



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

Appeal Number: PA/11497/2019 (P)

THE IMMIGRATION ACTS

**Decided under rule 34
On 5 August 2020**

**Decision & Reasons Promulgated
On 11 August 2020**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

K.S.H.

(ANONYMITY ORDER MAINTAINED)

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Appellant is a national of Iraq who is of Kurdish ethnicity. He arrived in the United Kingdom on 10 January 2019 and applied for asylum the next day. His application was refused on 8 November 2019. He appealed against this decision and his appeal was dismissed by First-tier Tribunal Judge Austin in a decision promulgated on 5 March 2020.
2. Permission to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge Simpson on 19 May 2020 and before any date could be set for an error of law hearing, Field House was closed from 23 March 2020, due to the Covid-19 pandemic.

3. Directions were sent out to the parties on 5 June 2020 by Upper Tribunal Judge Reeds inviting them to make further submissions in relation to the substance of the case and whether they considered that a hearing was necessary.
4. The Respondent replied on 14 June 2020 and the Appellant's solicitors replied on 25 June 2020. Both provided further written submissions and neither party asserted that it would not be appropriate to consider whether there had been an error of law on the papers. Therefore, I have proceeded to decide whether there was an error of law on the papers, as it is in the interests of justice for there to be no further unnecessary delay in this appeal and both parties have provided detailed written submissions in relation to the issues to be decided.

ERROR OF LAW DECISION

5. In paragraph 32 of his decision, First-tier Tribunal Judge Austin found that the Appellant was an adult.
6. The Appellant had been interviewed at the Midlands Intake Unit on 13 January 2019 without the benefit of legal representation. At section 1.2 of the Initial Contact and Asylum Registration Questionnaire it is said that his was an age assessment case and that his date of birth was 12 March 2000. It does not appear that the Respondent had undertaken any initial assessment of his age, as it was not stated that the Respondent had concluded for herself that the Appellant's physical appearance and demeanour very strongly suggested that he was 25 years old or over that age and this was the test to be applied by the Respondent.
7. It also does not appear that the Respondent had referred the Appellant to Hertfordshire County Council for an age assessment. The email from the local authority, was dated two days prior to the interview and simply states that a brief enquiry of age was undertaken by the out of hours team in which [the Appellant] was deemed to be over 18 years. It also stated that, as he was deemed to be significantly over 18 years old, a Full Merton was not required.
8. The letter and unaccompanied minors checklist which was also provided by the local authority did not provide any detailed reasons for the conclusion reached but merely stated that from visual and verbal assessment he was assessed to be over 18 years old. His description on the form also concentrates on his physical characteristics. This assessment clearly was not Merton compliant. In addition, it deemed his date of birth to be 1 June 2002.

9. In paragraph 32 of his decision, First-tier Tribunal Judge Austin noted that the age assessment was not Merton compliant. However, he did not consider whether the decision that the Appellant was significantly over the age of 18 was sustainable when the Appellant had given his date of birth as 1 June 2002 and the local authority had recorded his date of birth as 1 June 2000. In addition, when assessing the Appellant's age, First-tier Tribunal Judge Austin took into account the dates of birth which appeared on his initial contact questionnaire and his asylum interview when these did not represent the date of birth given by the Appellant but that assigned to him. The assigned date of birth would also have been the one used by the NHS. In addition, in his asylum interview the Appellant asserted that his true date of birth was 1 June 2002.
10. The Judge also asserted that the checklist completed by Hertfordshire County Council stated that the Appellant had stated that he had left Iraq in 2014 at the age of 15. In fact, what was recorded in the checklist is that the Appellant stated that the Appellant said that he left Iraq in 2014 when IS came to his village and he went to Iraq.
11. Taken in its totality, the evidence before the Judge as to the Appellant's true age was inconclusive, including the fact that the Respondent's letter, dated 11 January 2019, asserted that a Merton compliant age assessment had been carried out.
12. As a consequence, First-tier Tribunal Judge Austin was required to assess the Appellant's age to ensure that the Appellant was not a vulnerable witness whose vulnerability needed to be factored into the manner in which the hearing was conducted and the substance of his case decided upon.
13. The Respondent submits that First-tier Tribunal Judge Austin was correct to rely on the ratio of the decision in Rawofi (age assessment – standard of proof) Afghanistan [2012] UKUT 197 but his decision relied on the appropriate approach in an asylum appeal and did not relate to appeals relating to Humanitarian Protection and breaches of Article 3 of the European Convention on Human Rights, which were also relevant in the Appellant's appeal. In addition, before First-tier Tribunal Judge Austin could lawfully assess the substance of the Appellant's asylum claim, he had to decide whether he was dealing with a vulnerable appellant.
14. In relation to the second ground of appeal, in section 4.1 of his Initial Contact interview the Appellant clearly stated that he feared persecution by ISIS and in his asylum interview he said

that he had fled from Iraq after ISIS had raised his home village and that he now feared the Shia militia. He was questioned about his religion, but his answers were in the context of a more generalised fear of return. First-tier Tribunal Judge Austin appears to mischaracterise his original basis for fearing return to Iraq in paragraph 36 of his decision and this undermines his adverse credibility finding in paragraph 37 of his decision.

15. In addition, in paragraph 41 of his decision First-tier Tribunal Judge Austin found that the Appellant was a Kurd from the Kurdistan area of Iraq. There was no basis for such a finding in the evidence given by the Appellant. At most, he had said that his mother was from there but that she could not return there after her marriage and that he did not know any relatives there. In addition, the Respondent had not asserted that the Appellant was from Kurdistan in her decision letter and accepted that he was Kurdish and had previously lived in Mosul.
16. For all of these reasons, First-tier Tribunal Judge Austin's decision contained material errors of law.

DECISION

- (1) The Appellant's appeal is allowed
- (2) First-tier Tribunal Judge Austin's decision is set aside.
- (3) The appeal is remitted to the First-tier Tribunal for a *de novo* hearing before a First-tier Judge other than First-tier Tribunal Judges Austin or Simpson.

Nadine Finch

Signed
Upper Tribunal Judge Finch

Date 5 August 2020