IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001810

First-tier Tribunal No: PA/51671/2023
LP/00770/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 24 December 2024

Before

UPPER TRIBUNAL JUDGE LODATO

Between

HMH
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Schwenk, counsel
For the Respondent: Mr McVeety, Senior Presenting Officer

Heard at Manchester Civil Justice Centre on 2 December 2024

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

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1. I have decided to maintain the anonymity order originally made in these proceedings by the First-tier Tribunal because the underlying claim involves international protection issues in that the appellant claims to fear persecution or serious harm on return to Iran. In reaching this decision, I am mindful of the fundamental principle of open justice, but I am satisfied, taking the appellant's case at its highest for these purposes, that the potential grave risks outweigh the rights of the public to know of his identity.

2. The appellant appeals with permission against the decision, dated 28 March 2024, of First-tier Tribunal Judge Malik ('the judge') to dismiss the appeal on international protection and human rights grounds.

Background

3. The procedural background and immigration history which led to the appeal proceedings are not in dispute between the parties. The essence of the protection claim is that the appellant asserts that he came to the attention of the Iranian authorities after they ambushed his group of kolbers when they were engaged in the movement of political literature in support of Kurdish political rights. After he arrived in the UK, he claimed to have engaged in political activism against the Iranian regime which he suggested further placed him at risk of persecution on return.

Appeal to the First-tier Tribunal

4. The appellant appealed against the refusal of his claim on 4 March 2022. The appeal was heard by the judge on 13 March 2024 before the appeal was dismissed on all grounds in a decision dated 28 March 2024. For the purposes of the present proceedings, the following key matters emerge from the decision:

   - The judge summarised the appellant's factual claim at [6]. The centrepiece of the claim was the ambush which was said to have unfolded when he was working as one of a group of kolbers.

   - In addressing her mind to the necessary findings and reasons, the judge separated the narrative into various themes, the first of which was headed "Kolber". At [10], the judge rejected some of the challenges levelled against this part of the appellant's narrative.

   - At [11], the judge considered the appellant's motivation for embarking on work as a kolber at the time he claimed to do so. The judge found it difficult to reconcile why it had taken several years for him to assume this work after his father died in 2006 if, as he had claimed, his family were suffering financial hardship without this income. The risk which this form of work carried was a further factor which was found to weigh against the credibility of the events he had described.

   - The findings reached at [12] took on some importance during the error of law hearing. For that reason, it is necessary to include this passage in full:

     > *The appellant has provided photographs to evidence that he worked as a Kolber. Yet he has not evidenced where such photos came from and when they were taken. I also do not find it*

reasonably likely that he would have taken such photos, because if he did work as a Kolber, if found by the authorities in Iran, this would have placed him at risk. The appellant also came, he claims, to the UK with no mobile phone; he also claims he is not in contact with his family in Iran. That being so, it is unclear as to how he obtained these photos, and it appears to me that they were taken merely to bolster a false claim of being a Kolber.

- The judge referred to country background information to find that the appellant’s claim that he was carrying hard copies of Kurdish political materials was not credible. [13]

- The judge doubted the plausibility and consistency of the appellant’s claim that five members of his party of kolbers were ambushed at the head of the group in circumstances where he had also claimed that one member acted as a scout. [14]

- The judge held it against the appellant that he had not sought protection in the various safe European countries through which he travelled en route to the UK. [16]

- The judge turned to the appellant’s political mindset and his *sur place* activities in the UK from [17]. She accepted that he had some knowledge of Kurdish political parties but reiterated that she had rejected his claim to have supported any such cause when he was in Iran. It counted against him that he had not provided any supporting correspondence from the party he claimed to have assisted. For these reasons, it was found that he had not already come to the attention of the Iranian authorities.

- At [18]-[19], the judge found that the appellant’s *sur place* activities in the UK were at a low level and unlikely to have come to the attention of the Iranian authorities.

- At [20], the *sur place* activity was characterised as merely designed to underpin a false protection claim. It was further found that he could lawfully be expected to delete his Facebook account before returning to Iran.

- At [22]-[23], the judge considered the implications of the appellant’s illegal exit from Iran and his Kurdish ethnicity in light of applicable country guidance.

<u>Appeal to the Upper Tribunal</u>

5. The appellant applied for permission to appeal in reliance on the following grounds:

- Ground 1 – the judge did not provide legally adequate reasons to reject the proposition that the appellant worked as a kolber. This ground was based on various discrete challenges including that the judge failed to engage with the appellant’s evidence about what led to him taking on this work when he did and rejecting the photographic evidence of him apparently engaged in this work. It

was further contended that the appellant was deprived of an opportunity to address the concerns ultimately expressed by the judge about the authenticity of the photographs he relied upon. The failure to put these matters to the appellant was framed as a procedural irregularity which rendered the overall outcome unfair. Finally, the judge's findings at [13] were not reasonably open to her on a fair examination of the overall country background information.

- Ground 2 – the judge's findings at [14] of her decision did not adequately support her findings about the improbability of part of the kolber party being targeted in the way claimed.

- Ground 3 – the judge adopted a flawed analytical approach to the *sur place* dimension of the claim by adopting the adverse credibility findings she had already reached in relation to the events said to have preceded the appellant's departure from Iran.

- Ground 4 – the judge did not lawfully assess risk on return by reference to the prevailing authorities on the assessment of the reasonable likelihood of the Iranian authorities coming to learn of the *sur place* activities in the UK. The finding that the appellant could simply delete his Facebook account was argued to be inconsistent with the principles enunciated by the Supreme Court in HJ (Iran) v SSHD [2010] 3 W.L.R. 386.

6. In a decision dated 25 April 2024, First-tier Tribunal Judge Monaghan granted permission for ground one to be argued and refused permission for the remaining grounds to proceed. On renewal, Deputy Upper Tribunal Judge Haria granted permission for all grounds to be argued while noting that grounds two, three and four were difficult to untangle from ground one. The permission judge expressed some reservations about the strength of ground two.

7. At the error of law hearing, I heard oral submissions from both parties. I address any submissions of significance in the discussion section below.

Discussion

8. At the error of law hearing, the focus of submissions was directed to the judge's treatment of the photographic evidence relied upon to support the proposition that the appellant had indeed worked as a kolber in Iran. There can be no doubt that this was a foundational factual question for the judge to resolve and that the photographic evidence of the appellant engaged in this work would amount to strong support for this key element of his case if he could establish the reliability of this evidence in accordance with Tanveer Ahmed (documents unreliable and forged) Pakistan* [2002] UKIAT 00439 principles. In concluding that the appellant had not provided credible evidence about this core component of his narrative, it is hardly surprising that the judge went on to find that he not established that the ambush he described had ever happened nor that he was targeted by the Iranian authorities.

9. I have reproduced the findings reached about this topic in full above. Two key points emerge from paragraph [12] of the judge's decision.

10. Firstly, the judge indicated that he had not "evidenced" where these photographs had come from and observed that he did not travel to the UK with

his mobile phone, nor did he have contact with his family in Iran to have access to such supporting evidence. These adverse findings are impossible to reconcile with the account the appellant provided in response to question 160 of his substantive interview where he fully explained the circumstances in which he claimed to have come into possession of the photographs. There is nothing to suggest from [12] of the decision that the judge considered his explanation that he encountered a fellow kolber from Iran when they were both in the UK and that the photographs in the acquaintance's possession were then transferred to him. The judge was not required to accept this account, but I agree with Mr Schwenk that she was obliged to assess the explanation and her finding that there was *no explanation* for how he came to be in possession of these images is manifestly wrong and unsupported by the evidence.

11. The second point is that the judge found that the photos "were taken merely to bolster a false claim of being a kolber". It is difficult to understand this concluding remark as anything other than a finding that the photographs were in some way inauthentic. It was asserted on behalf of the appellant that this point was never put to him during the hearing. At the error of law hearing, Mr McVeety did not seek to suggest that the appellant was provided with the opportunity to deal with the strong implication of paragraph [12], that the photographs were staged for the purposes of a fictitious claim. In seeking to argue that it was not necessary for the judge to ensure that this point was put to the appellant so that he could seek to respond to it, Mr McVeety argued that there was a distinction between a pre-existing image which was then doctored, and unmodified photographs of a staged scene. Regarding the latter, this was said to merely be a matter going to reliability which the appellant remained under a burden to establish. As for the former, it was recognised that this would amount to an allegation of dishonesty which ought to be put to an appellant before such a point was taken against him. This struck me as a distinction without a material difference. Whether a pre-existing photograph is dishonestly altered to give a false impression, or a photograph is taken of a contrived and false scene are equally attempts at deceiving the viewer of the final photographic product. In each case, what is being suggested goes beyond a finding that the party adducing a supporting document has not established its reliability but is a finding that something manifestly more nefarious and duplicitous has taken place. I am in no doubt that the judge concluded that the appellant had staged the image of him standing with a donkey against a mountainous backdrop to convey the false impression that he was a kolber. Procedural fairness demanded that the appellant be given the opportunity to address such a point if it was to be taken against him. An appellant should not first learn that there is a suggestion that he has fabricated evidence in the very decision which dismisses his appeal.

12. During the error of law hearing, Mr McVeety accepted that if paragraph [12] had stood alone as underpinning the ultimate decision to reject the appellant's credibility, that would be sufficient to establish an error of law. When I sought to clarify whether the same would be true if [12] was merely instrumental in the fact-finding analysis, it was further accepted that if I were to reach such a conclusion, the overall decision must equally fall away as involving a material error of law.

13. I am entirely satisfied that the judge's approach to the photographic evidence amounted to a material error of law in that the only sensible interpretation of the findings at [12] is that the appellant was found to have staged the photographs he relied upon which depicted him working as a kolber. As alluded to above, the

factual question of whether the appellant was a kolber, was of considerable importance in the resolution of the centrepiece of the claim that he was engaged in this work when his party of kolbers was ambushed by Iranian forces. As a matter of elemental procedural fairness, an allegation of such seriousness, that he fabricated photographic evidence to support a false asylum claim was something he should have been given the opportunity to answer and address. In addition, it was plainly wrong to conclude that there was no evidence of how he came to be in possession of these photographs. Overall, I am satisfied that the judge's findings of fact on this important topic were materially flawed and flowed from procedural unfairness.

14. The factual question of whether the appellant worked as a kolber was the first issue the judge directed her mind to. This resonates with it being the platform on which the remaining fact-finding process was built. At the outset of the part of the decision which dealt with the *sur place* dimension of the appeal, the judge begins her analysis by recalling the adverse findings she had made in relation to the events which were said to have taken place in Iran. It follows that the material error of law I have found in relation to how the photographic evidence was approached functioned to taint the overall fact-finding exercise such that none of the findings of fact may safely stand. It is unnecessary to consider the remaining grounds of appeal because for the reasons I have given, the decision falls to be set aside on the strength of this discrete argument within ground one.

Disposal

15. The parties were agreed that remittal to the First-tier Tribunal was the correct disposal upon finding a procedural irregularity because the fairness of the proceedings was vitiated by the error.

Notice of Decision

The decision of the judge involved a material error of law such that I set aside the decision and preserve no findings of fact. The matter is to be remitted to the First-tier Tribunal to be decided *de novo* by a judge other than Judge Malik.

Paul Lodato

Judge of the Upper Tribunal
Immigration and Asylum Chamber

16 December 2024