Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/13284/2017**

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Decision & Reasons Promulgated**
On 10 December 2018	**On 13 December 2018**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

SKA

(ANONYMITY ORDER CONTINUED)

Appellant

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellant:	Mr. F. Magennis of counsel, instructed by the Migrant Legal Project (Cardiff)
For the Respondent:	Ms S. Cunha, Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Respondent is a national of Iran. He arrived in the United Kingdom on 30 July 2016, at the age of 16, as an unaccompanied child and applied for asylum. His application was refused

on 30 November 2017, when he was still a child. He appealed and his appeal was heard on 6 April 2018. By this time the Appellant had turned 18. His appeal was dismissed by First-tier Tribunal Judge Solly in a decision promulgated on 20 April 2018.

2. The Appellant appealed and First-tier Tribunal Judge Blundell granted him permission to appeal on 15 May 2018. The Respondent filed a Rule 24 Response on 10 July 2018 which submitted that First-tier Tribunal Judge Solly had directed herself to all the relevant evidence and that there were no errors of law in her decision.

ERROR OF LAW HEARING

3. Counsel for the Appellant and the Home Office Presenting Officer both made oral submissions and I have referred to these submissions, where relevant, in my findings below.

ERROR OF LAW DECISION

4. The Respondent did not dispute that the Appellant's age or that he was a national of Iran and was of Kurdish ethnicity.

5. As noted by the Home Office Presenting Office, in paragraph 8 of her decision, First-tier Tribunal Judge Solly reminded herself that, as the Appellant had been a child until very recently and because the events which were said to have led to his flight from Iran occurred when he was still a child, it would be appropriate to treat him as a vulnerable witness for the purposes of the Joint Presidential Guidance Note. No. 2 of 2010 and Practice Direction of First-tier and Upper Tribunal on "Child, vulnerable adult and sensitive witness", dated 30 October 2008.

6. As a consequence, she directed that the questions asked of the Appellant should be as brief as possible and should be "open" in nature and that he could request breaks if he needed to do so. The Appellant does not dispute that the manner in which the appeal was conducted was in accordance with this guidance or that the Respondent had accepted corrections to the interview record made by the Appellant's solicitor. However, he did submit that when considering the substance of the Appellant's appeal the fact that he had still been a child at the

time of the events which led to him leaving Iran had not been given appropriate weight in accordance with this guidance.

7. When the events relied upon took place in Iran occurred and when the Appellant was interviewed, he was still a child. Therefore, the UNHCR *Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees* were of relevance. They state that:

"[72] Children cannot be expected to provide adult-like accounts of their experiences. They may have difficulty articulating their fear for a range of reasons, including trauma, parental instructions, lack of education, fear or State authorities or persons in positions of power, use of ready-made testimony by smugglers, or fear of reprisals.

[73] Although the burden of proof is usually shared between the examiner and the applicant in adult claims, it may be necessary for an examiner to assume a greater burden of proof in children's claims, especially in the child concerned is unaccompanied".

8. In the current case the Appellant was unaccompanied and, as the Home Office Presenting Officer accepted at the hearing, he had never had the opportunity to attend school, as a school was only established in his home area after he would have been eligible to attend. The Respondent also speculated about the Appellant's parents' intentions but did not base this on any evidence.

9. In paragraph 68 of her decision, First-tier Tribunal Judge Solly did state that "she had borne in mind the appellant's age at the time of the events claimed, his SEF and the AIR and she provided details of his age at different stages of the proceedings at paragraph 50 of her decision. However, when analysing the content of the Appellant's asylum interview First-tier Tribunal Judge Solly she did not give any indication of giving any weight to the fact that he was a child at the time. For example, she relied on the fact that, in reply to question 68 of his asylum interview, the Appellant referred to his two fellow smugglers as "two people known to [his] father" and in reply to question 72 he confirmed that they were "work colleagues" but that in paragraph 3 of his witness statement, dated 2 December 2016, he referred to them as "friends". This was a small discrepancy which could have arisen from errors in translation as

different interpreters would have been used for the interview and for a statement prepared by his own legal representatives.

10. First-tier Tribunal Judge Solly did not consider any possible reasons for the discrepancy but merely noted that if there had been an error in translation, the Appellant should have made a complaint about his solicitors, which he had not done. The Appellant was a child at this time and, as he had no-one with parental responsibility for him, he lacked legal capacity to give instructions on his own. This was in marked contrast to the appellant in *MM and others (Out of time appeals) Burundi* [2004] UKAIT 00182, who was an adult.

11. The First-tier Tribunal Judge also relied on the fact that the Appellant had only mentioned a few security measures taken by the Appellant and his companions to evade the attention of the Iranian authorities; namely travelling at night, staying off the road and keeping the mules quiet. This was despite the fact that in response to question 92 of the asylum interview, the Appellant had confirmed that they had used look-outs and that the answer that he gave, as a child, to question 93 did not necessarily contradict that this was the case. The note of the hearing provided by counsel for the Applicant also confirmed that the Appellant had said in oral evidence that "the other tour guides were with me, they were sometimes going in front to see if everything is OK and nobody is around". This is confirmed by the record of proceedings which stated that his answer was "other two guys with me. Sometimes would to in front to make sure no-one is around".

12. The Appellant was still a child and a vulnerable witness at the time of this interview and care should have been taken to ensure that he understood any question so that he could give a sufficiently cogent answer and weight should have been given to the fact that a child, as opposed to an adult, may not have had the same understanding of the need for additional security measures.

13. In addition, when summarising her credibility findings in paragraph 77 of her decision, although First-tier Tribunal Judge Solly acknowledged the Appellant's age at the start of the paragraph, she did not moderate her specific findings in any way to reflect the fact that he had been a child. In particular, she did not give any weight to the fact that he said in oral evidence, as confirmed in the record of proceedings, that he did not know the route as he had "never been in front. The other two guys were in front finding the routes".

14. In contrast, the fact that the Appellant had been a child when acting as a smuggler was used as a basis for doubting the credibility of his account. For example, at paragraph 64 of her decision the First-tier Tribunal Judge stated that "Mr. Baker point out that at A33 [97] someone under the age of 18 would be carrying goods illegally and, as a minor, was at greater risk to the group and so even less likely to be involved in smuggling". She did not take into account that it was stated at paragraph 62 of the expert report that one per cent of the Kulbaran who had been killed by the authorities were under 18. In addition, in his evidence the Appellant explained that he had had to become a smuggler in order to support his family when his father became too ill to continue in this "trade".

15. At the hearing the Respondent had accepted that if the Appellant had come to the attention of the Iranian authorities, as someone who smuggled alcohol and Christian books into Iran, he would be at risk of persecution on return.

16. It is also the Appellant's case that his Kurdish ethnicity will increase his risk of persecution. Contrary to the submissions made by the Home Office Presenting Officer, he did not assert that he was at risk of persecution *per se* on account of his Kurdish ethnicity but did submit that it increased his risk of persecution. It was also never his case that he had been politically active in Iran. But in the conclusions of his expert report, Roya Kashefi found that smuggling alcohol is a codified offence and that smuggling a bible into Iran is seen as a threat to national security.

17. One example of the persecution that he may attract on account of his ethnicity and his activities was the fact that many Kurdish smugglers were shot on sight instead of being arrested and prosecuted. In relation to risk on return, in paragraph 48 of his expert report, Roya Kashefi, also stated that:

"The manner in which young Kurdish men are treated when detained has been widely reported in numerous international human rights reports. Use of force, beatings, ill treatment and even torture during interrogations undermine Iran's own national laws and international obligations".

18. When considering whether the Appellant had a well-founded fear of persecution, First-tier Tribunal Judge Solly also failed to take into account the Country Information and Guidance on *Iran: Kurds and Kurdish Political Parties,* Version 2.0, July 2016, which stated that:

"5.2.11 In January 2016 Kurdistan Human Rights Network (KHRN) published a report on the violation of Kolber workers in Iran. The report stated that 'Kolber is a Kurdish name for workers and tradespersons, who for a small sum of money risk their lives to transport packs of various foreign items on their own back or on the back of horses to transfer them from and to Iranian border territories from border areas of neighbouring Kurdish regions in Iraq and Turkey.'

5.2.12 The report went on to state that: 'The Kolber workers mostly come from Kurdish border villages and towns, where they are usually left with no job other than Kolber work to make a small income to survive through the harsh reality of the deprived Kurdish border areas. However, the Iranian government describes them as "smugglers", while Iranian soldiers and border guards deliberately shoot to kill them across the border areas.'

5.2.13 Jane's 'Sentinel Security Assessment' noted that 'there is growing anger in Iran's Kurdish community over the number of Kurds executed in Iran amid allegations that torture is widespread."

19. The Home Office Presenting Officer submitted that the expert report only confirmed that drug smugglers would be persecuted by the Iranian authorities. But in paragraph 60 of the report, the expert also relied on the extract from the Kurdistan Human Rights Network referred to above.

20. The First-tier Tribunal Judge also failed to take into account that paragraph 2.3.2 of the Country Information and Guidance on *Iran: Kurds and Kurdish Political Parties,* Version 2.0, July 2016 stated that although "…in general, the level of discrimination faced by Kurds in Iran is not such that it will reach the level of being persecutory or otherwise inhuman or degrading treatment. This was confirmed in the country guidance case of *SSH and HR (illegal exit: failed asylum seeker (CG)* [2016] UKUT 308 (IAC) (29 June 2016) where the Tribunal held that although the evidence does not show that there is a risk to returnees on the basis of

Kurdish ethnicity alone "a Kurdish person may be at risk if "that person is otherwise of interest to the Iranian authorities (para 34 of determination").

21. Instead, the First-tier Tribunal Judge relied on an Ekurd Daily article, mentioned in paragraph 28 of the Respondent's refusal letter which stated that "every month Iranian border guards shoot dozens of poor Kurdish people for trying to smuggle goods across the border from Iraqi Kurdistan". She did not take into account the rest of the quote which stated that the "authorities ignore complaints by relatives of victims who allege their loved ones were killed without reason or proper warning". It went on to assert that "the courts don't conduct a thorough investigation. Oftentimes, they categorise the victim as criminal, saying he deserved what he got because he ignored the police".

22. It is also the case that when considering the credibility of the Appellant's account First-tier Tribunal Judge Solly failed to give any, or any sufficient weight, to the country and expert evidence, which confirmed the plausibility of the Appellant's account. For example, in part two of the expert report, Roya Kashefi confirmed that the area from which the Appellant came is within a well-known area for smuggling and that there is an unofficial market at Qasmarash. She also confirmed that due to the economic plight of the Kurdish community many had to resort to smuggling to support themselves.

23. In paragraph 77 of her decision the First-tier Tribunal Judge lists her reasons for finding the Appellant's account incredible and in paragraph 88 she stated that "in reaching this conclusion have considered all of the evidence holistically and bearing in mind the low standard of proof". However, it is clear from the content of paragraph 87 of the decision that she had not taken into account the expert evidence before reaching such a holistic decision, as she stated that "the expert predicates her evidence on the appellant's account of his activities which I reject as I have not accepted that the appellant was engaged in smuggling". This was an approach which was explicitly rejected in *Karanakaran v Secretary of State for the Home Department* [2000] EWCA Civ 11.

24. For all of these reasons the decision reached by First-tier Tribunal Judge Solly contained errors of law and must be set aside.

Decision

(1) The appeal is allowed.

(2) The decision of First-tier Tribunal Judge Solly is set aside.

(3) The appeal is remitted to the First-tier Tribunal to be heard *de novo* by a First-tier Tribunal Judge other than First-tier Tribunal Judge Solly or Blundell.

Nadine Finch

Signed Date 10 December 2018

Upper Tribunal Judge Finch