



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002795

First-tier Tribunal No: HU/52388/2023

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 7th of November
2023**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MAA
(ANONYMITY ORDER MADE)**

Respondent

Representation:

For the Appellant: Ms L Brakaj, solicitor, Iris Law firm

For the Respondent: Mr McVeety, Senior Home Office Presenting Officer.

Heard at Phoenix House (Bradford) on 20 October 2023

DECISION AND REASONS

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and any member of his family 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 or any family member. Failure to comply with this order could amount to a contempt of court.

Introduction

1. I preserve the anonymity direction previously made in this appeal.
2. The Secretary of State for the Home Department brings this appeal but, to avoid confusion, the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Fisher, promulgated on 28 June 2023, which allowed the Appellant's appeal on asylum and article 3 ECHR grounds.

Background

3. The Appellant was born on 12/06/2005 and is a national of Iran.
4. The appellant entered the UK on 22/12/2021. He claimed asylum on 23/12/2021. The respondent refused the appellant's protection claim on 08/02/2023.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Fisher ("the Judge") allowed the Appellant's appeal on asylum and article 3 ECHR grounds.
6. Grounds of appeal were lodged by the respondent, and on 21/07/2023 First-tier Tribunal Judge Parkes gave permission to appeal stating
 2. The grounds argue that the judge in failing to apply findings in HJ (Iran) [2010] UKSC 31, applying the rationale the appellant completing a form relating to his occupation on return to Iran, the appellant having been a Kolbar. The grounds argue that the appellant would not be suppressing protected characteristic and an appellant can reasonably be expected to mitigate risk on return, e.g. by deleting Facebook posts.
 3. An individual's occupation is not an immutable characteristic, but *could*, in some circumstances, amount to imputed political opinion. In the circumstances the grounds are arguable as the judge did not appear to find that the appellant's occupation engaged the convention.
 4. The grounds disclose arguable errors of law and permission to appeal is granted.

The Hearing

7. For the respondent, Mr McVeety moved the grounds of appeal. He said that at [14] the Judge finds that the appellant is a smuggler who has not come to the attention of the authorities, so that the Iranian regime know nothing of the appellant. Mr McVeety told me that the Judge was wrong to apply the guidance given in HJ (Iran). He said that it was found in HJ(Iran), that a member of a particular social group cannot be expected to lie about an immutable characteristic in order to avoid persecution. He told me that the Judge's error is that working as a smuggler is not an immutable characteristic.

8. Mr McVeety stressed that the appellant's work as a smuggler was illegal, and would be illegal in the UK. He emphasised that smugglers avoid paying import tax, and neither the refugee convention or the guidance in HJ (Iran) is designed to protect illegal activity.

9. Mr McVeety stressed that the guidance in HJ concerned a member of a particular social group being forced to conceal his sexuality, and did not apply to criminals concealing their illegal trades. He insisted that the Judge had confused persecution with prosecution. He told me that is a material error of law and asked me to set the decision aside.

10. For the appellant, Ms Brakaj told me that the decision does not contain errors of law material or otherwise. She argued that the respondent was relying on putting the appellant into a position of dishonesty, but at the same time the respondent insists that appellants are entirely honest in their dealings with the Home Office. She reminded me that the unchallenged facts are that the appellant is an Iranian Kurd who left Iran illegally and who, because of his social circumstances, had to work as a smuggler.

11. Ms Brakaj took me to paragraph 31 of HJ (Iran) and reminded me that, there, the respondent's background materials were considered, and involvement in the smuggling business was identified as a risk factor. She told me that the appellant's profile is enough for the Iranian authorities to presume the appellant is a Kolbar, and that presumption enhances the level of risk faced by the appellant on return. She told me that it is accepted that the appellant has a subjective fear of risk on return and the respondent wants the appellant to take a further risk by lying to the Iranian authorities.

12. Ms Brakaj said that the decision does not contain an error of law, and urged me to dismiss the respondent's appeal.

Analysis

13. At [7] of his decision the Judge rehearses background information which discloses that Kolbars are dealt with harshly by the Iranians authorities. At [8] of the decision the Judge records that the respondent accepts that the refugee convention is engaged on the basis of race.

14. At [9] and [10] of the decision, the Judge carefully explains why he finds that the perceived inconsistencies the respondent relies on are not inconsistencies in the evidence. At [11] the Judge finds that the appellant was a kolbar and his group of smugglers were ambushed by the Pasdar. The Judge finds that the appellant does not establish that he has been identified by the authorities, and concludes [11] by saying

Although I accept that he has a subjective fear arising from the shooting incident, I am not persuaded that it is objectively well founded.

15. The judge goes on to find that the appellant left Iran illegally

16. The focus in this appeal is [14] of the decision, where the Judge relies on his own experience and knowledge to find that the appellant will have to disclose his occupation as a Kolbar on return to Iran. He takes guidance from HJ (Iran) and concludes that the appellant will not be expected to lie about his occupation.

17. Although the Judge refers to HJ (Iran), nowhere in his decision does he say that the appellant is a member of a particular social group, nor does he say that the appellant enjoys an immutable characteristic. The thrust of the respondent's appeal is that the Judge was wrong to apply the principles in HJ (Iran) to the appellant's occupation because an occupation is not a protected characteristic. That argument is misconceived because the convention reason accepted by the respondent is the appellant's race, not his membership of a particular social group.

18. The Judge did not find that the appellant would be forced to conceal an immutable characteristic. What the Judge found is that there is a real risk that the appellant will be forced to disclose that he is a Kolbar.

19. At [15] and [16] of the decision that the Judge draws together the facts as he finds them to be and combines them with the unchallenged facts in the appellant's appeal. The Judge finds that the appellant is a young Kurdish male who left Iran illegally after working there as a Kolbar. The Judge took guidance from HB (Kurds) Iran CG [2018] UKUT 00430 (IAC).

20. At [15] the judge places emphasis on headnotes 4 and 5 from HB (Kurds) Iran CG [2018] UKUT 00430 (IAC), which say

- (4) However, the mere fact of being a returnee of Kurdish ethnicity with or without a valid passport, and even if combined with illegal exit, does not create a risk of persecution or Article 3 ill-treatment.
- (5) Kurdish ethnicity is nevertheless a risk factor which, when combined with other factors, may create a real risk of persecution or Article 3 ill-treatment. Being a risk factor it means that Kurdish ethnicity is a factor of particular significance when assessing risk. Those “other factors” will include the matters identified in paragraphs (6)-(9) below.

21. The additional factor that the Judge finds is the evidence at paragraph 2.4.6 of the respondent’s CPIN. The Judge found that the Iranian authorities do not know that the appellant is a Kolbar, but will make enquiry if the appellant returns to Iran. The Judge finds that the combination of those factors engages the hair trigger approach mentioned in headnote 10 of HB (Kurds) Iran CG.

22. The conclusion reached at [15] and [16] of the decision is a conclusion which was within the range of reasonable conclusions available to the Judge on the facts as he found them to be.

21. The Judge did not find that the appellant has an immutable characteristic. What the Judge found is that the appellant will be of interest to the Iranian authorities and that the background materials disclose that there is a real risk that the appellant will be detained for questioning because of the hair trigger approach taken at the pinch point of entry.

22. A fair reading of the decision demonstrates that the Judge applied the correct test in law. The Judge carried out a holistic assessment of all of the evidence. There is nothing unfair in the procedure adopted nor in the manner in which the evidence was considered. There is nothing wrong with the Judge’s fact-finding exercise. The appellant might not like the conclusion that the Judge arrived at, but that conclusion is the result of the correctly applied legal equation. The correct test in law has been applied. The decision does not contain a material error of law.

23. The decision does not contain a material error of law. The Judge’s decision stands.

DECISION

24. The appeal is dismissed. The decision of the First-tier Tribunal, promulgated on 28 June 2023, stands.

Signed **Paul Doyle**
25 October 2023
Deputy Upper Tribunal Judge Doyle

Date