IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-001962
First-tier Tribunal No: PA/52549/2021
IA/06429/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 10 March 2023

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

MHI
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr L Garrett instructed by Albany Solicitors
For the Respondent: Ms S Rushforth, Senior Home Office Presenting Officer

Heard at Cardiff Civil Justice Centre on 12 January 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Iran who was born on 24 February 2002. He is a Kurd and comes from the Kurdish region of Iran.

2. The appellant arrived in the United Kingdom on 17 April 2020 and claimed asylum. The appellant completed a screening interview on 17 April 2020. That was followed by a Preliminary Information Questionnaire ("PIQ") on 4 November 2020 and an asylum interview took place on 20 March 2021.

3. The basis of the appellant's claim was that he had been a smuggler (Kolbar) over the Iran/Iraq border. In February 2020, the appellant claimed that he had been engaged in smuggling when he was ambushed by two Pasdars from the Islamic Revolutionary Guard Corps. During the alteration, they saw his face and shot at him. He ran away, stayed with a friend of his uncle and, following visits to his home, he left Iran on 26 February 2020.

4. On 14 May 2021, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and under the ECHR.

The First-tier Tribunal's Decision

5. The appellant appealed to the First-tier Tribunal. In a decision sent on 24 March 2022, Judge Lester dismissed the appellant's appeal on all grounds. First, the judge made an adverse credibility finding and rejected the appellant's account that he had been a smuggler and that he was of any interest on that basis to the Iranian authorities. Secondly, the judge rejected the appellant's claim to be at risk because of his *sur place* activities in the UK based, inter alia, upon photographs of the appellant attending demonstrations against the Iranian government.

The Appeal to the Upper Tribunal

6. The appellant sought permission to appeal to the Upper Tribunal. On 13 May 2022, the First-tier Tribunal (Judge Komorowski) granted the appellant permission to appeal. First, the judge concluded that it was arguable that Judge Lester had erred in law in reaching his adverse credibility finding and, secondly the judge had erred in law in dismissing the appellant's appeal based upon his *sur place* activities.

7. The appeal was listed for hearing at the Cardiff Civil Justice Centre on 12 January 2023. The appellant was represented by Mr Garrett and the respondent was represented by Ms Rushforth.

8. At the outset of the hearing, Ms Rushforth conceded the appellant's ground (ground 2) challenging the judge's adverse conclusion based upon the appellant's *sur place* activities. Together with Mr Garrett, Ms Rushforth agreed that the judge's decision in that regard could not stand and had to be re-made.

9. Ms Rushforth, however, did not concede ground 1 which, on a number of bases, challenged the judge's adverse credibility finding. I heard detailed oral submissions from both representatives in relation to ground 1.

Discussion

10. Ground 1 raises, in essence, five points. Three of those points relate to the judge's reasons in which he counted against the appellant's credibility:

> (1) the appellant had given a lack of detail of what ultimately became his claim in his screening interview (see para 43);
>
> (2) the appellant failed to mention in his PIQ, but did in his substantive interview, that he had been paid significantly higher for the smuggling operation in which he claimed he had been ambushed by the Iranian authorities (see paras 44 and 45); and
>
> (3) the appellant's account only included, at the hearing, the detail that when ambushed one of the Pasdars had been handcuffing someone else prior to approaching him (see paras 48 and 49).

11. The remaining two points challenge the judge's reasoning:

> (4) it was implausible, as the appellant claimed, that he would have carried out a number of smuggling activities without knowing whom he was smuggling for (see para 47); and
>
> (5) it was inconsistent with the background evidence, and therefore implausible, that if he were wanted by the Iranian authorities his family would not have been arrested or detained when his home was raided (see para 50).

12. It is helpful to take these two sets of points in turn.

Points (1)-(3)

13. Mr Garrett's first point ((1)) concerned the judge's reasoning in para 43 of his determination which is as follows:

> "43. It is of some note that in this brief description of the basis of his asylum claim he does not mention that he had been involved in an incident with border guards, that shots had been fired by the guards, that he had dropped his phone and was therefore worried the authorities would be able to trace him, fled the country and later found out the security services had attended his family home searching for him. While he provides this description in considerable depth later in other interviews it is of some note thought in this first contact with the respondent he failed to mention any of it no matter how briefly. While this apparent omission is not of itself conclusive it is something which must be weighed within the general basket of evidence as part of my conclusions".

14. The second point ((2)) concerns paras 44 and 45 where, at least in part, the judge took into account that the appellant had not mentioned that he had been paid more in relation to the final smuggling activity than previously:

> "44. In the PIQ (R bundle p18-20) the appellant provides a detailed description of the events in Iran, why he had to flee and his route to the UK. In the asylum interview (SEF) further detail is provided of the description of events given in the PIQ. While there are some differences a number of which are explainable as within the bounds of reasonable differences. It is however of note (R bundle p58) at Q96&97, in

describing why this final smuggling exercise was different the appellant describes the difference in payment for this last occasion as opposed to all of the other times.

Q-How much would you earn on a smuggling run?

A-so the first time run the small packages I earned 1 1/2 to 2 million.

Q-what about the subsequent times?

A-but the last time they gave me 5 million because it was heavy.

45. Therefore on his own evidence this final smuggling run paid him more than double what he had earned previously. This exchange was during his description of why this last occasion was different. In the PIQ (R bundle p19) he had described how the final occasion was different due to the weight of the load, something he also described in the SEF. However, the SEF was the only time he mentioned the substantial difference in payment. The difference in payment was substantial and in my view it is unusual that he failed to mention it in his detailed description within the PIQ, or the initial contact form. Further given that his stated purpose in undertaking smuggling was to gain money to pay for medical treatment for his mother it is surprising that he failed to mention previously this significant increase in payment. In those circumstances I do find this omission by the appellant to be significant and while not of itself conclusive it is something which must be weighed within the general basket of evidence as part of my conclusions".

15. The third point ((3)) arises from paras 48 and 49 where the judge took into account that in describing the incident, it was only in response to questions during cross-examination that the appellant explained that the second border guard had approached him, whilst he was being hit with a stick by another border guard, having been involved in handcuffing another individual:

"48. In the PIQ and SEF he describes the incident on the mountainside with the border guards, the struggle, shots being fired and how he got away. In his oral evidence he was asked about the incident, the struggle and getting away. At the hearing he provided additional evidence during the following exchange.

Q-you are inconsistent. In PIQ you said you hit one with a stick and the other one came towards you. But you now say one was far away dealing with someone else.

A-i have not changed. I said he captured someone else. Handcuffed him. Then he came to help his colleague. As I say I am from the area, I know the area quite well and was able to escape.

Q-in your PIQ you talk about struggling to get away. You talk about hitting one while the other one came towards you. You don't mention anyone getting handcuffed.

A-i have not been asked the same questions as you are asking today. I was not asked about handcuffs.

49. By the time of the hearing the appellant had described the mountainside encounter with the guards in detail in the PIQ and in further detail still in the SEF. I therefore find it surprising that he failed to mention previously that the other person was handcuffed. This is a significant detail in the

> narrative the appellant provides of the incident and it is noteworthy that he had failed to mention it previously. I find his reply in cross examination about not having been asked about handcuffs previously is in my view unconvincing. This is a significant point and I find that it impacts his credibility in describing the incident thereby undermining his credibility".

16. For clarity, the judge's reference to the "SEF", in context, is clearly a reference to the asylum interview.

17. In relation to (1), Mr Garrett submitted that the judge had been wrong to count against the appellant that at question 4.1 of his screening interview the appellant had not given the detail of the incident which he later gave in the PIQ, asylum interview and at the hearing. Mr Garrett submitted that that was inconsistent with the purpose of the screening interview which was only for the individual to give a brief explanation of his claim.

18. In relation to (2), Mr Garrett submitted that the additional information given in the asylum interview- that the appellant had been paid more for this particular job - was in direct response to questions put to the appellant and it was unreasonable to have expected the appellant to have volunteered this information earlier.

19. In relation to (3), Mr Garrett submitted it was unreasonable to count against the appellant that he had given the additional information about the second border guard being involved in handcuffing an individual since that was information given by the appellant directly in response to cross-examination.

20. Ms Rushforth submitted that the appellant's complaint was that the judge had given too much weight to the appellant's failure to mention earlier aspects of his claim but that that could only establish an error of law if it was Wednesbury unreasonable or irrational. Weight was essentially a matter for the judge and should not be characterised as an error of law otherwise. In support she referred me to the Court of Appeal's decision in Herrera v SSHD [2018] EWCA Civ 412 at [18] and Durueke (PTA: AZ applied, proper approach) [2019] UKUT 197 (IAC) at para [ii]. Ms Rushforth submitted that the judge had not, for example in para 43, expected the appellant to give *all* of the detail but simply noted that the appellant had not given any of the detail earlier.

21. In relation to the point (1), the Immigration Appeal Tribunal in YL (Rely on SEF) China [2004] UKIAT 00145 set out the purpose of a screening interview at [19] as follows:

> "19. When a person seeks asylum in the United Kingdom he is usually made the subject of a 'screening interview' (called, perhaps rather confusingly a "Statement of Evidence Form – SEF Screening–). The purpose of that is to establish the general nature of the claimant's case so that the Home Office official can decide how best to process it. It is concerned with the country of origin, means of travel, circumstances of arrival in the United Kingdom, preferred language and other matters that might help the Secretary of State understand the case. Asylum seekers are still expected to tell the truth and answers given in screening interviews can be compared fairly with answers given later. However, it has to be remembered that a screening interview is not done to establish in detail the reasons a person gives to support her claim for asylum. It would not normally be appropriate for the Secretary of State to ask supplementary questions or to entertain elaborate answers and an

> inaccurate summary by an interviewing officer at that stage would be excusable. Further the screening interview may well be conducted when the asylum seeker is tired after a long journey. These things have to be considered when any inconsistencies between the screening interview and the later case are evaluated."

22. The purpose of the screening interview is to set out, in general terms, the nature of the appellant's claim for asylum. An asylum seeker may be expected to tell the truth in answering questions in his or her screening interview. It is not, however, necessarily a place in which the appellant can be expected to set out in detail the basis of his claim. The nature of the questions and the process does not make this possible.

23. In YL, the IAT contrasted the screening interview with the SEF, Self-Completion Form, which, at the time, an asylum seeker subsequently returned, which the IAT recognised was an individual's opportunity to set out in fuller form his or her claim (see [10]–[13]). That form, in all material respects, may now be equated with the PIQ. At [20], the IAT said this about that form:

> "20. The Statement of Evidence Form –SEF Self Completion– (that is the "SEF" that the adjudicator considered) is an entirely different document. As has been explained above, it is the appellant's opportunity to set out his case. The asylum seeker has to return the form by a specified date, usually about a fortnight after the form is given to him. However the asylum seeker is allowed to choose his own interpreter and obtain all the assistance he wants in order to complete the form. He is in control of how the form is answered. It is hard to imagine a fairer way to enable the claimant to set out his case. That being so, the Secretary of State, and if it comes before him, an Adjudicator, is entitled to assume that it is right."

24. The IAT added at [22]:

> "22. We recognise, of course, that sometimes mistakes will be made and sometimes, for whatever reason, claimants will withhold information until a later stage or will answer questions inaccurately or downright untruthfully. However, the starting point must be that the form SEF is a complete and accurate statement of a case. If it is not, and the asylum seeker has been advised properly, he will say so at the first possible opportunity so that complaints can be investigated and put right. If an error has been made by solicitors then the Secretary of State, or the Adjudicator, can expect to see evidence from the solicitor concerned explaining how the mistake came to be made and exhibiting any notes or instructions in support. It is hard to see why a claimant who had been let down in this way would not waive any privilege that prevented proper instructions being disclosed. Solicitors who carelessly set out a claimant's case can be expected to be reported to their professional body."

25. In relation to a screening interview, the Court of Appeal in JA (Afghanistan) v SSHD [2014] EWCA Civ 450 considered the proper approach of a decision-maker to a screening interview when relying on evidential inconsistencies. The Court (at [24]) recognised the need for caution depending upon the circumstances:

> "24. .... [A tribunal] does, however, have an obligation to consider with care how much weight is to be attached to it, having regard to the circumstances in which it came into existence. That is particularly important when considering the significance to be attached to answers given in the course of an interview and recorded only by the person asking questions on behalf of the Secretary of State. Such evidence may be entirely reliable, but there is obviously room for mistakes and misunderstandings, even when the person being questioned

> speaks English fluently. The possibility of error becomes greater when the person being interviewed requires the services of an interpreter, particularly if the interpreter is not physically present. It becomes greater still if the person being interviewed is vulnerable by reason of age or infirmity. The written word acquires a degree of certainty which the spoken word may not command. The "anxious scrutiny" which all claimants for asylum are entitled to expect begins with a careful consideration of the weight that should properly be attached to answers given in their interviews. In the present case the decision-maker would need to bear in mind the age and background of the applicant, his limited command of English and the circumstances under which the initial interview and screening interview took place."

26. The approach in YL and JA (Afghanistan), which is uncontroversial, was recently cited with approval by the Inner House of the Court of Session in Scotland in Guvenc v SSHD [2022] CSIH 3 at [2] per Lady Paton and at [20] per Lord Turnbull.

27. In this appeal, the relevant part of the screening interview is at question 4.1 where the appellant was asked this:

> "Please BRIEFLY explain ALL of the reasons why you cannot return to your home country?
>
> Where applicable ask:
>
> What do you feel will happen to you on return to your home country?
>
> Who do you fear?
>
> Why do you fear them?
>
> When did this happen?"

28. In response the appellant answered:

> "'I am in fear of my life from the Iranian Government because I am a smuggler'.
>
> Q) Did you know smuggling was breaking the law?
>
> A) Yes but I would have died of hunger if I did not do it".

29. In para 43 of the decision, it was the absence of detail which the judge took into account in assessing the appellant's credibility adversely whether or not, as Ms Rushforth invited me to interpret the judge's reasoning, he did not expect the appellant did provide *all* of that detail,.

30. As Mr Garrett submitted, this was not a case where the appellant's answer in his screening interview to question 4.1 was inconsistent with anything he said later on. That would, most obviously, raise a possible argument that his account was not to be believed. Also, this is not a case where the appellant failed to disclose in his screening interview an entire basis upon which he subsequently claimed to fear return to Iran, for example on (later articulated) religious grounds or because of sexual orientation. The appellant's claim remained throughout that he was at risk because he had been a smuggler.

31. Ms Rushforth drew my attention to, and relied upon, what was said in Herrera at [18], where Underhill LJ (with whom Gloster and Asplin LJJ agreed) pointed out

that in determining whether a judge's assessment, there under para 276ADE(1)(vi) of whether there were "very significant obstacles to integration", amounted to an error of law:

> "[i]t is trite law that in performing an assessment of that kind different judges may reasonably reach different conclusions. Appellate tribunals must always guard against the temptation to characterise as errors of law what are in truth no more than disagreements about the weight to be given to different factors, particularly if the first tribunal had the advantage of hearing oral evidence".

32. In addition, she referred me to the UT's decision in Durueke where, at para [ii] of the judicial headnote, a similar point is made by reference to Herrera that:

> "Permission should only be granted on the basis that the judge who decided the appeal gave insufficient weight to a particular aspect of the case if it can properly be said that as a consequence the judge who decided the appeal has arguably made an irrational decision. As the Court of Appeal said at para 18 of [Herrera], it is necessary to guard against the temptation to characterise as errors of law what in truth are no more than disagreements about the weight to be given to different factors, particularly if the judge who decided the appeal had the advantage of hearing oral evidence".

33. Bearing in mind the caution expressed in Herrera (and repeated in Durueke), nevertheless the judge's approach to the appellant's screening interview failed, in my view, to take account of what was said by the IAT in YL at [19] and the purpose of that interview. The question which the appellant responded to at 4.1 in the screening interview did not seek to elicit detail of his claim but rather the underlying basis of it which was, as he consistently said throughout, that he feared the Iranian authorities because he was a smuggler. In my judgment, it was Wednesbury unreasonable for the judge to count against the appellant that having given that basis of his claim, doubt was cast on the veracity of his account because he failed to give the detail of the incident in which he was ambushed by two Iranian border guards,. He was not being asked for detail and he could not be expected to give detail.

34. Turning to the remaining points ((2) and (3)) raised by Mr Garrett, as the IAT pointed out in YL at [20], what is now the PIQ (and any subsequent asylum interview) is the proper place in which an individual can be expected to set out his case. In large part, the appellant did that in his PIQ and asylum interview.

35. In relation to point (2), however, at paras 44–45 the judge took into account that although the appellant had referred, in some detail, to the smuggling incident in which he was ambushed (he claimed) by two border guards, he did not mention in his PIQ, but did in his asylum interview, that he had been paid more in relation to this smuggling incident than usual. In his PIQ the appellant only said that he had been "coming back with a very heavy load". In his asylum interview at questions 96 and 97, the following questions and responses were made:

> "Q96 How much would you earn on a smuggling run?
>
> A. So the first time run the small packages I earned 1 1/2 to 2 million.
>
> Q97 What about subsequent times?
>
> A. But the last time they gave me 5 million because it was heavy".

36. Here, as can be seen, the appellant was asked specific questions about payment for his smuggling activities. The judge took into account, in effect, that the appellant had not volunteered that information in his PIQ even though he had referred to the load as being "very heavy". The judge has, in my judgment, alighted on a variation (by way of elaboration) of the appellant's account in a wholly unreasonable way. How much he was paid formed no part of the substance of his claim. He could not reasonably be expected to have volunteered that information in the PIQ. At least, its omission should not have been viewed as unreasonable and something which cast doubt on the appellant's veracity. By contrast, the questions in his asylum interview at Q96 and Q97 invited the appellant directly to address this issue and he provided information that he was, in effect, paid more because it was a heavier load consistently with his account in his PIQ. In my judgment, the judge erred in law in placing weight on this difference in the appellant's evidence in assessing his credibility.

37. The final matter (point (3)) relied upon by Mr Garrett arises out of paras 48 and 49 of the judge's decision. Whilst the appellant described the incident when he was ambushed by two border guards in his PIQ and asylum interview, and that included that a second border guard approached him after he was initially apprehended by one guard, he did not refer to the second border guard approaching him after the latter had dealt with another individual whom he was handcuffing. The exchange in cross-examination is set out in para 48 of the decision. There, it was put to him that he had been "inconsistent" in that in his PIQ he had said he was hit by one guard with a stick and that the other came towards him but that he was now saying that the second individual was far away dealing with someone else. The appellant then answered that his account had not changed. The second border guard had captured someone else and had handcuffed him. There is, obviously, an elaboration of the circumstances of the event given by the appellant in response to the questions he was asked in cross-examination at the hearing. His answer was given in the context that he was being told that he had been inconsistent in his evidence. In fact, that is not a proper reflection of the evidence. The appellant was not saying two things that were inconsistent but rather had added (by way of elaboration) to his account as to how he had been approached by the other border guard. The judge considered that this was a "significant detail in the narrative" of the appellant. Again, as with the issue of payment for the smuggling, the appellant was responding to specific questions put to him albeit, in this case, at the hearing. It is a detail which does not undermine the essence of the appellant's claim and the detail provided in his PIQ where he said this:

> "I was trapped in this ambush and was struggling to get away. I hit one of the Pasdars with a stick and he collapsed. The other one came towards me. At that moment I fell off my mule. When my load fell of the mule, I heard the noise of metal clattering.
>
> My mobile phone fell off me. That Pasdar saw my face and then I managed to run away. The Pasdar began to fire his gun into the sky in order to stop me running, but I did not stop. I was familiar with that area because I had been working there, so I carried on running. I knew where to go. ..."

38. Whilst not as obviously out of place as the reasoning in paras 43 and 44–45, the judge does, in my view, require a level of consistent detail which is unrealistic and which plausibly emerges because of the specific questioning in cross-examination when the appellant is, in effect, asked to elaborate about why he said the "other one came towards me".

39. I have considerable reservations as to the judge's reasoning in taking into account the appellant's "addition" in his cross-examination. I am conscious of the caution which Ms Rushforth submitted I should adopt applying the approach in Herrera and Durueke. Without yet turning to the remaining two points raised by Mr Garrett, I am left with a clear sense that the judge, despite concluding that there was "a degree of consistency" in the appellant's evidence of his overall description of events (see para 41), strained somewhat hard to identify elaborations in the detail of the appellant's claim as justifying his finding that the appellant was not credible. Certainly, in my judgment, his reasoning in paras 43 and 44–45, was a significant factor he took into account in reaching his adverse credibility finding.

Points (4) and (5)

40. In addition, there are the two remaining points made by Mr Garrett under ground 1. In my judgment, one of these (point (4)) has clear merit. At para 50, the judge took into account:

> "if what the appellant states is correct and the authorities left his family unharmed then *on the objective evidence* this would suggest that the authorities have not sought to deal with his case in the rigid and brutal manner with which they deal with other smugglers". (my emphasis)

41. Mr Garrett submitted that the judge did not make clear what is the objective evidence that he relied upon. At para 33, the judge set out five *CPINs* to which he had been referred. I was referred to two of these, namely the *CPIN Iran: Smugglers* (August 2019) and *CPIN Iran: Kurds and Kurdish political groups* (January 2019). Ms Rushforth accepted that the *CPIN* on "Smugglers" said nothing about the treatment of family members of actual or suspected smugglers. She submitted, however, that the *CPIN* on "Kurds and Kurdish political groups" both referred to serious ill-treatment and detention of Kurdish political activists (see, e.g. para 10.1–10.4) and also the consequential risk to their family members (see para 10.5). Ms Rushforth submitted that, therefore, the judge was entitled to contrast the treatment of the appellant's family with that background evidence in para 50 so as to doubt whether, in fact, the appellant's account was true.

42. In response, Mr Garrett submitted that there was no background evidence directly relevant to smugglers such as the appellant claimed to be. It was pure speculation to apply the *CPIN* on Kurds and political activists to the appellant.

43. I accept, in substance, Mr Garrett's submissions. Given that the "Smuggling" *CPIN* made no reference to any impact there might be upon family members of actual or perceived smugglers, it was incumbent upon the judge to explain why a *CPIN* not directly concerned with smugglers but applicable to, as Ms Rushforth acknowledged, members of opposition political parties and political activists, nevertheless applied to the appellant's situation, in particular that of his family. The judge did not offer any reasons why, as it can only be assumed he had it in mind, the non-smuggling *CPIN*, in para 50 applied such that the appellant's account was implausible that his family were not arrested or suffered adversely when his home was raided if, indeed, he was a suspected smuggler. To that extent, therefore, the judge's reasoning in para 50 is unsustainable and further undermines his adverse credibility finding.

44. I am satisfied on the basis of the reasons I have given that the judge's adverse credibility finding cannot be sustained and should be set aside.

45. It is unnecessary, therefore, for me to grapple with the final point (point (5)) relied upon by Mr Garrett, namely that the judge's reasoning that it was implausible that the appellant would work, on somewhere between 20 and 26 occasions for someone he did not know in smuggling goods across the Iran/Iraq border. I express no view, therefore, on the judge's reasoning in para 47 on that point.

Conclusion

46. For the above reasons, therefore, I am satisfied that the judge materially erred in law in reaching his adverse credibility finding. That finding cannot stand and is set aside.

47. It is accepted, on the basis of ground 2, that the judge's finding in relation to the appellant's *sur place* activities cannot stand and that finding is also set aside.

Decision

48. The decision of the First-tier Tribunal to dismiss the appellant's appeal involved the making of an error of law. The decision cannot stand and is set aside.

49. Having regard to the nature and extent of fact-finding required, and to para 7.2 of the Senior President's Practice Statement, the proper disposal of the appeal is to remit it to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judge Lester. None of the First-tier Tribunal's findings are preserved.

Andrew Grubb

Judge of the Upper Tribunal
Immigration and Asylum Chamber

10 February 2023