



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

Appeal Number: PA/03615/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 25th May 2017**

**Decision & Reasons Promulgated
On 12th June 2017**

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

**H J
(ANONYMITY DIRECTION MADE)**

and

Appellant

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Moriarty (instructed by Luqmani Thompson & Partners,
Solicitors)

For the Respondent: Mr S Kotas (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. Although not previously considered necessary I find it appropriate to make an anonymity direction in this case.
2. This is the resumed hearing following a hearing on 23rd November 2016 when I found as follows:-
 1. This is an appeal to the Upper Tribunal, with permission, in relation to a Decision and Reasons of the First-tier Tribunal (Judge Obhi) promulgated on

5th September 2016 by which she dismissed the Appellant's appeal against the refusal of his protection claim.

2. The appellant claimed to be an Iranian citizen born in August 1999 and therefore a minor. He claimed to be a Kurd who had worked for the Komola Party, a banned group, fleeing the country when the authorities were looking for him.
3. When he initially claimed asylum the Secretary of State treated him as a minor but then on 30th June 2015 a Merton compliant age assessment was carried out by Croydon social services which assessed him to be over the age of 18.
4. In the Decision and Reasons it is clear that the Appellant disagreed with that age assessment and the Judge was asked to decide the issue of his age as a preliminary matter. That the Judge did at paragraph 16 of her Decision. The Judge accepted that the two social workers who carried out the assessment were qualified to do so and that the assessment was undertaken in the presence of adult observers from the Refugee Council and with the aid of a Kurdish Sorani interpreter. The document provided indicated that they had considered the Appellant to be evasive and unwilling to provide the information they needed to complete the assessment. They had reached their conclusion based on such information as he had provided and his appearance. The Judge concluded that she had no reason to assume that the contents of the age assessment were incorrect given the number of independent persons present and none from the Home Office. She found that the assessment was carried out with the appropriate safeguards. She also found that if the Appellant had wanted to challenge that assessment then he could and should have done so. There was no rebuttal evidence save the Appellant's assertions as to his age and the Judge determined that he was 19 years of age rather than 16 years of age as he claimed.
5. The grounds upon which permission to appeal was granted argue that the Judge fell into error when dealing with the issue of the age assessment and in particular in determining age without the full age assessment before her. I was informed at the beginning of the hearing that neither Miss Chapman nor Mr Singh have the full age assessment and nor was it on the court file.
6. I do not find that the Judge erred in the way she dealt with the age assessment.
7. The history of this case is that the age assessment took place on 30th June 2015. The Appellant's solicitors, then as now, Luqmani Thompson and Partners lodged a Notice of Appeal on his behalf to the First-tier Tribunal on 9th July 2015. The matter was first listed for hearing before the First-tier Tribunal on 8th July 2016. On that occasion the Home Office Presenting Officer indicated to the Judge that age was in dispute and the age assessment document was not on the Home Office file. The representative indicated that he had not seen it. Upon making enquiries the Home Office Presenting Officer indicated that he could not produce the document on that day. As a result the hearing was adjourned and the Home Office directed to file and serve the age assessment carried out by social services. The matter was then listed for hearing before Judge Obhi. By that time a summary of the age assessment had been provided by the Home Office and was

appended to the Appellant's supplementary bundle together with a statement from the Appellant disagreeing with it.

8. It is of note that the Appellant's representatives have represented him throughout these proceedings. They would have been aware that the Appellant claimed to be a minor and they would have been aware that he had been assessed to be an adult. At no time did they seek to obtain any independent age assessment. The absence of the age assessment was not raised until the first hearing. The summary document was then produced by the Home Office and appears in both the Home Office bundle and the Appellant's supplementary bundle. When the matter came before Judge Obhi on 25th August 2016 (there is a typed record of proceedings on file) no point was taken as to that document being incomplete. There was no application for an adjournment for the complete document to be obtained.
9. It is clear that the Appellant raised his objection to the age assessment very late in the day. The age assessment document that is on the file makes clear that the Appellant was informed, through an interpreter, that he had the right to challenge the age assessment and how he should go about doing so. He did not take those steps and neither did solicitors take any steps on his behalf. Not only were no steps taken to challenge that age assessment but there was no effort to obtain any further independent evidence to corroborate his claim to have been born in 1999.
10. On the basis of the way the case was put to her and the evidence before the Judge she cannot have be said to have erred in her approach to assessing the Appellant's age.
11. The Judge's adverse credibility findings in relation to the Appellant are also reasoned, open to her on the basis of the evidence and the considerable inconsistencies and contradictions and contain no error of law.
12. However, the Appellant's representative before the Judge in his skeleton argument and in the grounds for permission to appeal made a submission that the Appellant, if an adult, would be perceived as a draft evader upon return to Iran. The country guidance case of SSH and HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 00308 (IAC) makes clear that Iranian males returned to Iran without a passport return on a Laissez Passer and will be questioned upon return. The submission made is that he will upon questioning be revealed as someone of draft age who has left the country. He will then be viewed as a draft evader and be detained in conditions which would breach Article 3 of the ECHR. That matter was not addressed by the Judge and for that reason that part of the Decision and Reasons is flawed.
13. Having so found both parties agreed that the appropriate step forward for this appeal is to preserve the findings of fact made by the Judge but to find a material error of law in failing to engage with the evidence with regard to draft evasion (which included an experts report). Having found that error of law the matter should be adjourned for a resumed hearing in the Upper Tribunal to deal purely with the issue of whether this Appellant, with no political profile, as a young male adult would be at risk on the basis that we would be considered to be a draft evader upon return.

14. **Notice of Decision**

15. The appeal is allowed to the extent that the conclusion on risk on return as a perceived draft evader is to be decided in the Upper Tribunal

No anonymity direction is made.

3. There then followed discussions as to whether this was a suitable case to be a country guidance case and it initially was to be listed as such. However, at a directions hearing it became clear that the appellant's representatives wished to add the fact that he was not just returning as an adult male but as a Kurd and it was then decided that it would not be listed as a country guidance case. Thus the matter came before me on 25th May 2017. Mr Moriarty wished to add the issue of the conditions within military service for Kurds. Mr Kotas objected to that. It had not been identified as an issue at the directions hearing and I refused to deal with it. However, it was agreed that I should deal with how the Appellant would behave upon return to Iran.
4. I heard evidence from the Appellant through a Kurdish Sorani interpreter. He confirmed the contents of his witness statement which indicated that prior to coming to the UK he had not appreciated that military service is compulsory for all adult males in Iran and that he would not be prepared to perform military service. In response to a question from Mr Moriarty he also confirmed that he would not be prepared to swear the oath of loyalty required of all conscripts.
5. In cross-examination he was asked about his knowledge of the draft. He was asked if his father had ever been called up to serve and he said he did not know and that his mother had never said anything about it. He was asked whether the friend he had in Iran had never mentioned it and he said that he had not and that he was not aware of anybody in the neighbourhood going into the Army. The Appellant also said that he only became aware of the oppression of the Kurdish people in Iran after he came to the UK and had not seen anything of it himself when in Iran. He was asked whether he had personally witnessed, in Iran, any problems faced by the Kurdish people and, other than the incident which he had claimed before the First-tier Tribunal and about which he had been disbelieved, he had not.
6. He was then asked if he returned to Iran and told he must perform military service what he would do and he said that as a Kurd he would was not prepared to join the army.
7. At this point I set out my findings in relation to the Appellant's evidence before me and his credibility. For a man who grew up in a Kurdish area of Iran to have no knowledge whatsoever that military service is compulsory for all adult males I find is simply not credible. Even if adult males in the

area in which he lived avoided the draft, it still incredible that the matter would not be known to him and generally by others in the area.

8. I also find it not credible that a person who based his original asylum claim on the oppression of Kurdish people in Iran and who now says that he will not perform military service because Kurdish people are oppressed, would not have known anything about this or witnessed any ill-treatment in Iran. That being the case I attach little weight to the Appellant's claim that he would refuse to perform military service. I do not accept that he has a genuinely held conscientious objection to military service.
9. Having so found I need to determine what is likely to happen to him upon return.
10. He is now aged, on the basis of the age assessment, 20.
11. I then heard oral evidence from the author of the experts report
12. The Appellant relied on an expert report prepared by Ms Roya Kashefi dated 10th April 2017 and she attended and gave oral evidence before me. Without repeating her experience as detailed in her report in this decision, I have no doubt that she has the necessary expertise to give an opinion and I note that she has previously done so before the Upper Tribunal.
13. Ms Kashefi had sight of an earlier expert report prepared for the First-tier Tribunal by Dr Mohammed Kakhki dated 4th July 2016. Towards the end of his report he opined that even though being a Kurd does not, in itself, result in persecution, when this is combined with other criminal suspicions, such persecution is likely to surface. Furthermore, consideration of the general discriminatory situation in Iran and its likely impact on the Appellant's treatment upon return is, in his opinion, relevant to assessing the risks in this case. As he is a Kurd, the general discriminatory situation mentioned above is relevant to his personal circumstances and experiences; particularly having a potential effect on any investigatory or judicial proceedings that may take place against him. Dr Kakhki goes on to say that it is certainly not suggested that being a Kurd, in isolation, would lead to legal prosecution or persecution; however, the level of scrutiny and treatment would, both, in his opinion, and as illustrated by the background evidence highlighted throughout the report, increase substantially; his involvement in the dissemination of illegal political materials along with, or in the alternative, his illegal departure from Iran and subsequent asylum application abroad, would in his opinion, attract the attention of officials and result in a thorough investigation to uncover his criminal activities. I pause at this point to point out that the increased risks Dr Kakhki refers to were based on the Appellant's claims as to what had occurred in Iran and which have been

found to be not credible. Absent that, Dr Kakhki's view was that his ethnicity alone would not lead to persecution on return

14. Earlier in his report Dr Kakhki looked at the situation of draft evaders and noted at paragraph 33 of his report that due to the closeness of Iranian society, detailed information about the punishment of draft evaders and deserters is difficult to obtain. He said that according to one source, draft evaders and deserters are particularly susceptible to face punishment if they have deserted for political reasons, if they have been politically active in the past or if they have deserted previously during the war with Iraq. None of applies to this Appellant. He then opined that in his opinion the Appellant would be required to complete his military service with the risk of facing extra service or being imprisoned due to the late commencement of his service.
15. In her report Ms Kashefi concurred largely with Dr Kakhki but her report had been commissioned on the basis of what would be likely to happen to the Appellant as a Kurd and whether he would be seen as a draft evader. One of the factors that she relied upon was the Appellant's inability to speak Farsi. That however, goes to the issue of the treatment of Kurds in the army which is beyond the scope of this appeal. She detailed the penalties for draft evasion and indicated that because draft evasion is such a significant issue in Iran, the authorities are reducing the penalties for draft evasion. She indicated that for a person who had evaded the draft for eight years or more they could avoid further punishment or military service by paying a fine. Those who had evaded for a shorter period of time were taken before a military court and could either be imprisoned or their military service period extended by a period of 3 to 6 months.
16. In addition to providing her report Ms Kashefi also responded to questions put to her by the Home Office in writing prior to the hearing. One of the points she made in response to those questions was that up was that as at July 2015 the number of missing conscripts throughout Iran was estimated to be 1.5 million but she was unable to say where they were; whether they were principally Kurds or from the Kurdish areas.
17. In her oral evidence Miss Kashefi was asked how likely it would be that the Appellant would be sent to prison as a draft evader and she said that the law was very clear that the punishment for draft evasion was either an extra period of service or prison and she opined that Kurds are more likely to receive harsher punishment and more likely to receive a custodial sentence. She opined that this was particularly so for this Appellant because he had exited Iran illegally and claimed asylum.
18. She was asked how likely it was that his father had not been required to perform military service and she indicated that living a rural life in a Kurdish area would make it more difficult to enforce conscription.

19. It was Ms Kashefi's firm view that as a failed Kurdish asylum seeker the Appellant would be at risk and that he is a draft evader purely by reason of his age. Persons who are of that age and lawfully outside of Iran, for example as students, can apply to the Embassy for an exemption. That is not something that would be available to this Appellant.
20. Mr Kotas asked Miss Kashefi about the source of her information in regard to what life was like within the army. She said that she had spoken to individuals who had performed military service. She said however that she had not spoken to anyone who had evaded the draft and been punished for it. She had not spoken to anyone outside of Iran who had avoided the draft and been punished and it was put to her that it was extraordinary that no one had fled abroad who had been in that position and she could only comment that she had not come across such a person. She also agreed that it was unusual that a person in Iran, such as this Appellant, would have no knowledge of conscription.
21. Whilst Miss Kashefi gave her report and her evidence in a straightforward manner and did not seek to exaggerate the evidence, it remains the case that there was no actual evidence of any person being punished for draft evasion on return to Iran from the UK or anywhere else having made a failed asylum claim. She relied very heavily on what the law provides as a punishment for draft evasion without being able to refer to actual examples.
22. I have to place her opinion, unsupported by actual evidence as it is, against the country guidance case of SSH and HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 00308 (IAC). The head note of that case states as follows:-

“(a) An Iranian male whom it is sought to return to Iran, who does not possess a passport, will be returnable on a laissez passer, which he can obtain from the Iranian Embassy on proof of identity and nationality.

(b) An Iranian male in respect of whom no adverse interest has previously been manifested by the Iranian state does not face a real risk of persecution/breach of his article 3 rights on return to Iran on account of having left Iran illegally and/or being a failed asylum seeker. No such risk exists at the time of questioning on return to Iran nor after the facts (i.e. of illegal exit and being a failed asylum seeker) have been established. In particular, there is not a real risk of prosecution leading to imprisonment.
23. Dr Kakhki provided expert evidence before that Tribunal and had previously given evidence in the earlier country guidance case SP (risk on return-illegal exit) Iran CG [2009] AIT 00053

24. While SSH & HR does not specifically deal with whether such persons on return would be viewed as draft evaders and punished accordingly, it seems to me highly significant that the Tribunal indicated that a failed asylum seeker with no political profile returning from the UK on a Laissez Passer would not be at risk either during questioning on return or thereafter. A very considerable number of those persons will have been outside of Iran while of draft age and it is in my view inconceivable that if there was a risk on that basis it would not have been identified by either Dr Kakhki or the Tribunal. It is a fact that a great many Iranian asylum seekers are of Kurdish ethnicity and it is a fact that a great many of them are young men of draft age.
25. If young men who left illegally and claimed asylum in the UK are at risk as perceived draft evaders the Tribunal in SSH & HR would have so found.
26. Accordingly, while acknowledging Miss Kashefi's expertise, I cannot accept in the absence of better evidence that this Appellant would be at risk on return for any reason. He is Kurdish but without any profile whatsoever that would excite the interest of the authorities.

Notice of Decision

The appeal to the Upper Tribunal is dismissed

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed C J Martin

Date 9th June 2017

Upper Tribunal Judge Martin