPI in this manner some 5 months before leaving Iran. He knew little of the KDPI, but was aware that its activities, fighting for the rights of Kurdish people in Iran, were proscribed and that there were dangerous consequences of supporting such organisations.

10. The judge gave cogent reasons at [17] for placing little reliance on a letter purporting that the appellant was a KDPI supporter. However, the judge found his account of distributing leaflets not credible. He said that only his two friends knew that he had distributed leaflets, but inconsistently also claimed that the whole village knew he was supporting the party. Later, he said he could have been seen at least once, but the judge concluded that was a late invention, an afterthought.

11. It is clear that the judge entirely rejected the appellant's claim to have been involved with the KDPI. In that light, I do not accept that at [22] the judge found that the appellant had an 'association' with the KDPI. I am satisfied that what the judge intended to convey was the appellant's awareness of the KDPI and the dangers of supporting it, having referred to spies and double-agents working in his village. At [22], at the end of the decision, after having already reached the relevant findings that the appellant did not distribute leaflets and was not wanted for that or any other reason by the Iranian authorities, the judge was no more than passing comment, that he thought it probable that the appellant was using that knowledge or familiarity to embellish an otherwise weak asylum claim. The comment was not relevant to the core findings and thus if there

were an error, it was not material to the outcome of the appeal.

12. However, there is greater difficulty in interpreting the judge's use of the phrase, "in all probabilities," in [22]. One of the two uses of this phrase follows immediately after, "I find that the appellant's account does not have the ring of truth about it." Even though the "all probabilities phrase is used to qualify the comment that the judge believes the appellant is an economic migrant and not in need of international protection, the extent to which this standard of proof has been applied to other issues remains unclear. As Mr Sharif pointed out, other than than the standard self-direction at [4], the judge made no reference elsewhere in the decision to having made the findings essential to the decision to the lower standard of proof. One could not be sure, Mr Sharif submitted, that the judge had inadvertently applied the balance of probabilities when reaching adverse credibility and factual findings, rather than the lower standard of proof of a reasonable likelihood. Unfortunately, whilst the judge may have intended to use this phrase only in relation to these two non-essential comments on the appellant's case, I cannot be satisfied that the judge has correctly applied the lower standard of proof to the core findings relevant to the outcome of the appeal. In the circumstances, I am persuaded that the decision cannot stand and must be set aside for error of law. For the Secretary of State Mr Harrison conceded that the use of the phrase amounts to an error of law and did not resist the appeal.

Remittal

13. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. The errors of the First-tier Tribunal vitiate all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.
14. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the appellant of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Conclusions:

15. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the appeal to be decided afresh in the First-tier Tribunal in accordance with the attached directions.

Signed

Deputy Upper Tribunal Judge Pickup

Consequential Directions

16. The appeal is remitted to the First-tier Tribunal sitting at Birmingham;
17. The appeal is to be decided afresh with no findings of fact preserved;
18. The ELH is 3 hours;
19. The appeal may be listed before any First-tier Tribunal Judge, with the exception of Judge Ghani;

Fee Award *Note: this is not part of the determination.*

I make no fee award.

Reasons: No fee is payable and thus there can be no fee award.

Signed

Deputy Upper Tribunal Judge Pickup