IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000186
First tier number: PA/52203/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 15th of March 2024

Before

UPPER TRIBUNAL JUDGE LANE
DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

ANZ
(ANONYMITY ORDERED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Greer, Counsel instructed by Bradford CAB and Law Centre
For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

Heard at Phoenix House (Bradford) on 1 March 2023

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

1. This is an appeal by the appellant, who claims to be an Afghan citizen born in Iran on the 22nd January 1991, against the decision of First-tier Tribunal Judge Sills to dismiss his appeal against refusal of his protection and human rights claims.

The appellant's claim

2. The appellant's protection claim can be summarised by saying that, despite having originally claimed (falsely) to be an Iranian citizen who feared retribution from family members of a woman with whom he had had an adulterous relationship, he is in fact an Afghan citizen who (a) has a well-founded fear of the Taleban in that country, and/or (b) would face very significant obstacles to his integration in Afghanistan given his lack of ties to it beyond mere nationality.

The decision of the First-tier Tribunal

3. The judge found as follows.

4. In originally advancing what he now admits to have been a false protection claim, the appellant's credibility is "seriously damaged" [17]. There are flaws in the transmission evidence of the appellant's DNA sample, which in turn casts doubt upon the validity of the expert opinion that he is the biological son of a woman who is a proven Afghan citizen [27]. Although an expert has vouched for the authenticity of 'temporary residence cards', supposedly issued to the appellant and his family as Afghan citizens by the Iranian authorities, that expert simply outsourced his investigation to an agent in Iran. The expert's conclusion is thus based upon information that is, "second hand or even third hand" [31]. There are significant discrepancies in the documentation concerning the appellant's date of birth [34]. The appellant has thus failed to prove on the balance of probabilities, or even to the standard of reasonable degree of likelihood, that he is an Afghan national [37]. There is, "no very good reason", to depart from the finding of the Tribunal that considered the appellant's original protection claim, namely, that the appellant is a citizen of Iran [38]. Given those findings, the appellant has failed to establish that he would, "face any very significant obstacles to integration", on return to his country of nationality (Iran) [41]. It follows from the above that the current appeal falls to be dismissed on both protection and human rights grounds.

The grounds of appeal

5. The grounds of appeal can be conveniently summarised as follows –

   (i) By applying the standard of 'a balance of probabilities' to the evidence when making his findings of fact, the judge misconstrued the effect of section 32 of the Nationality and Borders Act 2022;
   (ii) The judge's finding that the appellant had failed to substantiate the claimed transmission of his DNA sample was contrary to the evidence;
   (iii) The judge failed to attach appropriate weight to the expert opinion concerning the authenticity of the 'temporary residence cards' issued to the appellant and his family; and
   (iv) The judge erred in taking the finding of the previous tribunal as his starting point when determining the question of whether the respondent had discharged the burden of proving their assertion that he was a citizen of Iran.

The hearing

6. The representatives made helpful submissions in relation to the above grounds, and we will refer to them as appropriate in our analysis of those grounds.

7. The representatives also indicated that in the event of us setting aside the decision of the First-tier Tribunal, they were content for us to remake the decision on the basis of the existing evidence. They each made further submissions on that basis.

Legal analysis and error of law

8. We consider the grounds in turn.

9. Section 32 of the Nationality and Borders Act 2022 reads as follows:

> (1) In deciding for the purposes of Article 1(A)(2) of the Refugee Convention whether an asylum seeker's fear of persecution is well-founded, the following approach is to be taken.
>
> (2) The decision-maker must first determine, on the balance of probabilities—
>
> (a) whether the asylum seeker has a characteristic which could cause them to fear persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion (or has such a characteristic attributed to them by an actor of persecution), and
>
> (b) whether the asylum seeker does in fact fear such persecution in their country of nationality (or in a case where they do not have a nationality, the country of their former habitual residence) as a result of that characteristic.
>
> (See also section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (asylum claims etc: behaviour damaging to claimant's credibility).)
>
> (3) Subsection (4) applies if the decision-maker finds that—
>
> (a) the asylum seeker has a characteristic mentioned in subsection (2)(a) (or has such a characteristic attributed to them), and
>
> (b) the asylum seeker fears persecution as mentioned in subsection (2)(b).
>
> (4) The decision-maker must determine whether there is a reasonable likelihood that, if the asylum seeker were returned to their country of nationality (or in a case where they do not have a nationality, the country of their former habitual residence)—
>
> (a) they would be persecuted as a result of the characteristic mentioned in subsection (2)(a), and
>
> (b) they would not be protected as mentioned in section 34.

10. It is clear to us that the ordinary and plain meaning of the wording of section 32 of the 2022 Act requires the Tribunal to apply the standard of 'a balance of probabilities' to what is sometimes referred to as (somewhat tautologically) 'past facts' [sub-section 2] whilst applying the lower standard of 'a reasonable degree of likelihood' to what is sometimes referred to as (again, somewhat tautologically) 'future risk' [sub-section 4]. It also seems to us that there will frequently be an overlap between a finding that a claimant does or does not (a) have a "characteristic which could cause them to fear persecution", and (b) "does in fact fear such persecution". This is particularly likely to occur where the claimed fear of persecution is based upon membership of 'a particular social group', where the existence of both the claimed "characteristic" and the claimed fear of persecution on account of that characteristic are each likely to be determined by an assessment of whether the appellant has given a truthful account of his history. At

all events, we have no doubt that the standard of proof is in each case one of 'a balance of probabilities', and that the judge accordingly did not make an error of law by applying that standard. This supposed error of law was in any event immaterial, given that the judge made it plain that he was also not satisfied that, "it is even reasonably likely", that the appellant was the person he claimed to be.

11. Mr Diwnycz did not seek to defend the First-tier Tribunal's decision against the second ground of appeal. We consider that he was right not to do so. If the provenance of the respective samples is accepted, comparison of the DNA profile in the sample provided by the appellant's putative mother (a proven Afghan national) with that of the appellant demonstrates that the probability of maternity is some 99.999999992 per cent (assuming a prior probability of 0.5). On the face of it, therefore, this provides conclusive proof that the appellant is an Afghan national. However, whilst the judge accepted the provenance of the sample provided by the putative mother, together with the fact that it had been compared with a sample provided by her son, he did not accept that the latter sample was provided by the appellant. The reason he gave for this was that whilst there was a declaration of provenance by an appropriately-qualified sampler on the relevant form for the putative mother, the section that should have been completed by the sampler on the form for the appellant had been left blank. There was moreover no explanation for why this was the case. However, as Mr Greer pointed out, not only is such a declaration contained within an email sent by the appellant's sampler to the laboratory on the 15th August 2022 - together with a certified photograph of the appellant, in lieu of an identification document due to the appellant being an asylum-seeker - but the barcode on the incomplete sampler's statement for the appellant matches that of the completed sampler's statement that was provided in the case of the putative mother. Mr Diwnycz accepted that all this provided extremely cogent evidence in support of the proposition that the person identified by the laboratory scientist as the son of the putative mother was indeed the appellant. The only reason that the judge gave for attaching significance to the form of continuity evidence (rather than to its substance) was that the appellant's credibility had been damaged as a result of him making an earlier false protection claim. However, whilst we understand why the judge would wish in such circumstances to consider if there was independent evidence to support the appellant's recent claim of being an Afghan (rather than an Iranian) national, we cannot see how his damaged credibility can provide a logical basis for questioning the integrity and reliability of independent evidence. We therefore conclude that judge's finding was contrary to the evidence in this regard, and was consequently tainted by error of law.

12. Had the evidence relating to the authenticity of the Iranian temporary residence cards stood alone, then we would have concluded that it was open to the judge to place little weight upon it for the reasons that he gave. As it is, this evidence is consistent with, and thus provides further support for, what we consider to be the conclusive DNA evidence demonstrating that the appellant is the son of a woman who is an Afghan national (above).

13. Turning to the final ground of appeal, we consider that the judge was in error in treating as his starting point the so-called 'finding' by Judge Malik that the appellant was an Iranian national. Had Judge Malik made an evidence-based finding concerning the appellant's nationality, then this would have been the starting point for not only the determination of the respondent's assertion that the appellant was an Iranian national, but also for the appellant's assertion that he was an Afghan national. As it is, a close reading of Judge Malik's decision reveals that he in fact did

no more than to note that the respondent had 'accepted' the appellant's then claim to be an Iranian national [35]; a claim that the appellant had of course disavowed and which accordingly now fell to be determined afresh. Whilst the appellant's inconsistency in this regard was of course highly material to the matter upon which he bore the burden of proof (his claimed Afghan nationality) it took matters no further in assisting the respondent to discharge the burden of proving their positive assertion that the appellant was in fact an Iranian national. In order for the respondent to discharge the burden of proving that assertion, it would have been necessary for them to provide cogent evidence that was capable of showing, on the balance of probabilities, that the appellant's previously-claimed Iranian nationality was to be preferred to that of his currently-claimed Afghan nationality.

14. We conclude that the errors of law identified in the second and fourth grounds of appeal are such as to strike at the very root of the First-tier Tribunal's decision. It must therefore be set aside.

Redetermination

15. We have noted the discrepancies in the documentation that were identified by the First-tier tribunal concerning the appellant's date of birth [34]. We have also noted the explanation that the appellant gives for this at paragraph 9 of his witness statement of the 20th May 2020. We have placed these matters in the balance when conducting our overall assessment of the appellant's current claim to be an Afghan national. We have of course also placed in the balance the fact that this claim is inconsistent with his previous claim of being an Iranian national. With regard to the latter, we have not been informed as to why the respondent accepted this aspect of the appellant's earlier claim in 2017, notwithstanding that they rejected the remainder of it. It may well be that it was accepted because the appellant had demonstrated a detailed knowledge of life in Iran during the course of his original asylum interview. However, given that the appellant has consistently claimed to have been born, educated, and to have resided for the majority of his life in Iran, such knowledge is equally consistent with his current claim. We are not therefore satisfied that the respondent has discharged the burden of proving that the appellant is an Iranian citizen and/or that he has any right of residence in that country. We place a degree of positive weight upon the evidence that appears to show that the appellant and members of his family were previously granted temporary residence permits as Afghan citizens in Iran. However, the evidence that in our judgement decisively tips the balance of probabilities in favour of the appellant's current claim to be an Afghan national by descent is that of the DNA profiling. We accept that evidence for the reasons detailed at paragraph 10 (above). We therefore turn to consider the appellant's respective protection claim and human rights claims upon this factual basis.

16. It seems to us that the appellant's protection claim is based upon a single sentence: "I am afraid of the Taliban; that is true" [paragraph 16 of his statement dated the 26th May 2023]. However, there is absolutely no mention of this supposed fear elsewhere; whether in that statement, or in his earlier statement of the 20th May 2020. This is notwithstanding the fact that each statement provides what is otherwise an extremely detailed account of his history and his reasons for fearing removal to Afghanistan. He also fails to provide an explanation for why he should hold such fear, beyond saying that the Taliban are "fundamentalists" [16]. We are not therefore satisfied that any such supposed fear is well-founded, or that he genuinely holds it.

17. However, the situation is somewhat different concerning whether the appellant would face (in the words of Appendix PL of the Immigration Rules), "very significant obstacles", to his integration following removal to Afghanistan. Apart from a brief visit when he was 4 or 5 years old, of which he unsurprisingly recalls very little, the only time that the appellant has previously visited Afghanistan was a for a period of about a month some 11 years prior to him making his statement of the 20th May 2020 [2, 11]. The appellant therein describes how he was repatriated to Afghanistan by the Iranian authorities before illegally re-entering Iran with the assistance of an agent. On the occasion of that visit to Afghanistan, he stayed with his, "uncles and aunts in Farah Province", close to the border with Iran [11]. He says that, "life was very different", and he, "felt like an outsider, a foreigner". Notably, he does not explain those feelings in cultural terms. Rather, he says that there was much poverty and conflict.

18. At paragraph 17 of his statement of the 26th May 2023, the appellant also says that he has a sister, who now lives in Afghanistan having relocated there following her marriage to an Afghan citizen more than 20 years ago. It is clear from his description of her situation in Afghanistan that he remains in contact with her.

19. We have noted the references within the appellant's original Appeal Skeleton Argument to the relevant Home Office Country Policy and Information Note on Afghanistan, and in particular to the sources that suggest Afghans have been attacked and beaten for wearing western-style clothes. However, the appellant does not suggest that his preference for western attire is borne out of any deep-seated religious or moral conviction. We also note that an academic has described there being two distinct narratives of the Taliban on persons leaving Afghanistan to live in Western countries. In one narrative, the Taliban say that people who are simply fleeing poverty have nothing to fear on return. On the other, those who are perceived as belonging to the "elites" (such as activists, media workers, intellectuals, and former government officials) are viewed by the Taleban as having no "roots" in Afghanistan and are corrupt puppets of the occupation. By his own case, the appellant would clearly be viewed as belonging to the former rather than the latter category.

20. We also note that the appellant is a Muslim who speaks Farsi, Dari, and Pashto, as well as "some English" [paragraph 7 of the statement dated 26th May 2023].

21. Having considered all the above factors in the balance, we conclude that whilst the appellant would face a degree of hardship following removal to Afghanistan, the obstacles to his integration would not in our view be very significant given his religion, his language skills, and the fact that his uncles, aunts, and sister who would be able to assist him to readjust to his new life.

Notice of Decision

(1) The decision of the First-tier Tribunal is set aside, and none of its findings of fact are preserved.
(2) The appeal against refusal of the appellant's protection and human rights claims is remade and is accordingly dismissed in each case.

David Kelly
Deputy Judge of the Upper Tribunal
(Immigration and Asylum Chamber) 7 th March 2024