Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06589/2017

THE IMMIGRATION ACTS

Heard at Birmingham CJC	**Decision & Reasons Promulgated**
On 5 November 2018	**On 28 November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MR F X
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Sharif, Fountains Solicitors
For the Respondent: Mr Tan, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a claimed national of Iran born on 16 March 1997. He arrived in the United Kingdom and claimed asylum. That application was refused on 4 May 2017. He appealed against that decision and his appeal came before Judge of the First-tier Tribunal V A Cox at the hearing on 14 November 2017. In a decision and reasons promulgated on 28 November 2017, the judge dismissed the appeal.

2. Permission to appeal was sought in time on the basis of three grounds: firstly, that the judge had failed to apply the correct standard of proof in

assessing the Appellant's nationality; secondly, that the judge had materially misdirected herself in respect of the assessment of the risk on return to the Appellant as a Kurdish failed asylum seeker in light of the judgment in SSH and HR (Illegal exit: failed asylum seeker) Iran CG [2016] UKUT 00308 (IAC) and thirdly, that the judge had materially misdirected herself in failing to give adequate reasons for findings on material aspects of the case.

3. Permission to appeal was granted by First-tier Tribunal Judge Doyle on 10 January 2018 on the basis that the grounds of appeal were arguable. A Rule 24 response was submitted by the Respondent on 6 February 2018 which asserted that the judge gave adequate reasons for finding the Appellant was not credible at [34] to [48]. The judge considered risk on return at [49] to [50] and the judge agreed with the Respondent's conclusion that the Appellant was from Iran at [35]. Notably that should read "*the Appellant was not from Iran*" as that was the Respondent's case and the findings of the judge.

Hearing

4. At the hearing before the Upper Tribunal, I raised with Mr Sharif the point that the Tribunal decision in Hamza [2002] UKIAT 05185 did not perhaps bear the meaning ascribed to it, in that the Tribunal in that case found that if a judge was going to make a positive finding against the Appellant in respect of his or her nationality then this should be made on the higher standard which would be a balance of probabilities. Mr Sharif maintained his submission that the judge had applied the wrong standard of proof, that he was unaware of any subsequent case law and that his colleagues had been relying on the case of Hamza on numerous occasions over the past few years. This is in relation to the judge's finding at [35] where the judge found *"I do not find that he has through the history of his claim and in his evidence before me provided evidence that does on a balance of probabilities mean that he is from Iran"*. He sought to submit that the judge had also erroneously assessed the entirety of the asylum claim on the balance of probabilities which was clearly an error of law as that is the wrong higher standard of proof and that this was evidenced through the reference of the history of the Appellant's claim.

5. In respect of the second ground of appeal, Mr Sharif sought to rely on the ground as pleaded. He submitted that the Appellant's Kurdish ethnicity puts him at an enhanced risk on return if I were to find the substantive claim was made out in light of the judgment in SSH and HR (op. cit.) at 34 and that the judge at [47] had accepted that the Appellant is a Kurd.

6. In relation to the third ground of appeal, Mr Sharif submitted that, in his view, this was the strongest of the grounds of appeal and that was the inadequacy of the judge's reasoning for rejecting the credibility of the Appellant's claim. He submitted that if one reads the judge's findings at [40] to [42] that clearly inadequate reasoning had been provided for not accepting the Appellant's account as to how he obtained the leaflets. It is

not sufficient to simply say it is incredible and the judge had failed at [41] to give adequate reasoning as to why the Appellant's account is not credible. Nor was it sufficient at [42] simply to cite the Appellant's answer as provided at question 73 of the Asylum Interview Record. At [46] to [47] Mr Sharif submitted that the judge had failed to provide adequate reasons for not accepting as credible that the Appellant was not aware of his father's political activities until after his death. The judge has failed to give a reason as to why she has come to that conclusion and her finding is not supported by adequate reasons. In relation to the finding at [48] that the judge states she found on the evidence before her that the Appellant had given an inconsistent account and made incredible claims, once again the judge had failed to give adequate reasons for so finding. Mr Sharif submitted if one looked at the interview record and refusal letter, along with the alleged inconsistencies, these were not significant and it was not sufficient for the judge to simply state a claim was inconsistent when it is broadly consistent and thus that amounted to a material error of law.

7. In his submissions, Mr Tan stated that, having considered the Home Office guidance dated October 2017 in relation to proof of nationality in an asylum claim, the Respondent's position is that the burden of proof rests with the Appellant to prove his nationality to the lower standard. In cases where the Home Office assert that an individual has another nationality the burden is then on the Home Office to prove to the higher standard what that nationality is. The difficulty in this case is that the Respondent's refusal letter did not assert that the Appellant had another nationality, simply that it was not accepted that he was Iranian. It was only at the hearing before the First-tier Tribunal at [30] that the Presenting Officer asserted that the Appellant is Iraqi, but Mr Tan accepted there was no evidence to this effect. At [31] the Appellant's then representative invited the judge to find on the balance of probabilities that the Appellant is not Iraqi. Mr Tan accepted that there clearly had been some confusion, however he submitted this was not material given that the asylum claim had been considered in the context of Iran in any event and thus it was a moot point.

8. In relation to the second ground of appeal, he submitted there was no merit in this ground given that the Appellant's claim to be at a risk of persecution on political grounds had been rejected by the First-tier Tribunal. And in respect of the third ground of appeal Mr Tan submitted that [40] to [48] should be read as a whole and not isolated in the manner put to the Upper Tribunal today. He submitted that [40] is quite clearly reasoned in [41] where the judge considered the context of the claim and clearly considered the fact that the Appellant had accompanied Mohammad the neighbour, but did not previously appreciate that leaflets and papers had been placed in the goods transported amounted to an inconsistency which undermined his credibility. Similarly at [43] the judge noted the previous claim that the Appellant's mother had received leaflets in the family home and that it was unlikely that family members would not know about this. This also relates to the Appellant's claim not to know about his father's political activities until after his death in circumstances

where all the family members appear to have been aware and involved, albeit indirectly, in his activities before his death. It was open to the judge to find if the Appellant was a Kurd living and working in that area he would have some knowledge of the KDPI and that [48] was no more than a summary paragraph. He submitted there was no material error of law in the judge's decision. Mr Sharif in reply submitted briefly that it was clear in respect of ground 1 if [30] and [35] are read together, that this is a material error.

Findings and reasons

9. I reserved my decision, which I now give with my reasons.

10. In respect of ground 1 and the Appellant's nationality the judge held as follows at [35]:

> *"In dealing with the Appellant's nationality I note that the Respondent rightly identified that the Appellant claims as at paragraph 14 to be a national of Iran and will be removed to Iran as that is his claimed nationality. I do not find that he has through the history of his claim and in his evidence before me provided evidence that does on a balance of probabilities mean that he is from Iran."*

I find that this does not amount to a material error of law in light of the standard of proof applied by the judge, which was the balance of probabilities. Moreover, even if it were an error, it would not be material given that the judge went on to consider the Appellant's asylum claim in the context of Iran.

11. In relation to the second ground of appeal, I accept Mr Tan's submission there is no merit in respect of this particular aspect of the case in that it is clear from the decision in *SSH and HR* that Kurdish ethnicity is simply an aggravating feature if there are other reasons why the Appellant would be wanted on return. In light of the judge's findings that there is no risk to the Appellant if returned, this aspect of the appeal does not avail him.

12. In relation to the judge's reasoning underlying her rejection of the credibility of the claim, the judge found as follows:

> *"40. In respect of the core of his account that he had been involved in hiding papers or leaflets question 52 AIR I find that this is incredible.*
>
> *41. The Appellant described Mohammad as not wishing to cease political activities as he did not want to give up on the Appellant's father's legacy and yet the Appellant incredibly suggests that he has on occasion accompanied Mohammad but had not appreciated that leaflets and papers were being placed in the goods that were being transported.*

42. I find that there is no adequate explanation as to why the Appellant would suddenly have continued to act in the illegal way he claims that his father had acted and to store the same. I find it incredible that he suggests that a person called Ishmael would collect them and yet previously he knew nothing of the same despite claiming question 73 that his father used to help the party.

43. I find his evidence in respect of the arrest warrant to be inconsistent. At question 77 despite saying that his mother did not know of his activities or indeed of his father's, the Appellant clearly said that if Ishmael came to the property his mother would give them the letters and goods. I find that incredible given the Appellant's insistence that neither he nor his father had told his mother of the existence of the letters.

44. The Appellant maintained that it was Mohammad who had told him of the arrest warrant. His evidence before me was, as Mr Malcolm identified, inconsistent in respect of the existence of that warrant and I specifically reminded myself that the absence of the same and the challenges that many asylum seekers seek in providing documentary evidence for aspects including core aspects, of their claim cannot be underestimated. I find in this case, however, that the Appellant has manufactured this claim and that the arrest warrant does not exist.

45. I find the Appellant's claim that he never asked Mohammad why he did not keep the political materials in his own home to be incredible.

46. I do not find it credible that the Appellant, who claims to have no background of political involvement, was not aware of the details of his father's political activity until after his death.

47. He suggests that he is not a member of the KDPI and has no knowledge of the party and yet he claims he would take such risks and would expose himself and his mother to risk simply on the apparent request of a neighbour or in memory of his father. I find it unsurprising that the Appellant would have knowledge of the KDPI since I find that he is a Kurd. I do not find it is credible that having that knowledge and being a Kurd would persuade him to suddenly become so involved following the death of his father and to take such significant risks.

48. I have found as indicated above on the evidence before me that the Appellant has given an inconsistent account and made incredible claims.

49. He has delayed his claim for asylum and I do not find that he is at risk as a result of his claimed political activities."

13. Mr Sharif challenged the adequacy of the reasons put forward by the Judge for finding the Appellant not to be credible. However, as is apparent from the Judge's analysis set out at [12] above, the Judge provided clearly provided cogent reasons for rejecting the Appellant's credibility.

14. The grounds of appeal amount to no more than a disagreement with the Judge's findings of fact, which were open to her on the evidence before her and were properly reasoned.

Notice of Decision

15. I find no material errors of law in the decision of First tier Tribunal Judge Cox. The appeal is dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Rebecca Chapman Date 22 November 2018

Deputy Upper Tribunal Judge Chapman