Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/09429/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 5th June 2019	**On 13 June 2019**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

M R
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms V Easty, of Counsel, instructed by Paragon Law Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Iran born in 2003, and is now 15 years old. He arrived in the UK in February 2017 with his brother SR and claimed asylum the next day. He was refused asylum in a decision of the respondent dated 8th September 2017. His appeal, and that of his

separately represented brother SR, was dismissed by First-tier Tribunal Judge Bart-Stewart in a determination promulgated on the 16th February 2018.

2. An appeal against the decision of the First-tier Tribunal was only been brought on behalf of the appellant who is represented by Paragon Law. Permission to appeal was granted to the appellant by the Vice President of the Upper Tribunal on 2nd November 2018 following a grant of permission in a judicial review challenge to the refusals of permission to appeal by the First-tier and Upper Tribunals. The matter came before me and I found that the First-tier Tribunal had erred in law for the reasons set out in my decision appended at Annex A of this decision, but the remaking of that decision was adjourned.

3. The matter came back before me to remake the appeal. The remaking is confined to whether the appellant is entitled to succeed in his protection appeal based on a real risk of serious harm upon his returning to Iran as a failed asylum seeker from his particular family background without a valid passport, having left Iran illegally and being of Kurdish ethnicity.

4. The facts on which this remaking is based are that it is accepted that the appellant is an Iranian Kurd who left Iran illegally in 2017 and travelled overland by lorry and boat. It is preserved from the findings of the First-tier Tribunal that the appellant and his brother have not shown to the lower civil standard of proof that they had been politically involved with the KDPI as their history of engagement delivering leaflets was found to be vague, inconsistent, and as a result Judge Bart-Stewart found that their history of involvement with the KDPI had been fabricated. Judge Bart-Stewart made no findings as to whether the appellant had a family history of involvement with the KDPI but it was not found to be credible that his uncle was currently in prison.

Evidence & Submissions – Remaking

5. The appellant's evidence about his family history is that his father died when he was about 6 years old, when his father was about 35 years old, and he was told he was killed because he was a member of the KDPI by his brother. His mother remarried and left the appellant and his older brother, FR, to live with their paternal uncle, F, who had a wife and three children. They all lived in Dawan village in Iran where his paternal uncle had a small holding with chickens, cows and an orchard. The appellant's only schooling was attending the mosque on Fridays to learn the Koran. He knew his paternal uncle was also involved with the KDPI, but he himself has no understanding of the politics of the KDPI.

6. Mr Melvin submits, in summary, that the appellant and his brother were found not to be credible witnesses before the First-tier Tribunal and so as it is only their oral and written evidence that they have a family history of involvement with the KDPI the appellant had not shown to the required lower civil standard of proof that their father and paternal uncle had such involvement. There is also no evidence that the appellant suffered any harassment in Iran as a result of his father and

uncle's political membership except as a result of the incident in September 2016 involving the leaflets which has not been believed. There is no evidence of the appellant having any sur place political activity in the UK or of any internet activity. It is argued therefore that in accordance with country guidance set out in HB (Kurds) Iran CG [2018] UKUT 00430 the fact that the appellant exited illegally, has no valid passport and is ethnically Kurdish does not suffice to mean that there is an Article 3 ECHR risk on return.

7. Mr Melvin criticised the appellant's solicitors in relation to the updating expert report as they have not informed Dr Kakhki that the appellant had not been found to be credible in his history of political involvement by the First-tier Tribunal and that the remaking in the Upper Tribunal preserved that finding, and had not provided him with the decisions of the Tribunal which were relevant documents. The report starts, like the previous one, from the position that the history of appellant is to be believed when this is not the case and as such the report can only be given little weight applying AAW (expert evidence – weight) Somalia [2015] UKUT 673.

8. Ms Easty submits, in summary, that there is no inconsistency in the evidence provided by the appellant at interview, in his brother's evidence at interview, the evidence given before the First-tier Tribunal and in the appellant's statement with respect of his father having been killed when he was six years old because he was a member of KDPI and his paternal uncle also having involvement with the KDPI. As the appellant has no contact with anyone in Iran there is no way that he could have obtained any additional evidence to support these contentions. The history about the political involvement of the appellant and his brother had not been believed mainly due to issues with his brother's evidence, as he was the adult who could be expected to have known more and provided a more detailed and convincing account if it had been true. I should therefore find that the appellant had this family history of involvement with the KDPI. This should then be seen as a factor which was likely to cause a perception of involvement with Kurdish political activities or support for Kurdish rights in the Iranian authorities if the appellant were returned to that country. It was clear from the evidence of the expert in his most recent report, Dr Kakhki's report of May 2019, that political support was believed to run in families in Iran and he would be seen in this way particularly as the appellant is still a minor, and also that the situation in Iran had worsened with respect to issues for those involved with Kurdish groups since the Upper Tribunal issued the country guidance on the risk to failed Kurdish asylum seekers in HB (Kurds) Iran.

Conclusions- Remaking

9. The case of HB (Kurds) Iran provides country guidance on the issue of the risk on return for failed ethnically Kurdish asylum seekers when sent to Iran. The evidence before the Upper Tribunal supported the contention that Kurds suffer discrimination in Iran, but not that the

discrimination amounts in general to persecution or treatment contrary to Article 3 ECHR. Merely being a Kurd returned to Iran without a valid passport combined with having exited illegally will not of itself create a risk of persecution. It is however a risk factor which might, if combined with another risk factor or factors, lead to real risk of persecution on return if the asylum seeker had exited illegally. Other risk factors are: residence in KRI; involvement or perceived involvement with Kurdish political groups even at low-level of activity or if the activities are peaceful; and involvement with Kurdish social welfare or charitable groups which are perceived as political by the Iranian authorities. The country guidance is that the Iranian authorities are "hair-trigger" with respect to those who are involved with Kurdish political activities or rights, and that their threshold for suspicion is low and the reaction likely to be extreme.

10. I accept the criticism of the appellant's solicitors put forward by Mr Melvin in relation to failing to provide the expert Dr Kakhki with relevant documents, namely the decisions of the First-tier Tribunal and Upper Tribunal. I find that the evidence provided is from a very well qualified, informed and respect expert and that the material within the report can properly be given weight, but not the opinion in relation to the appellant himself as this is based on a mistaken understanding that it was accepted that he had personal KDPI political involvement. The expert evidence of Dr Kakhki may be summarised as follows: that illegal departure and family connection with the KDPI and an asylum application abroad will lead to additional scrutiny and background checks on return to Iran. It is almost inevitable that a person in such a situation will be detained on arrival in Iran and questioned about his reasons for leaving Iran illegally and his activities whilst abroad. If a senior closely related male figure in a family has been involved with the KDPI this will lead to a likelihood of ill treatment and persecution due to an interest on the part of the Iranian authorities in obtaining information from networks/connections and regarding the activities of his family members. An illiterate or ill-educated person may struggle to provide convincing responses to questions which may worsen their situation. Further the situation of conflict between the Iranian state and Kurdish groups is heightened, and there is a belief that the Kurdish groups are assisted by sympathisers from abroad. The other human rights reports submitted by the appellant's solicitors, and particularly the sections which were highlighted for my attention, clearly indicate that Iran continues to be a country which is responsible for detention, unfair trials and torture of Kurdish Iranian persons who are viewed as political activists.

11. This is an extremely finely balanced decision. I take full notice of the fact that the aspect of the appellant's history relating to his own involvement with the KDPI has not been believed, and that the decision of the First-tier Tribunal did take note of his evidence being inconsistent about the number of times the leaflets were distributed and the method when compared to that of his brother. On the other hand, I find that his

evidence, and that in the interview of his brother SR, is entirely consistent on the killing of his father as a KDPI fighter and his uncle being involved with the KDPI. Whilst the appellant's account is not detailed or well informed this is consistent with his having received no proper education whilst in Iran and the death of his father having taken place when he was six years old and his having left Iran when he was 13 years old. There has been no attempt to embellish the account; no inconsistent acquiring of a personal political profile in the UK; and there is nothing inherently implausible about the history he gives of a family involvement with the KDPI. It is the view of his foster parent, Mr Paul Pateman in his letter of 5th January 2018, is that he presented to them with attachment issues usual in a child separated from parents at an early age which supports the history of the death of his father and disappearance of his mother from his life. On consideration of all of the evidence before me I find, to the lower civil standard of proof, that the appellant's father and paternal uncle were supporters of the KDPI and his father died fighting for them.

12. In light of that finding, and the country of origin background evidence including that in the expert report of Dr Kakhki I am satisfied that applying the guidance in HB (Kurds) Iran, and noting particularly that the threshold for suspicion is low and the appellant is unlikely to be able to give any type of sophisticated level of response distancing himself from his family's activities due to his young age and lack of political understanding, that there is a real risk of serious harm to the appellant if he returned to Iran on the basis that he is an ethnic Kurd who has left Iran illegally as he may be perceived as a political opponent due to his family background in supporting the KDPI.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision of the First-tier Tribunal.
3. The appeal is remade allowing the appeal on asylum and Article 3 ECHR grounds.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of his protection claim.

Signed: Fiona Lindsley Date: 11th June 2019

Upper Tribunal Judge Lindsley

Annex A: Error of Law Decision:

DECISION AND REASONS

Introduction

1. The appellants are citizens of Iran and are brothers born in 2003 and 1993 respectively. MR, the first appellant, is now 15 years old and SR, the second appellant, is now 25 years old. They arrived in the UK in February 2017 and claimed asylum the next day. They were refused asylum in a decision of the respondent dated 8th September 2017. Their appeal against the decision was dismissed by First-tier Tribunal Judge Bart-Stewart in a determination promulgated on the 16th February 2018.

2. The appeals against the decision of the First-tier Tribunal have only been brought on behalf of the first appellant who is represented by Paragon Law. The second appellant has been separately represented throughout, before the First-tier Tribunal by Rodman Pearce Solicitors, and then from November 2018 by Woolfe & Co Solicitors Ltd. Although the second appellant has not made any appeal the original refusals of permission to appeal by the First-tier Tribunal and Upper Tribunal were sent to his solicitors and named him as an appellant. The grant of permission was only in the name of the first appellant, but was also sent with the notices of hearing to the second appellant.

3. Permission to appeal was granted to the first appellant only by the Vice President of the Upper Tribunal on 2nd November 2018 following a grant of permission in a judicial review challenge by the first appellant to the refusals of permission to appeal by the First-tier and Upper Tribunals.

4. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Preliminary Issue – Appeal for the Second Appellant

5. I find that the second appellant has no appeal before the Upper Tribunal or possibility to apply for permission to appeal. This is because he did not at any point appeal the decision of the First-tier Tribunal. It was not possible to grant permission on the basis of Mr Dulan's oral application for permission to appeal on the basis of the first appellant's grounds and because this course of action is argued to be in the interests of justice. This is because under Rule 21(2)(a) & (b) of the Tribunal Procedure (Upper Tribunal) Procedure Rules 2008 it is only possible for an appellant to apply for permission if an application has been made to and refused by the First-tier Tribunal, which in the second appellant's case it was accepted had not happened. The second appellant may discuss with his representatives whether it is appropriate to apply out of time to the First-tier Tribunal for permission to appeal or perhaps make a fresh asylum claim, but he has no basis on which to apply to the Upper Tribunal for permission to appeal at the current time. As he cannot

apply for permission and was not granted permission by the Vice-President I find he has no appeal to be determined by me.

Submissions – Error of Law

6. The grounds of appeal contend, in summary, firstly that the first appellant was found not to be credible but the First-tier Tribunal did not properly assess his credibility by reference to his age, which was 14 years at the date of hearing and 13 years when he arrived in the UK; and secondly, that the First-tier Tribunal failed to lawfully consider an expert report on the issue of his illegal entry.

7. With respect to the first issue it is argued that there was a failure to follow the guidance of the Senior President of Tribunals, Sir Ernest Ryder in AM (Afghanistan) v SSHD [2017] EWCA Civ 1123, and given his age was accepted there was a failure to record the effect this had on assessing the evidence and a failure to consider whether any of the inconsistencies in the evidence could be explained by the first appellant's age. The only reference is to having "regard" to the first appellant's age at paragraph 33, and this did not fulfil these two duties.

8. Ms Warren elaborated this ground further by explained that it was argued that that having "regard" to the first appellant's age with respect to his understanding of what had happened in Iran and completely failing to consider whether the appellant's age affected his stress levels, his lack of concentration and his ability to deal with interpreter problems and thus issues with his ability to clearly recount the history was a failure to properly apply AM.

9. Ms Warren argued that even though the treatment of the evidence of the second appellant, SR, who was a witness in the first appellant's case as well as an appellant in his own right, was not challenged that any failings of the First-tier Tribunal were not immaterial as the evidence of the first appellant combined with the country of origin evidence sufficed to enable him to succeed even if the second appellant had given non-credible evidence.

10. With respect to the second issue the grounds set out a contention that the expert report from Dr Kakhki, which deals inter alia with the situation faced by those who leave Iran illegally and which indicates that the first appellant is at increased risk of serious harm due to his having claimed asylum and could face persecution for his exit particularly as a Kurd, was not dealt with lawfully. There was a failure to have proper regard to this evidence. It was rejected on the basis that it was predicated on the appellants account being true but there was no finding by the First-tier Tribunal that the appellants were not asylum-seeking Kurds who had exited Iran illegally, so the relevant facts were apparently seen to be true. The evidence from Dr Kakhki was sufficiently credible fresh evidence to mean that is should have been considered whether or not the country guidance on risk on return to Iranians who have illegally departed from Iran should have been followed SSH & HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 00308, and

given that it had not been found that the first appellant did not have a political family this might be an additional risk factor in light of the guidance now issued in HB (Kurds) Iran CG [2018] UKUT 00430, so this error was clearly not an immaterial one given the current country guidance.

11. Mr Clarke argued that the first ground could not succeed as the First-tier Tribunal had sufficiently considered the issue of the appellant's age, and that the joint account of activities involving posters and leaflets was very careful considered and found to be vague and inconsistent mostly by reference to the evidence of the second, older, appellant, and that as a result this ground could not succeed as even if the evidence of the first appellant was treated with greater care on the basis of his age there was no basis on which the appeal could succeed.

12. Mr Clarke argued that the second ground should not succeed because the evidence of Dr Kakhki was the same as that set out in SSH & HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 00308 at Appendix 1, on which the Upper Tribunal had concluded that there was no evidence of a real risk of serious harm simply based on someone who exited illegally being return to Iran as a failed asylum seeker as that the examples featured all had an extra factor which explained the harm they had experienced on return. Mr Clarke did concede however that the First-tier Tribunal had not made a finding on the history of the appellants' family's political history and whether or not that was believed, and that this could be relevant if an error were found in the treatment of the evidence of Dr Kakhki.

Conclusions- Error of Law

13. After careful consideration of the arguments by both representatives I do not find that the First-tier Tribunal erred in failing to examine the evidence of the first appellant through the prism of his age.

14. At paragraph 21 of the decision the First-tier Tribunal sets out that the first appellant was accompanied by his foster parent, the way in which the hearing was conducted and how the First-tier Tribunal Judge bore in mind that he was 14 years old. At paragraph 27 the findings and reasons section of the decision sets out 7 paragraphs in which the First-tier Tribunal Judge explains why the evidence of the appellants with regard to the political history which they say led to their flight from Iran was not found to be credible, with the reasons being that the account was vague; the second appellant was internally inconsistent; and the accounts were also not consistent with each other. Most of the analysis relates to the second appellant. The evidence of the first appellant is only referred to twice in this section. The first time is at paragraph 29 when it is identified that he gave a different account of taping posters to walls rather than throwing leaflets into gardens at night and gave a different number of occasions to the two different accounts given by the second appellant. The second time reference is made to the first appellant's evidence is at paragraph 33 where the First-tier Tribunal has

specific regard to the age of the appellant at the time events took place in Iran when finding that the first appellant ought to have understood that the leaflets he was distributing were for the KDPI given that he had also said that he was told he was doing this to follow in his father's footsteps, and as such his account was not credible. The same paragraph finds that the claimed issues of stress, lack of concentration and interpreter difficulties did not suffice to explain the inconsistencies and lack of detail in the history of both appellants.

15. I find that the First-tier Tribunal has considered the claimed reasons why the history was not consistent and detailed for both appellants at paragraph 33 of the decision. The First-tier Tribunal has considered the issue of the young age of the first appellant at the time of the contended problems with respect to his not knowing that he was distributing KDPI leaflets, but found that the explanation given lacked coherence in the context of that young age on the basis of the first appellant's own other evidence. There is no complaint by the first appellant that any significant evidence of his was overlooked. There is no further reliance on his evidence bar noting it was different from the second appellant's two versions at paragraph 29 as detailed in the paragraph above. It is clear that the majority of the evidence regarding the claimed political activity of both appellants came from the second appellant, and the majority of the difficulties arose from his evidence. I find, in this context, that the First-tier Tribunal had appropriate consideration of the first appellant's age when drawing the conclusions that his explanation was inadequate at paragraph 33, and that the First-tier Tribunal did not need to go further in consideration of the first appellant's age and its impact as the rest of the history was given primarily by the second appellant.

16. I accept however that the very brief treatment of Dr Kakhki's evidence at paragraph 34 of the decision amounts to an error of law. The report deals with problems for those returning to Iran following illegal exit at section 3 of the report and refers back to the evidence of ill treatment of those associated with the KDPI in section 2 of the report. It was not disputed in the decision of the First-tier Tribunal that the first appellant had left Iran illegally. I find that the report does not contain the same evidence as was before the First-tier Tribunal in SSH & HR, as examples of events that happened after May 2016, when that case was heard, are included and there is a section at paragraph 117 which deals with SSH & HR. I find therefore that there were insufficient reasons given in the decision of the First-tier Tribunal for dismissing the appeal on the basis of risk on return for the first appellant as a failed asylum seeker Kurd who left Iran illegally in light of a report which deals with this issue; was not found deficient in any way; and which is from a well- qualified expert who had given evidence in a previous country guidance case and who makes an appropriate declaration as an expert witness.

17. The decision of HB (Kurds) Iran provides guidance that someone returned to Iran as a refused Kurdish asylum seeker who had exited illegally would be subject to additional questioning on their return, and

any perception by the Iranian authorities of support for Kurds rights could lead to a real risk of Article 3 ECHR treatment. As there is no finding by the First-tier Tribunal that the appellants had not told the truth about their father and uncle's political involvement with the KDPI, which could in turn be a reason why the first appellant might be perceived by the Iranian authorities as a political Kurd or a someone fighting for Kurdish rights, the outcome of an appeal on this basis cannot be foreseen.

18. In light of my conclusions I preserve the findings of the First-tier Tribunal that the first appellant is not at real risk of serious harm on return to Iran due to his own political activities, but set aside the findings that relate to risk he might face on return as a refused Kurdish asylum seeker who left Iran illegally. This issue alone will be remade at the adjourned remaking hearing.

19. It was necessary to adjourn that hearing in light of the Rule 15(2A) Tribunal Procedure (Upper Tribunal) Rules 2008 application made prior to this hearing by the first appellant's solicitors to be allowed to adduce updating country of origin materials and an updating statement from the first appellant, and the explanation that they were unable to do this work in advance of today's hearing as it would not be authorised by the Legal Aid Agency in advance of a finding that the decision of the First-tier Tribunal erred in law. There was also no Sorani interpreter present for the first appellant to use to give further evidence. I find that it is reasonable to up- date the evidence on these issues due to the lapse of time since the hearing before the First-tier Tribunal and to enable the parties to have the opportunity to address the relevant issues as identified in HB (Kurds) Iran, country guidance which was not available at the time of the hearing before the First-tier Tribunal.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set aside the decision of the First-tier Tribunal.

3. The remaking of the appeal is adjourned to the first available date after the 18th May 2019.

Directions:

1. The parties should serve on the other party and file with the Upper Tribunal a paginated bundle including all updating evidence on which they wish to rely 10 days prior to the remaking hearing.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of

publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of his protection claim.

Signed: Fiona Lindsley Date: 18th March 2019

Upper Tribunal Judge Lindsley