IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003382

First-tier Tribunal No: PA/00896/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 23 October 2024

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SR
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms Cunha, Senior Presenting Officer
For the Respondent: No appearance or representation

Heard at Royal Courts of Justice on 21 October 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. I make this order of my own volition and on account of the fact that the appellant maintains that he is (still) entitled to international protection.

DECISION AND REASONS

1. The Secretary of State appeals with the permission of Judge Hollings-Tennant against the decision of Judge Gibbs ("the judge"). By her decision of 24 May 2024, the judge allowed SR's appeal against the Secretary of State's decision to refuse his application for international protection, finding that he was a national of Iran and at risk there for a Refugee Convention reason.

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2. To avoid confusion, I will refer to the parties as they were before the First-tier Tribunal: SR as the appellant and the Secretary of State as the respondent.

Background

3. The appellant's nationality is in dispute between the parties. He arrived in the United Kingdom in 2010. He was fifteen years old at the time. He stated that he was a national of Iran and that he was at risk on return to that country because of his and his family's activities for the Kurdish Democratic Party of Iran ("KDPI"). The respondent refused asylum. She did not accept that he had been active for or associated with the KDPI. She also doubted that the appellant was a national of Iran. That was on account of his limited knowledge of the country: [41]-[57] of the refusal letter of 15 February 2011 refers. Due to his age, the appellant was granted discretionary leave despite those conclusions.

4. The appellant appealed against that decision. His appeal was heard by Judge Thew on 3 August 2011. By a reserved decision which was sent a week thereafter, she allowed the appeal. There is no need to rehearse the contents of her decision. She found, in basic outline, that although she had some concerns (particularly as to the appellant's contact with his mother), she accepted that he had given a truthful account and that he was "of specific adverse interest to the authorities". His appeal was allowed on protection grounds on that basis.

5. The appellant then committed a number of offences in the UK. Two are particularly significant.

6. The appellant was convicted of offences of robbery and kidnapping, for which he was sentenced by the Honourary Recorder of Reading on 24 January 2014 to a total of eighteen months' detention in a Young Offender Institution. He completed that sentence in 2014 and he made contact with the respondent's Facilitated Returns Scheme ("FRS") on 22 July 2014. He stated that he was from Northern Iraq and that he wished to return as his father was unwell. He wrote a letter in his own handwriting to that effect. He also filled in a disclaimer in which he stated that he wished to leave the UK and return to "Iraq Kurdistan Irbil" as soon as possible and that he would not be appealing against the decision to deport.

7. The respondent began the process of revoking the appellant's protection status in 2018. It is not clear why it took so long for the respondent to act. In the meantime, the appellant had been released into the community and had committed an even more serious offence. On 23 February 2018, the appellant and his co-defendants imprisoned a barber in his business premises and robbed him at knifepoint. The appellant changed his plea after the first listing of his trial and, on 7 March 2019, he was sentenced by HHJ Stubbs QC to a total of six years' imprisonment.

8. The appellant was notified again that the respondent intended to deport him from the United Kingdom. He responded again, in a notice signed on 23 March 2019, that he wished to leave the UK without making any representations against deportation. He stated that he intended to leave the UK for "Iraq/Northern Kurdistan". The applicant also wrote a letter (undated), the final paragraph of which was in the following terms:

> If it is possible to go back asap please send necessary paperwork to sign including FRS please I will get an Iraqi ID and a passport from 2010 to get deported but I need means to contact my brother to do so I can not at the moment as I don't have any money to contact them. Please I need help doing that. I have mental health problems. I have tryed [sic] to take my life a few times and have been on pills all I want is to see my mother one last time please help me.

9. The respondent wrote to the appellant again on 27 March 2019, stating that she intended to revoke his refugee status. The UNHCR provided its opinion on 17 May 2019. On 1 June 2019, the appellant made a human rights claim, stating that he did not wish to leave the UK as he had two children by an ex-partner.

10. On 18 October 2019, the respondent revoked the applicant's refugee status because it had concluded, in reliance on what he had said in 2014 and 2019, that he was an Iraqi national who had obtained refugee status by misrepresentation as to his nationality. The respondent did not accept that the appellant would be at risk on return to Iraq and no evidence had been provided to substantiate his Article 8 ECHR representations. His human rights claim was refused accordingly. A deportation order was made against him on 6 January 2020.

11. The appellant appealed against the revocation of his protection status and the refusal of his human rights claim. He subsequently signed a general application form whilst he was in HMP Moorland, however. The material part of that form stated:

> I would like to see someone regarding FRS. If I am eligible then I don't mind going back, only if I get FRS.

12. On 20 November 2020, the First-tier Tribunal confirmed that the appellant had withdrawn his appeal.

13. On 15 April 2021, however, the appellant was interviewed in connection with a further asylum claim. He stated in that interview that he was an Iraqi national who had an Iraqi passport but that he feared persecution in Iran and Iraq. He said that he was born in Bokan, Iran, and that he lived there until 2008. He said that his mother was in Northern Iraq and that his brother was with her. He thought his father was in Iraq also. He said that his father was "an escapee from Iran". He said that his father and brother fought against the regime. He stated in answer to question 72 that he was in fear of returning to Iran as there was a warrant for his arrest and Iraq as he was in fear of a gang called the Jaf tribe, who were involved in organised crime in the UK and Iraq. The appellant retracted the suggestion that he was Iraqi, stating that he had been scared of going to Iran. He stated that he had only managed to get an Iraqi passport with the assistance of his uncle, who had paid for it. (There is at the end of the respondent's bundle a copy of the biodata page of an Iraqi passport which was issued on 20 July 2010. There is also a Civil Status Identity Document ("CSID"), which is untranslated but bears the photograph of the appellant.)

14. The appellant's protection claim was refused by letter on 2 February 2022. The respondent concluded that the appellant was an Iraqi national and that he was not at risk there. It was against that decision that the appellant appealed to the First-tier Tribunal.

The Appeal to the First-tier Tribunal

15. The appellant's appeal was heard by Judge Gibbs ("the judge") sitting at Hendon Magistrates' Court on 29 April 2024. The appellant was unrepresented. The respondent was represented by a Presenting Officer. The appellant accepted that the Iraqi passport and CSID card 'could be genuine' but stated that he was not entitled to them because he was Iranian. The judge found that the appellant had not rebutted the presumption in section 72 NIAA 2002 that he was a danger to the community of the UK: [12]-[16]. His appeal was dismissed on asylum grounds accordingly.

16. At [18]-[33], the judge considered the appellant's nationality, and concluded that he was an Iranian national. In reaching that conclusion, the judge took account of the Iraqi passport and CSID and the fact that Judge Thew had accepted the appellant to be Iranian. She also took account of the trial record sheet, which showed the appellant's nationality as Iranian, and the various communications with the Home Office in which he had claimed to be of Iraqi nationality. The judge considered that there was a plausible explanation for the latter actions, in that he had been "in the depths of despair and facing ongoing detention". The judge accepted that the appellant had decided to return to his family in Iraq, rather than continue in detention in the UK, and that this was not a reliable indication of his nationality. The judge found that the appellant had "sought to use his Iraqi identity documents as a means of persuading the respondent to send him there".

17. At [34]-[36], the judge found that the appellant would be at risk on return to Iran. She adopted the findings of Judge Thew in that regard. So it was that the appeal was allowed on protection (Article 3 ECHR) grounds.

The Appeal to the Upper Tribunal

18. The respondent sought permission to appeal, contending that the judge had failed to give adequate reasons or had made a material mistake of fact in concluding that the appellant was an Iranian national. By the second ground, it was contended (somewhat oddly, given the scope of the judge's decision) that the judge had failed to consider the public interest considerations in Part 5A NIAA 2002.

19. Judge Hollings-Tennant granted permission on both grounds, noting in connection with the first ground that *Hussein & Anor (status of passports; foreign law)* [2020] UKUT 250; [2020] Imm AR 1442 placed the burden on the appellant if he was to contend that a genuine passport, apparently issued to him, did not establish that he was a national of the issuing state. The judge considered there to be less merit in the second ground, but he granted permission nevertheless, noting that it was the respondent's intention to remove the appellant to Iraq and that it was arguably incumbent on the judge to consider the question of 'very significant obstacles' as posed by the Immigration Rules.

20. The appellant has been detained and without representation throughout this appeal. On 22 August 2024, the Principal Resident Judge directed that he was to be produced from prison so that he could be present at the hearing in the Royal

Courts of Justice. He was notified of the hearing date by post on 12 September 2024. A Production Order was issued to the prison and the relevant contractor on the same date. An interpreter was booked to assist the appellant. The cells at the RCJ were notified that the appellant was to be produced.

21. On the morning of the hearing, my clerk was notified by the custody officer at the RCJ that the appellant would be produced at midday. That arrival time was then amended to 1230. When the prison (HMP Highpoint) was contacted again, she was informed that the appellant would be produced between 1330 and 1400. I asked Ms Cunha and the interpreter to wait until the afternoon and asked that the message be relayed that I would hear the case when the appellant arrived, such was the distance he was to travel.

22. It then transpired that the appellant had not been asked to leave his cell until 1100. When he was invited to leave his cell, he refused to do so. I asked for confirmation of his refusal to be conveyed to court in writing. A document prepared by Officer Mackenzie (HP112) was sent promptly, confirming the position. I ordered that the document be retained within the CE file system for future reference. I indicated to Ms Cunha that I was satisfied that the appellant had had proper notice of the hearing and that I considered that it was in the interests of justice to proceed with the hearing. The appellant had chosen to be absent from the hearing and it was in my judgment fair to proceed in his absence.

Submissions

23. For the respondent, Ms Cunha submitted that the judge had erred in failing to ascribe the correct legal significance to the passport and CSID. Ms Cunha submitted that the judge had also acted contrary to the guidance in *SSHD v BK (Afghanistan)* [2019] EWCA Civ 1358; [2019] 4 WLR 111in treating the findings of Judge Thew as a straitjacket, particularly in circumstances in which Judge Thew had been dissatisfied with aspects of the appellant's account. She sought a remaking hearing in the Upper Tribunal.

24. I indicated at the end of Ms Cunha's concise submissions that I was satisfied that the decision of the judge was vitiated by legal error and that it could not stand. I reserved my decision on the question of whether the decision on the appeal should be remade in the Upper Tribunal or whether the appeal should be remitted to the First-tier Tribunal. My reasons for reaching the former conclusion were as follows.

Analysis

25. Had the appellant been represented before me, the submission which would inevitably have been made on his behalf is that the trial judge had surveyed the evidence as a whole, including his oral evidence, and had reached a finding of fact which was open to her on the evidence. There would have been reference to the authorities on the restraint to be exercised by an appellate judge when considering the decision of the trial judge on a question of fact such as the appellant's nationality. I have in mind the relevant authorities, which are now too numerous to list but a useful summary appears in *Volpi v Volpi* [2022] EWCA Civ 464; [2022] 4 WLR 48.

26. In my judgment, however, this is not an appeal in which those dicta are particularly relevant because the respondent's primary submission (adopted by Ms Cunha from Judge Hollings-Tennant's observations in granting permission to appeal) is that the judge misdirected herself in law. Here, the respondent submits, is an appellant who did not merely state in formal correspondence in 2014 and 2019 that he was an Iraqi national; he also produced an Iraqi passport and a CSID card to show that to be the case.

27. As Ms Cunha submitted, the judge's treatment of the Iraqi national passport was not in accordance with the approach required by *Hussein*. The appellant in that case had entered the United Kingdom using a Tanzanian passport but he claimed that he was a Somali national and that he was not entitled to the Tanzanian passport. The passport he had used to enter the UK was his second Tanzanian passport. He claimed that both were fakes. In dismissing the appellant's appeal, the Vice President (Mr Ockelton) noted that passports have international recognition as assertions and evidence of nationality and that it was not open to an individual to opt out of that system by denouncing his own passport. He said that it was "not open to any State to ignore the contents of a passport simply on the basis of a claim by its holder that the passport does not mean what it says". Mr Ockelton therefore endorsed what was said at [93] of the UNHCR Handbook, which included (and includes) a statement that:

> a mere assertion by the holder that the passport was issued to him as a matter of convenience for travel purposes only is not sufficient to rebut the presumption of nationality.

28. Mr Ockelton noted that the appellant in that case had not adduced expert evidence in support of his contention that the passports were forgeries and that there was 'no reason to think that the appellant's passport is not exactly what it appears to be." It was "evidence at such a level that the Secretary of State is not entitled to treat the appellant as not being a national of Tanzania.

29. In my judgment, the analysis undertaken by the First-tier Tribunal does not accord with that approach. The judge took the wrong starting point for her analysis. The appellant had merely asserted, as in *Hussein*, that the Iraqi passport had been issued illegitimately, at the request of his uncle, but the starting point for the judge's analysis had to be the presumption of nationality noted by the UNHCR and endorsed by the Upper Tribunal in *Hussein*.

30. This being an Iraqi case, there was another dimension to it which was not considered by the judge. As was explained at possibly excessive length in *SMO, KSP (civil status documentation, article 15) (CG) Iraq* [2022] UKUT 110 (IAC) and *SMO, KSP & IM (Article 15(c); identity documents) CG (Iraq)* [2019] UKUT 400 (IAC), there is a complex patrilineal system of civil status documentation in Iraq. It might be thought that a person is inherently unlikely to be able to obtain a CSID card or a passport without being able to demonstrate their entitlement to such documents by reference to the records held in the family registration books at the population registration offices around Iraq.

31. The respondent submits that the judge's analysis of the documents was legally inadequate and I consider that submission to be well made. The judge was cognisant of the passport and the CSID card but she failed to note the presumption which applied to the former document and she failed to undertake any analysis in respect of the latter in light of the country guidance provided in

the two cases to which I have referred above. Her focus was on the reasons that the appellant might have claimed to be an Iraqi national in 2014 and 2019, rather than on the significance of the documents he had adduced to prove his nationality at those points in time.

32. It follows that the judge's decision cannot stand. I set aside her decision as a whole.

33. Ms Cunha submitted that the proper course would be to remake the decision in the Upper Tribunal. Having regard to *AEB v SSHD* [2022] EWCA Civ 1512; [2023] 4 WLR 12, I would potentially have taken that course despite the fact that the decision must be remade afresh. The difficulty with the appellant's current situation, however, is that he is detained in a prison and he cannot be brought to Field House. Were he to give evidence, he would have to do so at the Royal Courts of Justice. That brings about difficulties in listing and is in any event probably less suitable for a vulnerable asylum seeker. In my judgment, the better course is to remit this particular case to the First-tier Tribunal for consideration afresh by a judge other then Judge Gibbs.

34. I make one further observation, for the benefit of the respondent and the next judge. There has never, as I understand it, been any suggestion that the appellant's passport is not a genuine document. The appellant's evidence has previously been that it is a genuine document but that it was not validly issued to him. It is a matter for the FtT but it might be thought prudent to have a case management hearing at which such issues can be explored, lest the respondent considers it necessary to undertake enquiries with the Iraqi authorities. As presently advised, I do not think that any such enquiries would place the respondent in breach of her duty of confidentiality because the appellant's asserted fear of return to Iraq is of non-state actors. In the event that the respondent signals an intention to make any enquiries about the documents, however, that might be a matter to which the FtT should turn its attention before the appeal is heard substantively.

Notice of Decision

The Secretary of State's appeal is allowed. The decision of the First-tier Tribunal is set aside in full. The appeal is remitted to the First-tier Tribunal to be considered by a judge other than Judge Gibbs.

Mark Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

22 October 2024