



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/09841/2018

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre
On 10 January 2019

Determination Promulgated
On 24 April 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

KK
(ANONYMITY ORDER MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Wilkins, Counsel, instructed by Greater Manchester
Immigration Aid Unit
For the Respondent: Mr Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

- 1 This is the appeal against the decision of Judge of the First-tier Tribunal JJ Maxwell dated 2 October 2018, dismissing the appellant's appeal against the decision of the respondent dated 27 July 2018 refusing his protection and human rights claim.
- 2 The appellant is a national of Iran, and arrived in the United Kingdom on or around 9 August 2017, when he was aged 15. He sought protection on the grounds that Iranian border guards had identified him and his father whilst they had been in the process of smuggling alcohol on horseback from Iraq to Iran. The convoy of smugglers of which they formed part was shot at, injuring some within the group, but the appellant and his father had managed to run away. The appellant's father

believed that they would both have been identified as smugglers, and fearing punishment amounting to serious harm, he arranged for the appellant to leave Iran. He travelled with an agent, ultimately arriving in the UK.

- 3 The appellant was interviewed in connection with his protection claim, and provided a witness statement dated 22 March 2018. On 27 July 2018 the respondent refused the application, suggesting there were certain inconsistencies or implausible factors within the appellant's account, but given the appellant's age, granted him leave to remain until the age of 17 ½. The appellant appealed to the First-tier Tribunal against the decision to refuse the protection claim.
- 4 The matter came before the judge at the Manchester hearing centre on 21 September 2018. The appellant gave oral evidence.
- 5 The judge dismissed the appeal, for reasons accurately summarised in the appellant's subsequent grounds of appeal as follows:
 - (i) the ability of the appellant and his father to evade the Iranian border guards lacked credibility [32];
 - (ii) purported inconsistencies in the appellant's evidence as to where he was when shot at by the border guards and the direction of fire [33]; and
 - (iii) the ability of the appellant to leave the country the day after the incident was implausible [34].
- 6 The appellant applied for permission to appeal in grounds dated 16 October 2018 arguing that the judge had erred in law:
 - (i) when considering the credibility of the appellant's account, by failing to have proper regard to the appellant's evidence as to both (a) the location of the appellant and his father when the border guards opened fire, and (b) the direction from which the gunfire came; and
 - (ii) when considering the risk to the appellant as a Kurdish failed asylum seeker, failed to have adequate regard to country evidence, including expert evidence.
- 7 Permission to appeal was granted by Judge of the First-tier Tribunal Povey on 25 October 2018. Judge Povey expressed the view that the judge's findings regarding the appellant's account of events in Iran were sufficiently well reasoned, but found merit in the second ground, relating to the assessment of risk of harm as a Kurdish failed asylum seeker. However, permission was granted generally, and the appellant is thus entitled to rely on both grounds.
- 8 The appellant's grounds of appeal, drafted by Ms Smith of Counsel, who appeared before the judge, set out at paragraph [8] a record of the appellant's evidence said to

have been given in a cross examination, and it was argued that such evidence had not been taken properly into account. The papers available to me prior to the hearing contained only a single page of Ms Smith's typed note of evidence, which did not include the relevant extract, and did not contain a signed statement of truth confirming the accuracy of the note.

- 9 Prior to the date of hearing, I caused a notice of directions to be issue to the parties, informing them that I lacked a full note of evidence from the appellant, and giving the following directions:

"1 The Appellant shall by 4.00 pm Thursday 3rd of January 2019:

(i) confirm in writing to the Tribunal ... whether any further pages of Ms Smith's note of evidence were submitted with the application for permission to appeal, and if so, shall at the same time provide them by email and copy that material to the Respondent; and

(ii) confirm whether any statement of truth was made by Ms Smith as to the accuracy of her note of evidence and provided with the application for permission to appeal, and if so, shall at the same time provide a copy of the same, and provide a copy to the Respondent (and the parties are reminded of the provisions of BW (witness statements by advocates) [2014] UKUT 568 (IAC) (12 December 2014).

2 The Respondent shall by 4.00 pm Monday 7th January 2019 confirm in writing to the Tribunal ... and copied to the Appellant:

(i) whether the Respondent raises any material dispute as to the content of Ms Smith's note of evidence; and

(ii) whether the Respondent has any objection to Ms Smith acting as advocate in the proceedings.

3 In light of the Respondent's response, the Appellant shall make arrangements for representation at the hearing on 10.1.19 which are compliant with BW (witness statements by advocates) [2014] UKUT 568.

- 10 I was subsequently provided with a full copy of Ms Smith's note of evidence. Mr Tan, for the Respondent, also confirmed in writing that he had received a full copy of Ms Smith's note, and having crossed referred it to the note of evidence taken by Mr Townsend, who appeared before the judge, Mr Tan confirmed that the respondent did not raise any material dispute as to the content of Counsel's note of evidence. Therefore, although Ms Smith's note was not accompanied by a statement of truth that it represented an accurate note of evidence, there is no dispute as to its content.

- 11 At the hearing before me, the appellant was in fact represented by Ms Wilkins of Counsel, not Ms Smith. Ms Wilkins relied upon the grounds appeal. Mr Tan sought to defend the judge's decision on the basis that the findings made by the judge were open to him on the evidence before him, having had proper regard to both the content of the appellant's witness statements and his oral evidence. He invited me to dismiss the appellant's appeal.

Discussion

- 12 In relation to the Appellant's location, and the direction of fire, the judge held as follows:

"33. Further, the appellant, in his first statement dated 22 March 2018, said *"As were [sic] approaching the border and approaching Iran, we started to hear shooting. My father told me that he thought the shots were coming from the Iranians border guards."* He went on to confirm, in his recent statement dated 13th of September 2018, they were shot at *"approaching the Iranian side."* When pressed on this point in cross-examination, he changed his account to the convoy being shot at from behind after they had crossed the Iranian border. The appellant sought to explain this by suggesting the border does not have a hard and fast demarcation and the fact they were being shot at meant they must have crossed into Iran. Making due allowance for the appellant's age, I cannot accept this as an explanation. He has reiterated the claimed fact of being shot at as approaching the border twice; both occasions in statements he has made with the assistance of his representative so it cannot reasonably be suggested these were answers inadvertently given; they are, in fact, consistent one with another. Further, the statements indicate the shooting was in front of them whereas he now maintains it came from their rear."

- 13 As the appellant argues that the judge failed to have adequate regard to relevant evidence, it is appropriate to set out the rest of that evidence (insofar as not already quoted within the judge's decision at [33]). In relation to the appellant's evidence about his and his father's location at the time that they were shot at, the appellant relied upon paragraph 7 of his witness statement of 13 September 2018:

"When we were shot at we were in the border area. All of the legal routes have checkpoints and gates so that legal traders can enter legally. Illegal crossings are not defined and not marked, and the border area is several hundred metres wide. We would describe this area as 'no man's land'. When we were shot at we were in this area, approaching the Iranians side."

- 14 It is accepted by both parties that the following, taken from Ms Smith's note, is an accurate record of certain questions and answers within cross examination by Mr Townsend:

"Q: WS1 [18] as we were approaching border to Iran we started to hear shooting, father said shots coming from a reading border guards and

shooting at us for what doing. You, your father, and companions, actually in Iraq when shooting happened?

A: As I have indicated in my statement we were on the border, the border is wider, not a specific borderline to say which country in, but I am sure we were going into Iran because shot at by Iranians border forces.

Q: WS says approaching border and approaching Iran?

A: Yes we were going, approaching the border, we were on the border, it is a vast area and no specific point that tells you that you are on this side or the other but because shot at by Iranians border guards we were on the Iranian border.”

- 15 The Appellant contends that his evidence in his statement of 13 September 2018 was entirely consistent with his oral evidence, and that at no point in his oral evidence did he state that he *had crossed* the border; rather, as he had stated in his statement, had said that they were *in the border area*. The appellant argued that there was no inconsistency. Further, in relation to the direction of fire, the appellant argues that the judge, in finding that the appellant had ‘indicated’ in both of his witness statements that the shooting had been in front of them, failed to have regard to the actual content of his statements, neither of which gave any evidence as to the direction of fire. The first statement provided that he and his father heard shooting, which the father thought had come from the Iranian border security guards [18], and in the second statement the appellant stated that they were shot at when in the border area [7]. In stating in cross-examination that the shooting had been from behind, the appellant had not given evidence which was inconsistent.
- 16 I find that the appellant’s first ground is made out. In relation to the appellant’s first witness statement, it is correct to note that the appellant described starting to hear shooting when ‘approaching the border and approaching Iran’. If the border were treated as a clearly defined position or line, then the words used by the appellant in his first witness statement would tend to suggest that at the time that they started to hear shooting, the appellant and his father were still in Iraq. Thus, although the appellant was silent in his first witness statement as to the actual direction of fire, it would indeed be reasonable to infer, as the judge appears to have done, that the firing came from in front of them, if it came from Iranians border guards.
- 17 However, the respondent having queried this sequence of events in the refusal letter, the appellant gave further evidence about the border at paragraph 7 of his second witness statement, as set out above. Although the judge notes at [33] the appellant’s explanation that ‘the border does not have a hard and fast demarcation’ the judge’s approach to the Appellant’s evidence on this point still appears to adopt the model that the border is at a fixed point or line. The appellant’s description of the border in his second statement, that the crossing is not defined, is not marked, is several hundred metres wide, and can be described as ‘a no man’s land’, is clearly more nuanced than his evidence at paragraph 7 of his first witness statement, but is

clearly capable of having weight attached to it; the appellant is describing crossing a border area in a mountainous region, and not at a regular border control area. The judge does not appear to consider whether this more detailed description of the border area is capable of being accurate or truthful.

- 18 The judge's suggestion at [33], line 11, that the appellant had stated in *both* of his witness statements that he was shot at when *approaching the border* does not, I find, accurately reflect the content of his second witness statement, which provides "When we were shot at we were *in this area, approaching the Iranian side*" (emphasis added), and the appellant had described *this area* as being several hundred metres wide. Thus when the judge quotes at [33] line 5 that the appellant had stated they had been shot at 'approaching the Iranian side', the judge has omitted to refer to highly relevant evidence immediately preceding those words.
- 19 Further, I find that at [33] line 14, when the judge suggests that *both* statements indicated that the shooting was in front of them, this does not accurately reflect the appellant's evidence in his second witness statement; he simply did not state that the shooting came from in front; rather, as above, he describes being shot at whilst within the border area, several hundred metres wide.
- 20 Further, there was simply nothing in the second witness statement or the appellant's evidence in cross examination that entitled the judge to use the past perfect tense at [33] line 6: "He changed his account to the convoy being shot at from behind after they *had crossed* the Iranian border"; the appellant's evidence was in the past progressive.
- 21 It may have been possible for the judge to have specifically considered the appellant's second and more detailed description of the border area, and to have rejected it, so long as reasons that were adequate in law were given for such a finding. However, not having rejected the appellant's more detailed description of the border area, I find that the judge has failed to take into proper account the appellant's explanation of the setting and the events. There is, practically speaking, no reason why Iranian border guards, who may also have been physically present within this border area, several hundred metres wide, could not have been positioned 100m behind the convoy, and to shoot at it from behind, as the convoy was travelling in the direction of Iran.
- 22 I thus find that one of the three core reasons given by the judge for disbelieving the appellant's account is flawed. I cannot be satisfied that the judge would have arrived at the same decision on the overall credibility of the appellant's account, had he not made such an error. I therefore find that the judge's error was material to the outcome of the appeal.
- 23 It is not necessary for me to consider the appellant's second ground, which argues that the judge failed to take into account certain country and expert evidence regarding the risk to the appellant as a Kurdish failed asylum seeker. It is necessary for this appeal to be heard afresh in the First-tier Tribunal. In doing so, the Tribunal

can apply as it sees fit the further country guidance, post dating the judge's decision, now given in HB (Kurds) Iran (illegal exit: failed asylum seeker) CG [2018] UKUT 430 (IAC).

Decision

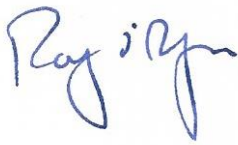
The judge's decision involved the making of a material error of law

I set aside the whole of the judge's decision

I remit the appeal to the first-tier tribunal

Signed:

Date: 19.4.19



Deputy Upper Tribunal Judge O'Ryan

This appeal concerns a protection claim. Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed:

Date: 19.4.19



Deputy Upper Tribunal Judge O'Ryan