IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-004807

First-tier Tribunal No: PA/58403/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 9th of January 2025

Before

UPPER TRIBUNAL JUDGE NEVILLE
DEPUTY UPPER TRIBUNAL JUDGE WALSH

Between

M A
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr H Sadiq, solicitor with Adam Solicitors
For the Respondent: Mr K Ojo, Senior Home Office Presenting Officer

Heard at Field House on 18 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

1. The appellant is a 24 year old Iranian national of Kurdish ethnicity. He claims that in 2021 he was ambushed by the Iranian authorities while smuggling illegal pro-Kurdish political leaflets over the Iraq-Iran border at

the behest of the Pashmerga. While he managed to escape, four days later he was told by his uncle that the police were looking for him. Arrangements were made to flee the country. After passing through several countries, the appellant entered the United Kingdom on 17 October 2021 and claimed asylum the same day.

2. The appellant was not interviewed until 26 September 2023. He claimed to be at risk if returned to Iran due to his Kurdish ethnicity, because he had left Iran illegally, had previously worked as a kolbar (smuggler), and because he was wanted in connection with the ambush. He had also undertaken further political activity in the UK while waiting for his asylum claim to be processed, posting political criticism of the Iranian authorities on Facebook and attending protests outside the Iranian embassy in London; this was put forward as increasing his risk on return.

3. The respondent refused the claim on 10 October 2023. It was accepted that the appellant was Kurdish, had worked as a kolbar and had exited Iran illegally. The respondent disbelieved the rest of his account: several parts of it lacked detail, others were implausible or speculative, and he had failed to correctly answer several questions about the pro-Kurdish KDPI party despite claiming to support it. Since the appellant lacked any genuine political opinion, he could simply delete his Facebook account; there was no reasonable likelihood that the Iranian authorities would have been proactively monitoring him, nor any other reason why he would be at risk as a perceived political activist on return.

4. The appeal against the refusal decision was dismissed by First-tier Tribunal Judge Row on 8 August 2024. Having heard evidence from the appellant, the Judge rejected the credibility of the appellant’s account and likewise decided that he would not be at risk on return to Iran.

5. Dissatisfied, the appellant applied for permission to appeal to the Upper Tribunal on grounds that can be fairly summarised as follows:

a. First, that the Judge had approached the failure to claim asylum in France as damaging credibility in a way that was procedurally unfair;

b. Second, that the Judge had mistaken the appellant’s account as to when he first engaged in political activism;

c. Third, that the Judge misunderstood or misdescribed the Facebook evidence; and

d. Fourth, that the Judge misapplied the relevant country evidence and guidance on the risks faced Kurdish returnees to Iran.

6. We were ably addressed on these errors by Mr Sadiq and Mr Ojo, and shall set out their submissions where necessary to explain our conclusions.

Failure to claim asylum in France

Section 8 – Principles

7. Section 8 of the Asylum & Immigration (Treatment of Claimants, etc.) Act 1999 provides that (so far as relevant):

> (1) In determining whether to believe a statement made by or on behalf of a person who makes an asylum claim or a human rights claim, a deciding authority shall take account, as damaging the claimant's credibility, of any behaviour to which this section applies.
>
> […]
>
> (4) This section also applies to failure by the claimant to take advantage of a reasonable opportunity to make an asylum claim or human rights claim while in a safe country.

8. In *JT (Cameroon) v SSHD* [2008] EWCA Civ 878, the Court of Appeal interpreted the provision as follows:

> 20. […] The section 8 factors shall be taken into account in assessing credibility, and are capable of damaging it, but the section does not dictate that relevant damage to credibility inevitably results. Telling lies does damage credibility and the wording was adopted, probably with that in mind, by way of explanation. However, it is the "behaviour" of which "account" shall be taken and, in context, the qualifying word "potentially" can be read into an explanatory clause which reads: "as damaging the claimant's credibility". Alternatively, the explanatory clause may be read as: "when assessing any damage to the claimant's credibility". The form of the sub-section and Parliament's assumed regard for the principle of legality permit that construction.
>
> 21. Section 8 can thus be construed as not offending against constitutional principles. It is no more than a reminder to fact-finding tribunals that conduct coming within the categories stated in section 8 shall be taken into account in assessing credibility. If there was a tendency for tribunals simply to ignore these matters when assessing credibility, they were in error. It is necessary to take account of them. However, at one end of the spectrum, there may, unusually, be cases in which conduct of the kind identified in section 8 is held to carry no weight at all in the overall assessment of credibility on the particular facts. I do not consider the section prevents that finding in an appropriate case. Subject to that, I respectfully agree with Baroness Scotland's assessment, when introducing the Bill, of the effect of section 8. Where section 8 matters are held to be entitled to some weight, the weight to be given to them is entirely a matter for the fact-finder.

The case before the Judge

9. Referencing section 8(4) and the appellant's asylum interview, the refusal decision had stated:

> You said that you travelled through France but did not claim asylum. However, your explanation that you were under the control of an agent has been accepted as reasonable. Therefore, the credibility of your claim has not been affected (SCR 3.4, AIR 29-31).

10. In the Appeal Skeleton Argument and bundle of evidence submitted to the First-tier Tribunal, the appellant unsurprisingly made no mention of section 8 credibility concerns – it was common ground that his failure to claim in France did not materially undermine the credibility of his account, so there was no reason to spend time on the issue. When the respondent then came to provide her Review however, it contained the following:

> 8. The R also maintains that s8 behaviours are present in the A's case due to his failure in making an asylum case in France, where he travelled through.

11. Far from 'particularising the grounds of refusal relied upon' as required by the relevant Practice Statement, this obscured them. While acknowledging that the statement could have been much clearer, Mr Ojo argued that it was enough to put section 8 credibility fairly back in issue between the parties. We disagree. The Review does not state that credibility is damaged at all, let alone why and to what extent, and nor does the respondent state her case on the appellant's explanation in interview. As held in *JT (Cameroon)*, what the Review terms "s8 behaviours" do not *inevitably* cause material damage to credibility. Moreover, if the respondent's intention was that a previously accepted matter was now controversial, this should have been clearly spelled out. The Review comes after the appellant's evidence has already been served, so any new factual issue must be clearly signposted so that the appellant can prepare new evidence to meet it. The Tribunal must also be clear as to the matters upon which the parties wish it to adjudicate: *Lata (FtT: principal controversial issues) India* [2023] UKUT 163 (IAC) at [31]-[34].

The Judge's decision

12. Faced with this unsatisfactory state of affairs, the Judge's procedural and substantive treatment of section 8 is as follows. First, as part of the overall credibility assessment:

> 39. The appellant travelled overland from Turkey to France. That journey would inevitably involve travelling through several safe countries. The appellant says that in one of those countries he was detained by the authorities, fingerprinted, and then released. He claims not to know the name of the country he was in.
>
> 40. I do not find it credible that an adult, in the absence of cognitive impairment, would not know the name of the country in which he

was detained. The authorities would have had to explain where he was. The appellant, and those with whom he travelled, would have asked where they were.

41. An alternative explanation is that the appellant was aware that his failure to claim asylum in a safe country would damage his credibility and has chosen not to say where he was detained[1].

42. I am not satisfied that all material factors at the appellant's disposal have been submitted or a satisfactory explanation given regarding the lack of these.

and then specifically in relation to section 8:

48. There are matters which damage the appellant's credibility by virtue of section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. This is a mandatory provision. The decision maker did not apply section 8. In the review the respondent indicated that section 8 did damage the appellant's credibility. This line was pursued at the hearing.

49. The appellant was detained somewhere on the way although he claims not to know where he was. He was in France for a week. It was open to him to claim asylum there. His failure to do so damages his credibility.

50. It also goes to the plausibility of his account. If fleeing harm in Iran the United Kingdom is a long way to flee. Safety could have been obtained closer to Iran and with less expense and physical danger than would be involved in the overland and overseas journey to the United Kingdom.

51. I do not find that the appellant has met all the requirements of paragraph 339L.

13. We underline the two sentences at [48] because each of them is wrong. The author of the refusal decision did apply section 8, in accordance with the correct legal principles and having had regard to the appellant's explanation. The Review did not indicate that section 8 behaviour damaged credibility, simply that section 8 behaviour had been committed. Of course, that misdescription of the issues will not stand as a material error itself. We must still decide whether the appeal was fairly decided and the Judge's own consideration of section 8 properly conducted.

Consideration

14. We are satisfied that the appeal was not fairly decided and that the Judge's consideration of section 8 was not properly conducted. While the Judge says that the section 8 "line was pursued at the hearing", he does not say what that line was, the appellant's position on the fairness of

[1] We note that at question 3.3 of the screening interview that the appellant freely volunteered that he had spent a week living in France before making his way to the United Kingdom, but nothing turns on this.

dealing with it, what arguments were actually made by the respondent, whether the matter was put to the appellant in evidence, or his answers in response. Before the respondent could fairly argue that the explanation given at interview should be rejected, the appellant had to be afforded the opportunity to meet that case in cross-examination: *Ullah v SSHD* [2024] EWCA Civ 201 at [36]-[39]. The explanation potentially went to the failure to claim in other transit countries as well as in France.

15. Most fundamentally, the Judge's decision never actually records or evaluates the explanation that was given in interview and carefully noted in the refusal decision. The Judge instead appears to take the appellant's explanation as being his claim not to know the country in which he was detained and fingerprinted. This arises from question 3.2 of the screening interview where, asked directly whether he had ever been "fingerprinted in any country including your own", the appellant replied:

> "No, only in my own country once I was fingerprinted for my ID card and during the journey I was arrested and fingerprinted. I don't know the country."

This was an answer to a direct question from an Immigration Officer, and was never put forward by the appellant as his reason for not claiming asylum in a safe country. The appellant had volunteered elsewhere in the screening interview that he had spent a week living in France. The explanation given for not claiming asylum was control by an agent. While the Judge was entitled to take the appellant's claim not to know where he was detained and fingerprinted as a separately arising indicator of credibility, nowhere does he set out the appellant's response to it.

16. Against this apparent failure of anxious scrutiny Mr Ojo made several submissions. He first very properly reminded us that reasons for decisions should be concise and not subjected to hypercritical analysis. We agree, and carefully bear in mind all that is said in the *Practice Direction from the Senior President of Tribunals: Reasons for decisions, 4 June 2024*, particularly in this case at paragraphs 7 and 8. Yet in this appeal the Judge failed to correctly identify the issues between the parties and failed to take into account a response to a material adverse point. They are certainly matters that could have been dealt with concisely, but here they were not properly dealt with at all.

17. Next targeting the confusion in the Review, Mr Ojo argued that section 8 is always in issue because it is mandatory for the Tribunal to consider it. While that statement of principle is correct so far as it goes, the Tribunal is still entitled to consider section 8 according to the way the issue has been framed by the parties. Parliament must be taken as aware that the Tribunal decides appeals according to the procedures set out in its rules and relevant Practice Directions, made on a statutory footing, and explicit language would be required to do otherwise. Nothing in the Act disapplies the overriding objective or justifies departure from fundamental principles of case management. The Tribunal is entitled to adopt the parties'

common ground on an issue as its own position if there is no apparent reason to do otherwise. If the Tribunal were required in every case to start considering section 8 from scratch even where it was conceded by the respondent, then the respondent would have to provide all the information upon which she reached her own decision. In some cases this might include intelligence on border movements that would be disproportionate or against the public interest to supply. This is another reason why the relevant issues in the appeal must be clearly identified.

18. Mr Ojo next argued that if the section 8 issue had indeed been an ambush, it was incumbent upon the appellant's representative to object at the hearing. We disagree that this is a case where a party has acquiesced to a procedural development only to later criticise it on onward appeal. The grounds of appeal to the Upper Tribunal assert that the respondent did not even raise the issue, and there has been no section 24 response to the contrary: see *Abdi v Entry Clearance Officer* [2023] EWCA Civ 1455 at [20]. The Judge's lack of engagement with the actual detail of the issue in the Decision also suggests that that it was never raised in such a way that the appellant's representative could be expected to either object or properly put his client's case.

19. Notwithstanding Mr Ojo's skilful and valiant submissions in defence of the Decision, we are therefore satisfied that it contains two discrete errors of law. First, if the respondent intended to argue section 8 then given the confusion over the Review the Judge should have sought submissions from the parties on whether this could be done fairly, and how. His reliance on section 8 behaviour as materially damaging credibility without taking those steps deprived the appellant of a fair opportunity to argue his case. Second, and separately, the Judge's material reliance on section 8 when rejecting credibility overall was vitiated by the failure to consider the appellant's explanation in response. While there were other factors telling against credibility, the weight placed on the failure to claim in a safe country occupied such a central position in the Judge's assessment that the entire decision must be set aside.

The other grounds

20. Grounds 2 and 3 argue factual matters that fall away with the rest of the Judge's findings. We likewise need not formally resolve Ground 4, as it concerned application of country guidance to the facts found by the Judge, but we do give some brief reasons as to why it had potential merit. The refusal decision had correctly summarised the significance of the appellant's accepted work as a kolbar:

> […] Country Policy and Information Note Iran: Smugglers, Version 4.0, February 2022 states at Paragraph 2.4.6 that evidence continues to support the findings that a person will not be at real risk of persecution or serious harm based on their Kurdish ethnicity alone, though when combined with other factors, such as involvement in smuggling, may create a real risk of persecution or Article 3 ill-treatment.

21. At [22] the Judge notes the appellant's concession that he had stopped working as a kolbar in 2019 (save for the later ambush incident that the Judge rejected), finds that there would accordingly be no risk on that account, and never returns to the issue again. While this is phrased as forming part of the concession made by the appellant's representative, the language used by the Judge is equivocal as to what aspects of the claim were actually conceded. More detail should have been provided by the appellant's representatives, or the matter more squarely raised in the grounds, but given our conclusion on the first ground it is sufficient to state that a positive disavowal by an appellant of a risk factor contained within a CPIN, as the Judge appears to have treated it, should have been recorded in much clearer terms. This combines with an approach to whether the appellant was sufficiently 'high profile' that is contrary to the country guidance given at headnote (8)-(11) of *HB (Kurds) Iran (illegal exit: failed asylum seeker) CG* [2018] UKUT 430 (IAC).

Disposal

22. Applying the principles set out in the Practice Direction, according to the guidance given in Begum (Remaking or remittal) Bangladesh [2023] UKUT 46 (IAC), we consider it appropriate to remit the Decision to the First-tier Tribunal. The appellant has not yet had a fair hearing of his appeal and ought not to be unfairly deprived of the two-tier decision-making structure.

23. It is appropriate to continue the appellant's anonymity pending a final decision on his appeal, as ordered above. The risk that might arise on return to Iran from his identification and the need to maintain the integrity of the UK asylum system justifies derogation from the principle of open justice.

Notice of Decision

(i) The decision of the First-tier Tribunal involved the making of an error of law and is set aside.
(ii) The case is remitted to the First-tier Tribunal for re-hearing with no findings of fact preserved, to be heard by any judge other than B Row.

J Neville

Judge of the Upper Tribunal
Immigration and Asylum Chamber

30 December 2024