



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/01551/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 11 March 2020**

**Decision & Reasons Promulgated
On 14 April 2020**

Before

UPPER TRIBUNAL JUDGE KEITH

Between

**'PA'
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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

By virtue of the appellant appealing an asylum decision, 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 his family. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:

For the appellant: Ms G Brown, Counsel, instructed by Southwark Law Centre
For the respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

These are a written record of the oral reasons given for my decision at the hearing.

Introduction

This is an appeal by the appellant against the decision of First-tier Tribunal Judge T Brown (the 'FtT'), promulgated on 13 November 2019, by which he dismissed the appellant's appeal against the respondent's refusal on 24 February 2014 of his protection claim. The FtT allowed the appellant's appeal solely by reference to article 3 of the European Convention on Human Rights ('ECHR'), on the basis that he would be at risk of prosecution for illegal alcohol smuggling, and the consequences of such prosecution risked torture, so as to breach the appellant's rights under article 3.

The appellant arrived in the UK on 4 August 2008, aged 17 years old, as recorded in the judgement of Haddon Cave LJ, in a previous decision of the Court of Appeal: R (PA (Iran) v Upper Tribunal (Immigration and Asylum Chamber) [2018] EWCA Civ 2495. Without reciting the background in full, which is referred to in that judgment, there is a previous unimpugned decision of Asylum and Immigration Tribunal Judge JF W Phillips promulgated on 18 March 2009, which dismissed the appellant's previous asylum claim on the basis that the appellant was not credible or truthful. Further submissions were lodged on 1 March 2011 which were considered and rejected by the First-tier Tribunal and Upper Tribunal, but in response to which the Court of Appeal set aside the earlier findings, on the basis that there had been a failure to consider that a plausible explanation for the inconsistencies in the appellant's account were his relative youth and impaired cognitive function.

Judge Phillips had, in his unimpugned decision, noted that the appellant's fear was of prosecution for smuggling, not persecution, which the appellant conceded as much. Judge Phillips had rejected the protection claim on that basis.

The FtT, whose decision is challenged in this appeal, took Judge Phillips's decision as his starting point, and considered the different basis on which the Refugee Convention was said to be engaged ([18]). In particular, it was claimed that there was a risk because of the appellant's imputed political opinion, as a smuggler involved in illegal activity; or in the alternative, on grounds of race or ethnicity, as someone having contravened the law and illegally exited Iran. Further, it was claimed that the appellant was at enhanced risk of questioning and ill-treatment on return to Iran.

The FtT concluded at ([33]) that despite concerns about the appellant's credibility, and taking into account country information about the prevalence of smuggling in border areas in Iran, the appellant's account was sufficiently credible to meet the lower standard of proof in a protection claim. The FtT found that that the appellant was involved in illegal smuggling activity as a child in Iran, and left Iran in or around May

or June 2008. The FtT further concluded, despite significant concerns about scarring evidence, at [38] that the appellant was subject of adverse attention from the Iranian authorities before he left Iran, in the form of the police visit to his home. However, the FtT did not accept that it was reasonably likely that the appellant remained at risk of active interest by the Iranian authorities on return some 11 years later. First, the appellant been smuggling alcohol rather than drugs and by implication, alcohol smuggling was regarded as less serious. Second, he was not a leading smuggler. Third, there was no evidence of any outstanding issues relating to the appellant some 11 years later. The FtT was highly critical of the expert evidence relied on by the appellant of Dr Kakhki, regarding it is not updated, unhelpful in its format, and without adequate explanation for why the appellant would remain at real risk on return. The appellant had not been involved in Kurdish political activities in Iran or the UK; had not lived in the KRI; nor was he perceived by the Iranian authorities of falling into either of these categories.

The FtT did however accept that on his return, it was likely that the appellant would be questioned by the Iranian authorities and he would, as a result of his cognitive impairment, say things which would give the impression he was 'hiding something'. This would not lead to the Iranian authorities concluding that the appellant had been engaged in Kurdish political activities or that he supported Kurdish rights, but there was a real risk that he would be detained, with the risks that that posed of torture and inhuman treatment.

1. In the FtT's analysis, he concluded that the appellant was excluded from a grant of humanitarian protection under paragraph 339D(v) of the Immigration Rules on the basis that the appellant left his country solely in order to avoid sanctions resulting from a crime, in this case, the smuggling of alcohol. That would be punishable with imprisonment in the UK and therefore the appellant was excluded from the grant of humanitarian protection but his claim under article 3 ECHR succeeded.

The FtT additionally considered the claimed risk that having missed military service, it was possible for the appellant to buy himself out of any liability ([52]), which undermined Dr Kakhki's evidence on that risk. The FtT also, by reference to the country guidance authority of SSH and HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 00308 (IAC), concluded that those who had not been in Iran would not face the risk of prosecution for failing to perform military service. Whilst the FtT accepted that Iranians of Kurdish ethnicity faced discrimination there is no real risk of imputation of political motives to the appellant on the facts before the FtT.

The grounds of appeal and grant of permission

The appellant lodged grounds of appeal which are essentially as follows:

- 1.1. Ground (1) - the FtT's analysis of risk to the appellant on the basis that he was a leader, not involved in drug smuggling and that there

was no evidence suggesting that he would remain of interest 11 years after his departure from Iran, was erroneous. Alcohol smuggling was still regarded serious; there was no evidence to support the contention that the authorities would only have interest in leading smugglers; and that an absence of evidence, particularly when the appellant left as a minor was insufficient to justify the conclusion that he would not be at risk on return. In particular, Dr Kakhki had given evidence that young Iranians of Kurdish ethnic origin would face particular risk and that the Iranian authorities' interest would be aroused on the basis of the appellant as a Kurdish man, hailing from the Iraqi border, who was previously been apprehended by the Iranian authorities and had left Iran illegally. The FtT had failed to consider the combination of those factors.

- 1.2. Ground (2) - The FtT failed to consider, on the basis of the findings at [46], that the appellant might say things which could intensify the interest in him, which might lead to the suspicion that he was involved in Kurdish political activities, bearing in mind the low threshold of suspicion.
- 1.3. Ground (3) - the FtT had erred in concluding that the appellant was excluded from protection by virtue of paragraph 339D(v), on the basis that the appellant was a child when engaging alcohol smuggling and there was a strong mitigation of economic deprivation. The crime committed by the appellant may not in fact be one that was punishable by imprisonment for this appellant were it committed in the UK.

First-tier Tribunal Judge Saffer granted permission on 17 January 2020, concluding that all of the grounds raised arguable errors of law. The grant of permission was not limited in its scope.

The hearing before me

In terms of the hearing before me, a preliminary issue arose at the beginning of the hearing which, as I have indicated to the representatives verbally, I was very grateful for the representatives' swift and pragmatic way of resolving the issue and I record that appreciation. The issue was this: on 19 February 2020, the respondent had in fact granted the appellant humanitarian protection. Ms Everett did not seek to go behind or resile from that grant and the position was therefore how matters were left in respect of the claim of asylum. Ms Brown indicated, and I make no criticism of her at all whatsoever, that whilst her instructing solicitor had been aware of the correspondence, the appellant had regarded the grant as a mistake, particularly in light of the earlier FtT determination, and on taking instructions, there was an important difference in the rights granted by reference to humanitarian protection as opposed to asylum.

I discussed with the representatives the reported authority of MSU (S.104(4b) notices) Bangladesh [2019] UKUT 00412 (IAC) and the effect of the grant

of humanitarian protection on the continuation of this appeal under Section 104(4B) of the Nationality, Immigration and Asylum Act 2002. Having taken instructions from her instructing solicitors, Ms Brown agreed with me the proposition that it would be necessary for a notice to be served in order for this Tribunal to have jurisdiction to consider the continuing appeal and there was still time to serve such a notice. As a consequence, during an adjournment, Ms Brown drafted a copy of that notice, which was handed to Ms Everett and Ms Everett agreed that she was content to proceed with continuing consideration of the question of whether there was an error of law in relation to the asylum claim. In other words, the procedural issue posed by the authority of MSU was resolved swiftly by the representatives.

Dealing then with the substance of the submissions, firstly, they were necessarily brief as I invited neither representative to recite their grounds in full and indeed, the grounds were ones that I have already set out.

The appellant's submissions

In essence, ground (1) asserted that the FtT's reasoning was inadequate, particularly in light of the expert report of Dr Kakhki. While its format was criticised, the content had not been rejected in its entirety. Second, the FtT's decision was irrational, particularly in circumstances where the FtT had concluded at paragraph [46] that the appellant would be questioned and was likely to invite the interest of the Iranian authorities because of his impaired mental health functions. Bearing in mind the combination of factors already outlined of the appellant as a young man of Kurdish ethnic origin having lived near the border with Iraq, the FtT's conclusion that there was not a real risk that the appellant would be perceived as being an active supporter of Kurdish ethnic rights, was irrational.

The respondent's submissions

Ms Everett, on behalf of the respondent, accepted that the appellant's ethnicity would be relevant to an assessment of the risk but whether that was causative of the appellant's adverse interest, for the purposes of the Refugee Convention, was a different matter. In these particular circumstances, what would ignite the interest of the Iranian authorities was, upon questioning, because of the appellant's mental health impairment, namely his propensity to get himself into trouble by saying things which would give the impression that he was attempting to conceal matters, rather than his ethnicity.

Discussion and conclusions

I conclude that the FtT's reasoning on Refugee Convention grounds did amount to an error of law for the following reasons. On the one hand, the FtT was clear at [46] that it was reasonably likely that the appellant would face questioning on arrival, which would intensify the interest of the Iranian authorities in him. The FtT at [46] continued:

“This risk, in my judgment, would be reasonably likely to relate to the appellant’s criminal activity but after very careful consideration, I am not satisfied that it would be reasonably likely to relate to any conduct, or suspicion about conduct, which would be perceived by the Iranian authorities as relating to involvement by the appellant in Kurdish political activities or support for Kurdish rights. This is too far removed from the appellant’s case to be even a real risk.”

At [47], the FtT went on to consider that the appellant had never been involved in Kurdish political activities or support for Kurdish rights.

At [48] of the FtT continued:

“It follows that I accept that there is a real risk that the appellant would be arrested and detained (with the risks that this poses of torture and inhuman and degrading treatment) but I am not satisfied that it is reasonably likely that this would be because of his ethnicity or his perceived or imputed political opinion or any other Refugee Convention reason.”

The FtT’s discussion at [48] is important because having analysed the risk to the FtT on the basis of perceived political opinions at [47], the FtT then went on to reach a conclusion by reference to the appellant’s ethnicity at [48]. The FtT needed to reach a conclusion on that separate convention ground, because the Convention reasons relied on by the appellant were set out at [18]:

- “(i) imputed political opinion as a smuggler involved in illegal activity; and*
- (ii) race or ethnicity as a Kurd who has contravened Iranian law...
(b) having illegally exited Iran.”*

In other words, whilst the FtT considered the first ground, namely imputed political opinion, and effectively concluded that because it related to smuggling rather than imputed political opinion that no risk would therefore arise, the FtT did, in my view, fail to adequately explain why the appellant would not face a risk of persecution on the basis of his race or ethnicity as a Kurd who had contravened Iranian law, in particular by having illegally exited Iran, which was accepted. This was in the context that it was accepted at [46] that the appellant would be interviewed; would excite the interests of the Iranian authorities because of his impaired mental impairment; and in particular, where at [46] the FtT had not disregarded the expert evidence of Dr Kakhki although criticising parts of it, Dr Kakhki’s report had expressly referred at page [387] of the appellant’s bundle before the FtT to the following:

“The reason for providing the brief description of the Kurds’ smuggling activities is to show that such illegal activities are very common as a result of economic deprivation, the government approach members of this ethnic group with a particular level of suspicion, especially when they fall within the demographic group of

young, rural Kurds. This economic circumstance leads the local population to turn to opposition activities and results in widespread suspicion towards this ethnic group."

It is unnecessary for me to recite further details of the report, as the contents of it clearly require an analysis by the FtT as to why the appellant would not be at risk of persecution because of his ethnicity, in combination with other factors. That was a gap in the FtT's analysis which amounted to an error of law.

I further accept that in relation to the separate Convention reason relied upon, namely by reference to imputed political opinion, the FtT did, in my view, stray into the error of speculation in distinguishing between drug and alcohol smuggling, particularly in the context of Dr Kakhki's evidence. Bearing in mind, as Ms Brown rightly submits, that this was an analysis that required an assessment of a combination of factors, this undermined the FtT's conclusions in relation to imputed political opinion as well, and therefore that is a further reason that the FtT's decision is unsafe.

Decision on error of law

I find that the FtT's decision did contain errors of law such that it is unsafe and will need to be remade. However, I do so, preserving the FtT's findings about the extent to which the appellant has previously been the subject of adverse interest, in particular at paragraphs [33] and [34] to [38] of the FtT's decision.

Remaking hearing

I agreed with the representatives that it was appropriate in accordance with the Senior President's Practice Statements that the remaking of this appeal be retained in the Upper Tribunal, given the narrowness of the issues and in particular the sole question of whether the appeal should be remade on the basis of the appellant as a refugee rather than by reference to humanitarian protection. I did so, noting that I had already preserved a number of findings of fact, as already set out. The submissions from both representatives were, as a consequence, brief but, once again, were succinct and to the point.

The respondent's submissions on remaking

In terms of the respondent's submissions, Ms Everett acknowledged that the appellant had particular vulnerabilities, which may mean that he would arouse suspicion on being questioned but this was a case where I should consider whether somebody who was not of Kurdish ethnicity would have had the same fear of persecution; or whether in fact the fear was because of the appellant's behaviours, on being questioned, as a result of his vulnerabilities.

The appellant's submissions on remaking

Ms Brown submitted that this was a classic case of multiple risk factors and that by analogy with the tort of negligence, one had to take one's 'victim' as one found them, sometimes referred to as the "egg-shell skull" principle. The appellant needed to be considered with all of his vulnerabilities and then the question needed to be asked of whether he had a well-founded fear for a Convention reason. Whilst there were criticisms of the report of Dr Kakhki, nevertheless the FtT had relied at least in part on conclusions in the report and, as identified already, at pages [284] and [387] of the appellant's bundle, the appellant's particular risk profile as somebody of Kurdish ethnic origin was described as a causative factor in relation to persecution, albeit in conjunction with a number of risk factors.

Discussion and conclusions on remaking

I agree with Ms Brown that the appellant has to be considered and to be taken on the basis of his personal characteristics. It is acknowledged that he does have vulnerabilities which would lead to him answering questions during interview which would arouse the interest and suspicion of the Iranian authorities. That treatment would be sufficient to breach article 3, as already previously found, and, I find, would therefore be sufficiently serious to amount to persecution beyond mere discrimination. The question then was whether the well-founded fear would be for a Convention reason. What was said by Ms Everett was that in essence I should apply a "but for" test whereby I should compare him with somebody who was not of Kurdish ethnic origin and it was said therefore in these circumstances that he might still similarly arouse suspicion and ill-treatment.

I accept the force of the argument that one cannot in these circumstances divorce one particular characteristic of an individual fearing persecution and then identify a hypothetical comparator, of different ethnic origin, who would still have a fear, but not on grounds of race or imputed political opinion. In these circumstances, and whilst I accept that being of Kurdish ethnic origin alone was not sufficient to be the basis of a well-founded fear of persecution and the same applied in relation to illegal exit from Iran, nevertheless it is quite common for an assessment in relation to persecution to be based on multiple factors and that in circumstances, where at least one of those factors is a material cause of that well-founded fear for a Convention reason, that that is sufficient in the circumstances to engage the protection of the Refugee Convention. I have already referred to the report of Dr Kakhki at page [387] of the appellant's bundle and in particular what was referred to as "a particular level of suspicion". This was also considered earlier by Dr Kakhki at page [284] where an Iranian male without identification documents to prove his identity and having left illegally would arouse further suspicion:

"He would be questioned by Iranian officials and the general suspicion towards Kurds and the level of scrutiny of their background would extend to this application too."

The same analysis for risk based on race applies to imputed political opinion. The appellant would be perceived as a rule-breaker, from a marginalised and politicised racial group, viewed with deep suspicion. His actual lack of involvement or support for Kurdish political groups would not mitigate the risk, where he may be perceived by those questioning him as concealing matters, on the lower evidential standard. In summary, the risk factors are linked with the appellant's vulnerability and cannot be divorced from that vulnerability. I therefore conclude that the appellant does have a well-founded fear of persecution which engages the Refugee Convention on the basis of the appellant's race and imputed political opinion, and therefore the respondent's decision is in breach of his rights as a refugee.

Remaking decision

I remake the decision by upholding the appellant's appeal on asylum grounds.

Signed J. Keith

Date: 19 March 2020

Upper Tribunal Judge Keith

TO THE RESPONDENT
FEE AWARD

While the appeal has succeeded, the appellant had the benefit of fee remission. In the circumstances, I make no award of fees.

Signed J. Keith

Date: 19 March 2020

Upper Tribunal Judge Keith