



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

Appeal Number: AA/09285/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 25 January 2016**

**Decision & Reasons Promulgated
On 5 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

**ND
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr T Gaisford, Counsel instructed by Wick & Co Solicitors
For the Respondent: Ms A. Fijiwala, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.
2. The appellant is a citizen of Iran born on 24 September 1994. He entered the UK as an unaccompanied minor in October 2010 and claimed asylum

on 2 November 2010. His application was refused but, because of his age, he was granted discretionary leave to remain until 24 March 2012.

3. On 22 March 2012 he applied for further leave to remain on the grounds of asylum and/or international protection. This appeal arises from the respondent's decision, made on 16 October 2014, to refuse that application.
4. The appellant claims that he would be at risk on return to Iran because (a) immediately before he fled Iran the government discovered his property was being used to store alcohol that was being transported by smugglers and he would face arrest and execution upon return to Iran as a consequence; (b) he is Kurdish and left Iran illegally without a passport and would be returned as a failed asylum seeker; and (c) since arriving in the UK he has engaged in demonstrations in support of Kurds including one outside the Iranian embassy where someone from the embassy observed him.
5. The appellant's account of his life in Iran includes, inter alia, that three years before leaving Iran he was detained and beaten for stealing a photograph from a mosque and men arrested at the same time were executed. He also maintains that his father was executed because of political activity in around 2004.
6. The respondent did not accept the appellant's account or that he would be at risk on return to Iran. The appellant appealed and his appeal was heard by First tier Tribunal ("FtT") Judge Broe on 22 December 2014. Judge Broe's decision to dismiss the appeal was set aside by the Upper Tribunal and remitted to the FtT where it was heard afresh by FtT Judge Amin. In a decision made on 30 September 2015, the FtT dismissed the appeal.

Decision of the First-tier Tribunal made on 30 September 2015

7. The FtT did not find the appellant to be a credible witness. It did not accept that his house was used for storage of alcohol or other goods, that he was arrested and detained three years earlier for stealing a photograph, or that his father was executed. It also described the appellant as having been opportunistic in his sur place activities and as someone who has come by choice to the UK as an economic migrant.
8. With respect to sur place activities, the FtT relied on Iran CG BA (*demonstrators in Britain - risk on return*) [2011] UKUT 36 (IAC). The FtT found that the appellant had attended three demonstrations in relation to Kurds since arriving in the UK, only one of which concerned Iran. It did not accept that the appellant had a profile as a political activist or that his involvement in these demonstrations put him at risk.
9. In addition, although the FtT accepted the appellant left Iran illegally, following *SB Iran CG (risk on return - illegal exit)* 2009 UKAIT 0053, it determined that this was not a significant risk factor.

Grounds and submissions

10. There are four grounds of appeal:

- a) First, that the FtT erred in respect of the standard of proof given the appellant's age.
 - b) Second, that the FtT erred in relation to the appellant's sur place activities by: (a) not treating as relevant the two demonstrations attended which were not specifically directed against Iran but which concerned support of Kurds; (b) failing to engage with the risk arising from his attendance at a demonstration being subject to surveillance; and (c) failing to consider the discrimination which he would face as a Kurd.
 - c) Third, that the FtT failed to assess the risk of return based on the appellant's Kurdish ethnicity despite the objective evidence before it.
 - d) Fourth, that in considering the appellant's risk on return as a minor of Kurdish ethnicity who left Iran illegally, the FtT relied on SB Iran without considering the current background material or taking into consideration that the appellant is likely to be questioned on return about his sur place activities.
11. Mr Gaisford gave detailed submissions in respect of the first ground. The essence of his argument was that although the FtT acknowledged the need to be cautious in considering the appellant's evidence because of his age, no such caution was in fact taken and the FtT improperly placed significant weight on slight (or even non-existent) discrepancies in the evidence whereas the appellant should have been given the benefit of the doubt. For example, at paragraph [51] the FtT referred to, and placed weight on, an apparent discrepancy between the appellant's comments in the asylum interview about his uncle's involvement with illegal goods. Mr Gaisford contended that not only was it improper for the FtT to attribute such weight to the asylum interview given the appellant's age and lack of adult support or representation at the time, but that upon proper scrutiny of the evidence it is apparent that there is in fact no discrepancy.
12. Mr Gaisford argued that not only had the FtT failed to weigh inconsistencies properly given the appellant's age, it had also not given proper consideration to objective evidence that was consistent with the claim. Moreover, he argued that the FtT's credibility findings were not safe because (a) the appellant's account was internally consistent; (b) it was not embellished and (c) the FtT had made factual errors, including for example about what the appellant had said about his mother's presence when the property was raided by police.
13. In respect of Grounds 2 - 4, Mr Gaisford argued that the FtT had failed to take into account up to date country information showing the risk faced by Kurds. He submitted that the Country Guidance Cases upon which the FtT relied - *BA Iran* and *SB Iran* - are out of date and fail to address the present risk to individuals in the appellant's position and the FtT should have taken into account the country information submitted by the appellant. His argument was that had an assessment of the up to date country information been carried out, it would have been apparent, firstly, that the appellant's sur place activities are sufficient to place him at risk;

and secondly, that the appellant is at risk as a consequence of being a Kurdish failed asylum seeker who left Iran illegally.

14. Ms Fijiwala argued that the pleaded grounds differ to the arguments submitted at the hearing. The first ground concerns the standard of proof but Mr Gaisford has sought to challenge the FtT's credibility findings. Mr Fijiwala argued that the FtT was clearly aware of the appellant's age and had properly directed itself to the standard of proof. At paragraph [50] the FtT referred to the appellant being 16 when interviewed and stated that it was giving him the benefit of the doubt in respect of an inconsistency in the evidence. At paragraph [75] the FtT stated that it would not expect the appellant to recall and understand as much as an adult asylum seeker. In respect of the credibility arguments made by Mr Gaisford, she argued that these are mere disagreements with the FtT which made findings that were open to it.
15. Ms Fijiwala argued that the FtT's analysis of the risk from sur place activities was consistent with *BA Iran*. With respect to risk on return as a Kurd, she argued that there was no evidence of the appellant's family facing persecution. The appellant is not an anti government activist and the FtT made clear findings that he would not be of interest to the authorities. As to the risk on return as a failed asylum seeker who left Iran unlawfully, Ms Fijiwala argued that the FtT was entitled to rely on *SB Iran* and had done so appropriately.

Consideration

16. When assessing an asylum claim by a minor, although the standard of proof does not differ to that which applies where an applicant is an adult, greater caution may be appropriate and more weight should be given to objective indications of risk.
17. Paragraph 351 of the Immigration Rules states (emphasis added):

'351. A person of any age may qualify for refugee status under the Convention and the criteria in paragraph 334 apply to all cases. However, account should be taken of the applicant's maturity and **in assessing the claim of a child more weight should be given to objective indications of risk than to the child's state of mind and understanding of his situation.** An asylum application made on behalf of a child should not be refused solely because the child is too young to understand his situation or to have formed a well founded fear of persecution. Close attention should be given to the welfare of the child at all times.'
18. In *KS (Benefit of the doubt)* at [97] the panel commented that:

"... for a judge to proceed to assess the evidence of a minor without any indication that he or she has considered the modified approach enjoined by paragraph 351 may often result in an error of law, because under that provision more weight must be given to objective evidence."

In *KS* it is also stated that:

“A child sensitive application of the lower standard of proof may still need to be given to persons if they are recounting relevant events that took place at a time when they were minors or were even younger minors”

19. The appellant was sixteen at the time of his screening and substantive interview and considerably younger when some of the events he described in those interviews were said to take place.
20. The FtT made several references to the appellant's youth. At paragraph [46] it described the appellant as “an anxious and inexperienced asylum seeker” and directed itself to be cautious before rejecting his account. At paragraph [50] the FtT stated that it was giving the appellant the benefit of the doubt in respect of a discrepancy about his involvement in the sale of alcoholic drinks because of his age. At paragraph [75] the FtT stated that it accepted the appellant was young when some of the events he recounted are alleged to have occurred. It is clear, therefore, that the FtT was aware that claimant was, and attached some significance to the claimant being, a minor both when interviewed upon arriving in the UK and when the events that formed the substance of his claim were said to have transpired. However, although the FtT identified the issue of the appellant's age, it failed to consider - or follow - the modified approach under paragraph 351 whereby greater weight should be given to objective evidence.
21. The FtT reached its conclusion that the appellant's account was not credible without making any reference to, or findings in respect of, objective evidence submitted on behalf of the appellant to corroborate his account and focused solely on apparent inconsistencies in the accounts given by the appellant. For example, the FtT did not accept that the appellant's house was used for storage of smuggled goods, which was a core element of the appellant's claim, on the basis that there were inconsistencies in the accounts the appellant gave of his uncle's involvement. However, the FtT did not take into account, in making this finding, the objective evidence before it concerning the appellant's village being on a known smuggling route. Likewise, the FtT did not accept that the appellant's father was executed because in cross examination the appellant accepted there was no evidence and he was relying on what his mother had told him. But the FtT made no reference to the objective evidence submitted on behalf of the appellant purporting to show evidence of the treatment of Kurds at around the time the appellant's father was said to have been killed.
22. It is also apparent that the FtT, although it acknowledged the greater caution that may be required because of the appellant's age, has not applied a child sensitive approach in respect of the standard of proof. At paragraph [57], for example, the FtT sets out what it describes as an inconsistency that undermines the appellant's credibility and on which, to a not insignificant extent, it appears to base its finding that the appellant's account of being apprehended and tortured cannot be accepted. The inconsistency identified by the FtT is that in his earlier statement the appellant stated that three men with whom he was apprehended in around

2007 were sentenced to the death penalty whereas at the hearing he said he believed they were executed because he was told about this. It is difficult to see where there is a material inconsistency between the two accounts or to reconcile the FtT's credibility finding made in consequence of this inconsistency with the lower standard of proof in asylum claims, irrespective of whether the appellant was a child. In any event, it is clear that the FtT has not taken into account, in determining the weight to be attached to this inconsistency that the appellant was only around 13 when the event was said to take place.

23. Accordingly, I am satisfied that the FtT erred in law by failing to properly apply the lower standard of proof in asylum appeals having regard to the appellant's age both at the time his application was processed and to his age when the events under scrutiny were said to have taken place. This error is such that the decision must be set aside.
24. The remaining three grounds of appeal can be considered together, as they raise the same fundamental issue. It is clear from the decision that the FtT determined the appellant's risk on return to Iran by relying on and following the current Iranian Country Guidance cases of *BA* and *SB*. However, the appellant submitted to the FtT several up to date reports addressing the risk he might face. These included, inter alia, the UK Home Office Country Information on Kurds in Iran dated 19 August 2015, the US Department of State 2014 Country Report on Iran dated 25 June 2015 and an Amnesty International Report dated 25 February 2015. In my judgment, the FtT erred in law by failing to take into consideration this up to date country evidence that was before it.
25. *BA* and *SB* are authoritative to the extent that an appeal turns on the same or similar evidence, but this is not such a case. Firstly, the FtT had before it recent evidence that indicated a departure from *BA* and/or *SB* might be appropriate. Secondly, neither *BA* nor *SB* address the specific issue that was before the FtT, which is the risk faced by ethnic Kurds on return to Iran. Accordingly, I find that the FtT erred in law by failing to take into account the objective evidence before it pertaining to the risk the appellant may face on return to Iran as an ethnic Kurd who left Iran illegally and who would be returned as a failed asylum seeker.
26. Given the extent to which further fact finding will be required to re-make this appeal, the proper course is for this matter to be reheard afresh in the First-tier Tribunal. In light of there being a pending Country Guidance case which will likely be of relevance to issues in this appeal, the de novo hearing of this appeal should take place after that Country Guidance case has been promulgated.

Decision

- a) The decision of the First-tier Tribunal contains a material error of law such that it should be set aside in its entirety and the appeal heard afresh.

- b) The appeal is remitted to the First-tier Tribunal for hearing afresh before a judge other than First tier Tribunal Judge Amin or First tier Tribunal Judge Broe.
- c) An anonymity direction is made.

Signed



Deputy Upper Tribunal Judge Sheridan

Dated: 2 February 2016