Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/13334/2016

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 13th July 2017	**On 18 July 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

[J R]
~~**(ANONYMITY DIRECTION NOT MADE)**~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr C Holmes, Counsel instructed by Parker Rhodes Hickmotts Solicitors
For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals against the decision of Judge K Henderson, promulgated on the 3rd February 2017, to dismiss his appeal against the Secretary of State's refusal of his Protection Claim.

2. The basis of the appellant's Protection Claim was that he is a Kurdish shepherd from the Sardasht region of Iran. He was forced to flee his home having become wrongly suspected of involvement in an attack on a nearby military base whilst he was grazing his sheep. The respondent did not accept that the appellant was from Iran and neither did she find his account of his experiences in that country credible. It therefore fell to Judge

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Henderson to resolve both those issues in order to determine whether the appellant had substantiated his claim for asylum. The essence of the grounds of appeal is that the judge failed to reach any settled conclusion in relation to the appellant's nationality.

3. Judge Henderson set out her findings of fact at paragraphs 36 to 45 of her decision –

> 36. The Appellant is not accepted as a national of Iran. It is accepted that he is of Kurdish ethnicity and there was nothing in his evidence before me which would lead to doubts regarding his ethnicity and language.
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> 37. The Appellant's nationality was tested at the second substantive interview. It was tested in a rudimentary fashion. He was asked about the currency of Iran. He responded that the currency in Iran is called toman. In fact, the official name of the Iranian currency is Rials. However, as the Appellant's representative pointed out in the objective evidence provided, it is common for the currency to be referred to as toman and a Wikipedia report refers to the Iranian government approving a change to the name on 7th December 2016 "*to the more colloquially and historically known toman denomination*." I also note that the denomination referred to by the Appellant does exist.
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> 38. The Appellant also gave information about public holidays which is consistent with objective evidence provided on public holidays in Iran
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> 39. The Appellant's reference to dates cannot be assumed as proving that he is either from Iran or Iraq. I note that it was not clarified during either his screening interview or his substantive interview whether he was being asked questions in the western calendar or if the interpreter was converting the dates for the interviewers. I accept that it would have been odd for him to give dates in the western calendar if he was from Iran but I cannot make any findings of fact regarding his knowledge of the western calendar based on the interviews provided.
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> 40. I accept that the Appellant did provide knowledge of military bases which he stated where near his village. It is an example of local geographical knowledge which he acquired either by living there or by some other means. He was specific about a base being between his village and another village and that in total there were the five bases. So far as I am aware this was not disputed by the Respondent. In fact, the Respondent confirmed such bases do exist and this was confirmed in the website the Respondent referred to copies of which were provided by the Appellant's representative.
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> 41. The Kurdpa article refers to a military base being set ablaze. The date given is 26th August 2015. This date is not consistent with

the information given by the Appellant. In his first interview, he referred to leaving Iran on 27th April 2016. He also confirmed that he had arrived in United Kingdom in May2016 and the journey had taken a total time of three weeks from leaving Iran. The report of the incident itself therefore does not correspond with the Appellant's account.

42. The major difficulty with the Appellant's account is that he made no mention of the later version of events he relied upon at the original screening interview. He stated at that stage that he left Iran in February 2016 and travelled on foot to Turkey where he stayed for one week. He was asked to give a brief explanation of his asylum claim. He stated that there was a money dispute between his family and his father's family and his mother's family and that his brother had been killed two years previously and they wanted to kill him. He made no reference whatsoever to an attack on a military base in Iran or his part in assisting those who attacked the base.

43. I do not accept that this discrepancy can simply be explained by the Appellant not having any education and not speaking Farsi. I do not accept that the number of inconsistencies and the huge difference in the account can be explained simply by the Appellant's education or his general understanding of the system. I conclude that the Appellant has decided or been advised that his original account was weak and he needed to put forward a different account.

44. There are elements of the Appellant's second account which also give rise to concerns about whether he has been truthful. He referred to the family being able to hide in very close proximity to his home in a fairly small village. Given that the Iranians authorities were searching for people who had assisted a military attack on their bases I do not accept that they would have simply searched the Appellant's former home or that they would not have made further enquiries about family members. The Appellant stated that his uncle's house was safer and that they were hiding in his house. He also referred to a hidden place at his uncle's house. He later stated that the family had hidden in a stable. I did not find this aspect of his account to be credible.

45. The Appellant stated in his later account that in fact he was not in France for two months. In his original screening interview, however, he stated that he had reached the jungle in Dunkirk and stayed approximately 2 months. I conclude that the Appellant failed to take advantage of a reasonable opportunity to make an asylum claim whilst in a safe country. His failure to do so has damaged his credibility with reference to section 8 (4) of the Asylum and Immigration (treatment of Claimants, etc) Act 2004.

4. Mr Holmes argued before me that it had been incumbent upon the judge to either accept or reject the appellant's claim that he was an Iranian national and, in the event of rejecting it, to assess the risk of persecution to the appellant as a non-Iranian national

being forcibly returned to Iran. He based this submission, which he had also made to Judge Henderson, upon the fact that the respondent had indicated that she intended to return the appellant to Iran notwithstanding that she did not accept his claimed citizenship of that country. I reject that submission on both legal and practical grounds.

5. Prior to the amendments to section 82 of the Nationality, Immigration and Asylum Act 2002 by section 15 of the Immigration Act 2014, a claimant could not appeal against a decision to refuse his claim for asylum. He could, however, appeal against a decision to remove him to a stated country on the *ground* that the decision in question would (if executed) be contrary to the United Kingdom's obligations under Article 33 of the Refugee Convention (*refoulement)*. Consequently, the focus of the appeal was at that time upon the country to which the Secretary of State was proposing to return the appellant. That, however, is no longer the case. Removal decisions are not now appealable. Instead, the only decision against which a claimant can appeal is the refusal of his 'protection claim'. The focus of the appeal is therefore now upon the question of whether the appellant has substantiated his claim to have a well-founded fear of persecution in the country of his claimed nationality or (in the case of a person who is stateless) his habitual residence. The country to which the Secretary of State may in due course decide to return him (always assuming it is feasible to do so) has thus no relevance to this question.

6. The scenario that Mr Holmes submits that the judge ought to have determined in the alternative – that is to say, the risk to a non-Iranian national who is being returned to Iran – is in any event, and with all due respect, wholly unreal. In the real world neither Iran nor any other country would receive a person unless it either accepted that he was a citizen of that country or was itself willing to grant him asylum. The practicalities of removal in this case are such that the appellant would need to be issued with an emergency travel document by the receiving country. The Iranian authorities are hardly likely to issue him with such a document if they are not completely satisfied of his Iranian nationality.

7. It follows from my legal analysis at paragraph 5 (above) that Judge Henderson was not required either to accept or reject the appellant's claim to be an Iranian national. There was a third option, namely, to find that the appellant had failed to substantiate his claimed nationality. This was the position adopted by the respondent in the Reasons for Refusal Letter in which the author stated that the appellant's claimed nationality was "not accepted" [paragraph 20 of the letter]. Contrary to the submission of Mr Holmes, that did not imply positive rejection of

the claim. The correct analysis is as it was stated at paragraph 15 of the Reasons for Refusal Letter, in which the author says that, “the material facts … have either been accepted, rejected, or found to be unsubstantiated”. It is clear from the remainder of that letter that its author followed that analysis.

8. The same cannot however be said of the analysis of Judge Henderson. Although she carefully analysed every aspect of the evidence bearing upon the question of nationality, she does not appear to have reached any settled conclusion upon the penultimate question in an asylum claim, namely, whether the appellant has substantiated his claimed nationality (the ultimate question being whether there is a real risk of him being persecuted in that country). It was important for this question to be addressed not only because there is an onus upon a claimant to establish his nationality (or country of habitual residence) to succeed in his claim for asylum, but also because any findings in that regard are likely to have consequences for the claimant’s credibility as a whole. Thus the appellant’s account of experiences in Iran was unlikely to be considered credible if he had been found not to be a citizen of that country. Conversely, a finding that the appellant was a national of Iran may have lent credence to his account of those experiences. That is not to say that the judge was obliged to adopt precisely the same approach as the decision-maker, who examined the evidence by reference to each aspect of the appellant’s claim in isolation before accepting it, rejecting it, or finding it to be unsubstantiated. Indeed, it is arguably preferable to defer reaching a conclusion upon the question of nationality pending an examination of the evidence as a whole. Whichever approach is adopted, however, it is necessary at some point to reach a settled conclusion upon the issue of nationality where this has been questioned by the original decision-maker. The failure in this case to do so was an error of law. Thus, whilst it is clear that Judge Henderson rejected the appellant’s account of the events that he claimed had led to his departure from Iran, her findings in relation to his claimed citizenship of that country are obscure. I therefore conclude that the reasons she gave for rejecting the appellant’s claim were insufficient for the reader to understand how and why she arrived at her conclusion. Her decision must therefore be set aside.

9. Given that the error of law impinges upon the safety of the fact-finding process as a whole, it is not possible to preserve any aspect of the First-tier Tribunal’s findings of fact in this appeal. The whole of its decision must therefore be set aside. It is appropriate in those circumstances to remit the re-making of the decision to any First-tier Tribunal Judge save Judge Henderson.

<u>Notice of Decision</u>

10. The appeal is allowed, the decision of the First-tier Tribunal is set aside, and the remaking of the decision is remitted to any First-tier Tribunal Judge save Judge Henderson.

11. Any further directions concerning the re-hearing of this appeal will be a matter for the Acting Resident Judge at Bradford.

No anonymity direction is made.

Judge Kelly Date:

Deputy Judge of the Upper Tribunal