IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001812

First-tier Tribunal No: PA/54092/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 7th of December 2023

Before

UPPER TRIBUNAL JUDGE CANAVAN
DEPUTY UPPER TRIBUNAL JUDGE CAMPBELL

Between

A A S

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

(ANONYMITY ORDER MADE)

Representation:
For the Appellant: Ms F. Kadic, instructed by Wimbledon Solicitors
For the Respondent: Ms A. Ahmed, Senior Home Office Presenting Officer

Heard at Field House on 08 November 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity because the case involves protection issues. 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

1. The appellant appealed the respondent's decision dated 22 September 2022 to refuse a protection and human rights claim.

2. First-tier Tribunal Judge Norris ('the judge') dismissed the appeal in a decision sent on 01 April 2023. The judge directed herself to the relevant legal framework [2]. She summarised the documentary and other evidence before her [3]-[4]

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before going on to make her findings. The judge began by considering the credibility of the appellant's account of how he came to leave Iran [5.3]-[5.9]. She concluded that it was implausible that the appellant would take the risk of smuggling KDPI leaflets into Iran when he was not involved in politics and knew very little about the KDPI. The judge considered the CPIN and noted that a Danish report suggested that the smuggling trade makes it easier to bring in political material. However, the evidence suggested that from 2013 onwards flyers produced in Iraq are often sent electronically to party sympathisers in Iran.

3. The judge noted that there was no plausible explanation as to why the KDPI would approach him to smuggle leaflets. He did not suggest that he was paid to do so. The judge concluded that, in light of the extreme risk that he and his family would face if caught, and the lack of any reward or interest in the cause, she considered that it was 'highly unlikely' that the appellant would become involved in smuggling leaflets [5.6].

4. The judge found that the appellant's account of an ambush by the Pasdaran provided little detail. Given that the appellant said that he escaped on foot because of the mountainous terrain, it did not seem plausible that the Pasdaran would ambush him and his companions in a vehicle [5.7]. The judge also noted that the appellant's claim that his mother was able to call her cousin, and appears to have faced no problems, contradicted the background evidence contained in the CPIN, which suggested that family members of perceived activists might be monitored and could also be at risk [5.8].

5. The judge also found aspects of the appellant's account of how arrangements were made to leave Iran to be implausible. She found it reasonable to infer that people smugglers would require payment. However, it was implausible that the appellant paid nothing. Even if his mother's cousin had paid, it was implausible that a farmer was likely to have contacts with people who could smuggle the appellant out of Iran at 24 hours notice and would have the resources to pay them to take the appellant all the way to the UK [5.9].

6. Having heard the appellant give evidence, the judge went on to consider his overall credibility. She noted that the appellant often did not answer the question that had been put to him and sought to explain something else instead. She did not draw any inference from this as it was quite common in the immigration tribunal. However, she appeared to place weight on the fact that the appellant purported to give definitive answers to things he did not know for certain, such as whether the other smugglers he was with at the time of the ambush had been arrested. He admitted that he did not know that they had been but said that it was obvious (at [8] of his witness statement the appellant inferred that they had been arrested because the authorities had raided his house looking for him) [5.10]. Despite her earlier statement, the judge went on to conclude that the manner in which the appellant gave evidence suggested that he wanted to provide pre-prepared answers. He struggled to answer questions that he was not prepared for. Instead he would say that he did not know the answer or would 'fall back on what he had rehearsed to say.' She considered that this was damaging to his credibility [5.11].

7. The judge found that the fact that the appellant passed through a number of potentially safe countries without claiming asylum was also a matter that was damaging to his overall credibility [5.12]-[5.15]. Earlier in the decision she noted the statutory requirement contained in section 8 of the Asylum and Immigration

(Treatment of Claimants, etc.) Act 2004 ('AITCA 2004') to take into account such matters.

8. The judge also concluded that there were other inconsistencies in the appellant's evidence that undermined the overall credibility of his account albeit she did not seem to place much weight on them. The appellant had been inconsistent in relation to the date of the ambush, the date when his mother's cousin decided he should leave, and why he would choose to use an agent when he was a smuggler and would know routes out of Iran. She noted that these matters did not go to critical issues, and taking into account his level of education, she found it reasonable to still expect him to be consistent [5.16]. The judge went on to give reasons to explain why she did not consider the appellant would be at risk as a result of *sur place* activities online and limited attendance at demonstrations in the UK [5.18]-[5.33]. It is not necessary to set out those findings because none of them are challenged in this appeal. The judge concluded that she did not accept the appellant's account of having come to the attention of the Iranian authorities for smuggling leaflets for the KDPI. He would not be at risk on return for reasons of imputed political opinion [5.35].

9. The appellant applied for permission to appeal to the Upper Tribunal. The original grounds were redrafted in the renewed application to the Upper Tribunal, but continued to rely on the points made in the original grounds, which were:

(i) The judge 'descended into the area' and gave the appearance of bias. Counsel's note of the hearing indicated that the judge asked extensive questions of the appellant that went far beyond simple clarification. Her interventions were likely to have hampered the appellant in giving evidence and gave the impression that she was hostile towards him from the outset of his evidence. It was arguable that a fair minded and informed observer might consider that there was an appearance of bias.

(ii) The second ground in fact made three separate points:

(a) It was not open to the judge to conclude that the appellant's evidence seemed pre-prepared or rehearsed. This was not raised as a reason for refusal nor put to the appellant at the hearing.

(b) It was not open to the judge to place such weight on the fact that the appellant did not claim asylum in potentially safe countries on route to the UK. Section 8(4) AITCA 2004 states that it will be damaging to a claimant's credibility if he fails to take advantage of a 'reasonable opportunity' to make an asylum claim in a safe country. The judge failed to take into account the fact that the applicant claimed to be under the control of agents throughout the journey.

(c) The judge misconstrued the submissions made about risk on return arising from the recent unrest in Iran. It was not open to the judge to find that the risk was not enhanced on the basis of the appellant's Kurdish ethnicity. Nor was it open to her to find that the appellant would be of almost complete insignificance to the authorities given that the (unparticularised) background evidence showed that being a 'Kolbar' (smuggler) would itself give rise to a risk from the authorities.

10. Before the hearing in the Upper Tribunal, both parties had the opportunity to listen to the recording of the First-tier Tribunal hearing. We have also listened to the recording. We take into account the fact that Ms Kadic might have been hampered by the fact that she was not the representative who attended to listen to the recording.

11. We have considered the First-tier Tribunal decision, the evidence that was before the First-tier Tribunal, the grounds of appeal, and the submissions made at the hearing, before coming to a decision in this appeal. It is not necessary to summarise the oral submissions because they are a matter of record, but we will refer to any relevant arguments in our findings.

<u>Decision and reasons</u>

12. Having listened to the recording of the hearing we find that the first ground fails to disclose unfairness or the appearance of bias such that it would amount to an error of law that might justify setting aside the decision.

13. The recording indicates that the judge presented a calm and polite demeanour towards those in the court, including the appellant. There were two brief interjections in the early stages of cross-examination. The first was to clarify an aspect of the appellant's evidence that seemed unclear to the judge. When asked about how he knew his fellow smugglers had given his name to the authorities, the judge asked if he knew for sure that they had or whether he was guessing. She reminded him that if he did not know the answer to a question he should say and/or that he needed to answer the question that he was asked. It is true to say that she repeated the point several times before cross-examination continued, but in our assessment this did not stray into badgering or hostility towards the witness. A few minutes later the Presenting Office began to ask the appellant why the authorities had not done something, but the judge interjected to say that the appellant could not answer a question about the motives of another person. This indicates that the judge was willing to interject if questions put to the appellant in cross-examination were not considered appropriate i.e. in his favour.

14. The recording indicates that the Presenting Officer cross-examined for around 30 minutes. We accept that the judge asked an extensive set of questions once cross-examination finished. The note prepared by counsel who attended the hearing is detailed and accurate. The recording indicates that the judge conducted around 20 minutes of questioning. However, the judge asked open questions and did not adopt a style of questioning that would normally be used in cross-examination. There is no evidence of hostility towards the appellant. We accept that at times the judge interrupted the appellant's answers. We also accept that the level of questioning was such that the judge appeared to be testing the appellant's evidence to some extent.

15. The respondent's amended rule 24 response quoted the following exchange when the appellant's representative expressed concerns about the extent of the questioning:

> 'Counsel: (interjects) Sorry to interrupt – I do fear that you are getting a little bit too far in the arena… cross-examination rather than clarification.
>
> Judge: …clarification – these are open questions. I will be criticised for making any adverse findings without having explored whether this is plausible. This is a man (who) comes from a farming community and he is able to less than 24 hours' notice,

he is able to find someone to prepare to smuggle him all the way to the UK with no payment, on his case. That is why I am asking these questions. If you think I am stepping into the arena by the manner I am asking, I can rephrase. I don't think I am. I am asking how he knows someone who can smuggle people… the appellant can answer that.

Counsel: fair enough

Judge: That's why I am asking these questions because that is an area of concern for me – the story around this lacks some depth, let's just say.'

16. Proceedings before the First-tier Tribunal are adversarial. The respondent had been given an opportunity to cross-examine the appellant on the credibility of his account. Nevertheless, it is open to a judge to ask additional questions to clarify any matters that are not clear or to address any residual concerns that they might have relating to the claim if there are matters that have not been dealt with in cross-examination.

17. The level of questioning was nearly equivalent to the length of the cross-examination. To this extent we accept that it was unusual. However, having listened to the recording we do not consider that any of the questions were inappropriate, and as the judge said, they were designed to elicit more detail surrounding the account in order for her to evaluate the credibility of the appellant's claim. We did not discern any inappropriate hostility towards the appellant. Ms Kadic did not go so far as the grounds to suggest that there was an appearance of bias, but continued to rely on the submission that the questioning was unfair and that the appellant was likely to have seen this as hostile. Counsel who attended the hearing and drafted the original grounds expressed her opinion that the questioning was hostile. However, there is no evidence from the appellant to suggest that he thought it was or that the nature of the questions in any way hampered his evidence.

18. For the reasons given above, we conclude that the judge's conduct during the hearing does not disclose an error of law.

19. We can deal with the other matters argued in the second ground relatively briefly.

20. We bear in mind that an appeal court should be slow to interfere with the findings of fact made by the court below when the First-tier Tribunal judge had the opportunity to hear and assess oral evidence given by the appellant. There is a distinction between evidential matters that might need to be put to a witness, such as internal discrepancies or inconsistencies with other evidence, and the reasons given to explain a judge's evaluation of the evidence. Just as a judge is not required to make findings on each and every piece of evidence, save for that which is central to a proper determination of the case, procedural fairness does not require a judge to put each and every potential reason for their decision to an appellant during the hearing.

21. The judge heard evidence from the appellant. It was open to her to evaluate him as a witness and to make the findings she did about the seemingly rehearsed nature of his answers. In her assessment, he found it difficult to provide detail that went beyond the rather vague and narrow account that he had already given.

22. The argument that it was not 'open' to the judge to make such a finding is in effect a rationality argument. In such circumstances, the appellant would need to show that no properly directed judge could reasonably come a particular conclusion on the evidence. Ms Kadic made general submissions with reference to the evidence to explain why, in the appellant's view, his claim is plausible and credible, but these amounted to nothing more than disagreements with the decision. We are satisfied that the judge's findings relating to the credibility of the appellant as a witness, and his failure to claim asylum in a potentially safe country on a long overland route to the UK, were within a range of reasonable responses to the evidence and do not disclose any errors of law that would have made any material difference to the outcome of the appeal.

23. The third point pleaded in the second ground was not pursued orally at the hearing. In general, the assertions are too unparticularised to disclose any errors of law. The assertion that the judge failed to take into account additional risk as a Kurd failed to explain why this would have made any material difference to the outcome of the appeal in light of the country guidance decision in *HB (Kurds)* CG [2018] UKUT 430 (IAC). The judge rejected the credibility of the appellant's claim that he would be at risk for smuggling KDPI leaflets. The country guidance makes clear that, taken alone, the fact of being a Kurd who has exited Iran illegally is unlikely to give rise to a real risk of persecution or Article 3 ill-treatment.

24. Neither was the point about potential risk as a smuggler (kolbar) pursued in submissions at the hearing. Again, this aspect of the grounds is not clearly particularised and does not identify why the evidence showed that the appellant might be at risk solely on this basis. We note that this did not form part of the essential issues that were agreed for determination albeit that it was argued tangentially in the appellant's skeleton argument.

25. Taking a precautionary approach, we have considered the relevant CPIN 'Iran: Smugglers' (Version 4.0) (February 2022). The background evidence indicates that smuggling can be a risky business and that those caught by the authorities in Iran might be subject to fines, serious ill-treatment, or could be shot at the border. We observe that smuggling is likely to be a criminal offence and that the evidence shows that those who are caught might be dealt with harshly. It was accepted that the appellant was a smuggler. His past choice of work does not mean that he would be compelled to continue such a risky business if returned. In circumstances where the judge made sustainable findings rejecting his claim to have come to the attention of the Iranian authorities as a smuggler, it is not arguable that this issues would have made any material difference to the outcome of the appeal.

26. For the reasons given above, we conclude that the First-tier Tribunal decision does not disclose any material errors of law. The decision shall stand.

Notice of Decision

The First-tier Tribunal decision did not involve the making of an error of law

M.Canavan
Judge of the Upper Tribunal

Immigration and Asylum Chamber

23 November 2023