



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/05052/2017

THE IMMIGRATION ACTS

Heard at Birmingham
On 23 November 2018

Decision & Reasons Promulgated
On 10 January 2019

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

JG
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Azmi, Counsel

For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal comes back before the Upper Tribunal ("UT") following a hearing before Upper Tribunal Judge Kebede on 13 September 2018, whereby she found an error of law in the decision of the First-tier Tribunal ("FtT"), which itself allowed the appellant's appeal against a decision to refuse a protection claim.
2. The further background to the appeal and the context of my re-making the decision is best informed by my quoting in full from Judge Kebede's decision as follows:

- “1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing JG’s appeal against the respondent’s decision to refuse his asylum and human rights claim.
2. For the purposes of this decision, I shall hereafter refer to the Secretary of State as the respondent and JG as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.
3. The appellant claims to be a citizen of Iran born on 24 March 1994. He claims to have left Iran on 18 September 2015 and to have entered the UK on 16 November 2016. He claimed asylum on 17 November 2016. His asylum claim was refused on 17 May 2017. He appealed against that decision and his appeal was heard in the First-tier Tribunal on 16 November 2017 and allowed in a decision promulgated on 7 December 2017.
4. The basis of the appellant’s claim is as follows. He is a national of Iran, the son of a Hazara, Afghan, father from Baghlan Afghanistan who died when he was ten years of age and an Iranian mother. He is an Ismaeli and his mother is a Zoerastrian. He was beaten up after asking his mosque, at his mother’s request, to lower the volume as the noise upset her due to her illness and depression. He was arrested on 29 August 2015 and taken to the Seppah building and held for around ten days/two weeks, during which time he was told that there was a hefty case against him and he would be executed if he went to court unless he agreed to go to Syria for six months. He agreed to do that and was given a letter for recruitment and told that he had one week before going there. He fled the country. If he returned to Iran the police would kill him. He would be hanged. The appellant also claimed to be stateless.
5. In refusing the appellant’s application, the respondent did not accept the appellant’s account of being beaten, arrested and detained and volunteering to go to Syria. The respondent considered that the appellant met the relevant criteria to apply for and be granted Iranian citizenship, given that he was born in Iran, that he lived there for 21 years from birth and for more than a year after the age of 18, and given that his mother had an Iranian passport. The respondent also considered that the appellant met the relevant criteria to be granted Afghan citizenship as the son of an Afghan national. The respondent did not, therefore, accept that the appellant was stateless. Neither was it accepted that he was Ismaeli or that he had been persecuted on account of his religion. It was not accepted that the appellant was at any risk on return and it was not accepted that his removal to Iran or Afghanistan would breach his human rights.
6. The appellant appealed against that decision. His appeal was heard by First-tier Tribunal Judge Birk who found him to be a credible witness as to the core elements of his claim. The judge accepted that the appellant’s account of his complaint to the mosque and his arrest and detention. She found that he would be at risk on return to Iran as a result of his illegal escape from the conditions imposed upon him. The judge did not accept that the appellant would be able to establish an entitlement to Afghan nationality. The judge accepted that the appellant was Ismaeli but did not accept that he was persecuted or would be persecuted because of his

religion. She found that he was at risk on return due to his imputed political opinion and that his removal would breach his Article 2 and 3 rights. She allowed the appeal on asylum and human rights grounds.

7. Permission to appeal to the Upper Tribunal was sought by the respondent to the grounds that the judge had failed to apply relevant caselaw and engage with the reported guidance in MW (Nationality; Art 4 QD, duty to substantiate) Eritrea [2016] UKUT 00453 in assessing the appellant's entitlement to Afghan nationality, which in turn impacted upon her findings on risk on return.
8. Permission to appeal was granted in the First-tier Tribunal on 5 January 2018, on the basis that the judge had arguably failed to consider the guidance in MA (Ethiopia) v Secretary of State for the Home Department [2009] EWCA Civ 289.
9. At the hearing before me both parties made submissions.
10. Mrs Aboni relied on the grounds of appeal. She submitted that, whilst there was no challenge to the judge's findings that the appellant was at risk on return to Iran, the judge had failed properly to resolve the matter of the appellant's ability to obtain Afghan nationality. The judge had failed to apply the guidance in MW (Eritrea) and had erred by failing to consider the lack of evidence of any steps taken by the appellant to approach the Afghan authorities in regard to obtaining Afghan citizenship and failing to consider that he could then safely return to Afghanistan. Mr Azmi submitted that the appellant had provided evidence of an inability to obtain Afghan citizenship, in an expert report, and the judge had made findings on that evidence. The judge had been entitled to conclude that that it was unlikely the appellant would be able to establish that he was an Afghan national.
11. I advise the parties that in my view the judge had erred in-law by failing to consider the relevant guidance in MW (Eritrea) and MA (Ethiopia) in considering the appellant's ability to obtain Afghan citizenship. She had therefore failed to provide full and proper reasons for concluding, as she did at [24], that it was unlikely that the appellant would be able to establish that he could become a member of Afghanistan.
12. Accordingly I set aside the judge's decision in that matter. Her finding on risk on return to Iran are to be preserved.
13. The case will be listed for a resumed hearing in the Upper Tribunal for consideration of the questions of the appellant's ability to obtain Afghan nationality and to return, without risk to that country.

Anonymity

The First-tier Tribunal made an anonymity order and I maintain that order.

Directions

Any further evidence relied upon by the appellant in regard to the matter of Afghan nationality and risk on return to Afghanistan is to be filed with this Tribunal and served on the opposing party, not less than 14 days before the date of the resumed hearing in compliance with Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008."

3. Thus, one can see that the issue to be determined is the extent to which the appellant is entitled to the surrogate protection of the UK if it is the case that he is entitled to citizenship of Afghanistan and where no protection claim arises in respect of Afghanistan.
4. Before me there was a supplementary bundle of documents consisting of 26 pages which, to summarise, deal with the efforts made by the appellant and his solicitors to secure confirmation by the Afghan authorities of his entitlement to Afghan citizenship.
5. I now summarise the submissions made on behalf of both parties before me at the resumed hearing. My summary of the submissions encapsulates the party's responses to the various issues I raised.

Submissions

6. Both parties before me agreed that the FtJ, at least implicitly, found that the appellant was a citizen of Iran. Mr Bates confirmed that it was the respondent's position that the appellant was indeed a citizen of Iran and Mr Azmi accepted that that was what the FtJ found. Indeed, in the first sentence of Mr Azmi's skeleton argument dated 23 November 2018 (although wrongly titled as relating to the First-tier Tribunal), it expressly states that the FtJ found the appellant to be an Iranian national.
7. I asked Mr Bates about the background material set out in the respondent's decision letter which states that dual citizenship is not recognised in Afghanistan (subject to certain exceptions). Mr Bates suggested that his understanding was that the Afghan Constitution requires a person to renounce Afghan nationality. He provided an extract from RefWorld setting out the Afghan law on citizenship. He suggested that in any event, it was not the appellant's argument that he would not be entitled to dual citizenship.
8. I informed the parties that I had viewed online the source material from which the Citizenship Laws for Iran and Afghanistan are drawn in the respondent's decision, and had noted that the material appears to date from 2000 or 2001. Both parties were given the opportunity for themselves to view the website but neither availed themselves of that opportunity and raised no objection to my having seen the website (Citizenship Laws of the World). Indeed, its first page was produced by Mr Bates which confirmed the date which I had noted. He also provided a document entitled "Law on Citizenship of the Islamic Emirate of Afghanistan (English translation)" chapters one to five, consisting of eight pages, which appears to be a complete version of the citizenship law of Afghanistan.
9. Mr Bates also submitted that the appellant would be able to renounce his Iranian citizenship, thus the issue of dual citizenship would not in any event apply to him in respect of Afghanistan's prohibition of dual citizenship. He accepted however that he did not have any information on the basis upon which one may renounce Iranian citizenship or the process for doing so.

10. Mr Bates otherwise relied on the decision letter, submitting that the appellant had accepted that his father was an Afghan national. Thus, he would be able to obtain Afghan nationality. Reference was made to *MW (Nationality; Art 4 QD; duty to substantiate) Eritrea* [2016] UKUT 00453 (IAC) to the effect that the appellant in this case had not taken reasonable steps to establish that he is not a national of Afghanistan. Although the appellant says that he has no documents in relation to Afghanistan and has never had them, there was no evidence that he had taken reasonable steps to obtain a tazkira, for example by contacting his mother there. It was not surprising that the Afghan Embassy would want documents from the appellant. He had not exhausted all avenues.
11. Mr Azmi accepted that the expert evidence before the FtJ did not deal with the issue of renouncing Iranian nationality. However, as set out in the skeleton argument it was clear that the FtJ found the appellant's father to be Afghan and his mother Iranian and that the appellant's core account was credible, including that his father passed away 13 years ago. The FtJ also accepted that the appellant had no documentation in relation to his father, and no documentation *relating* him to his father. In those circumstances, considerations of dual citizenship and renunciation of Iranian citizenship are not applicable to him.
12. I was referred to the appellant's supplementary bundle in relation to the contact by way of correspondence between the appellant's solicitors and the Afghan Embassy, and the appellant's visit to the embassy. There was proof in the bundle that he attended there, in terms of the coach ticket and photographs. He was told that he would not be provided with any documents by the embassy.
13. Given that the Afghan Embassy required the appellant to provide documents to show that his father was of Afghan nationality, and it was found by the FtJ that the appellant's father had died 13 years ago, the situation was different from *MW*. The appellant does not have a tazkira and has no identity documents at all.

Assessment and Conclusions

14. The guidance in *MW* concerning an individual's duty to substantiate nationality states as follows:
 - "1. Article 4(1) of the Qualification Directive does not impose a shared duty of cooperation on the Member State to substantiate an applicant's nationality.
 2. Article 4(2) refers to documentation (including documentation regarding nationality(ies)) "at the applicant's disposal" - which must include documentation which is not in the applicant's present possession but is within his or her power to obtain.
 3. The terms of Article 4(3) are consistent with the position that an applicant who denies he is a national of a country where he could obtain protection can be expected to take reasonable steps to establish that he is not such a national."
15. In particular, at [10] the UT said this:

“10. Nor is it just that the Directive regards the duty of substantiation of nationality to rest on the applicant (by virtue of the Member State in question - the UK - considering it the applicant's duty to substantiate his application). When setting out the basis on which assessment of an application (what the MM judgment terms the second stage of assessing (or evaluating) the application) Article 4(3) specifically identifies the steps that have to be taken in the context of assessing nationality/citizenship as being for the applicant:

‘3. The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:

(e) whether the **applicant** could reasonably be **expected to avail himself** of the protection of another country where he could assert citizenship.’

(emphasis added in bold)

In our judgement, the terms of Article 4(3) are consistent with the position that an applicant who denies he is a national of a country where he could obtain protection can be expected to take reasonable steps to establish that he is not such a national.”

16. In addition, at [11] it quoted from *MA (Ethiopia) v Secretary of State for the Home Department* [2009] EWCA Civ 289 where the court said this at [50] – [54]:

“50. In my judgment, where the essential issue before the AIT is whether someone will or will not be returned, the Tribunal should in the normal case require the applicant to act *bona fide* and take all reasonably practicable steps to seek to obtain the requisite documents to enable her to return. There may be cases where it would be unreasonable to require this, such as if disclosure of identity might put the applicant at risk, or perhaps third parties, such as relatives of the applicant who may be at risk in the home state if it is known that the applicant has claimed asylum. That is not this case, however. There is no reason why the appellant should not herself visit the embassy to seek to obtain the relevant papers. Indeed, as I have said, she did so but wrongly told the staff there that she was Eritrean.

51. I am satisfied that there is no injustice to the appellant in this approach: it does not put her at risk. The real risk test is adopted in asylum cases because of the difficulty of predicting what will happen in the future in another country, and because the consequences of reaching the wrong decision will often be so serious for the applicant. That is not the case here. As Ms Giovannetti pointed out, there is no risk of ill treatment if an application to the embassy is made from the United Kingdom, even if it is refused.

52. Furthermore, this approach to the issue of return is entirely consistent with the well-established principle that, before an applicant for asylum can claim the protection of a surrogate state, he or she must first take all steps to secure protection from the home state. That was the approach adopted in *Bradshaw*, to which I have made reference. It can be seen as an aspect of the duty placed on an applicant to co-operate in the asylum process. Paragraph 205 of the UNHCR handbook expressly states that an applicant for asylum

must, if necessary, make an effort to procure additional evidence to assist the decision maker. *Bradshaw* is an example of such a case. The issue was whether the applicant was stateless. Lord MacLean held that before a person could be regarded as stateless, she should make an application for citizenship of the countries with which she was most closely connected.

53. Any other approach leads, in my view, to absurd results. To vary an example given by my Lord, Lord Justice Stanley Burnton in argument: the expert evidence might show that three out of ten in the appellant's position were not allowed to return. If that evidence were accepted it would plainly be enough to constitute a real risk that the appellant would not be successful in seeking authorisation to return. But it would be strange if by the appellant's wilful inaction she could prevent the Tribunal from having the best evidence there is of the state's attitude to her return. She could refuse to put to the test whether she might be one of the seven who would be successful. It would in my view be little short of absurd if she could succeed in her claim by requiring the court to speculate on a question which she was in a position actually to have resolved.
54. It is clear that the Tribunal did not approach matters in this way. In the absence of evidence as to how she would have been treated had she made a proper application, they sought to resolve the issue by considering whether someone in her position was likely to be allowed to be returned or not. In adopting this approach they were apparently approaching the matter in line with the submissions of the parties. Nevertheless, for the reasons I have given, in my judgment this means that they erred in law. They ought not to have engaged on this inquiry without first establishing that the appellant had taken all reasonably practicable steps to obtain authorisation to return."

17. In his decision the respondent provides extracts from "Citizenship Laws of the World" in relation to Iran and Afghanistan. There, it states as follows in relation to Iran:

"IRAN

CITIZENSHIP: Based upon the Iranian Civil Code.

BY BIRTH: In general, birth within the territory of Iran does not automatically confer citizenship. The following are instances where birth within the territory of Iran does confer citizenship: Child born to unknown parents. Child born to non-citizens, one of whom was born within Iran. Child born to non-citizens, who, after reaching the age of 18, continues to reside within Iran for at least one year.

BY DESCENT: Child born to an Iranian father regardless of the child's country of birth.

MARRIAGE: Foreign woman who marries an Iranian man is entitled to citizenship.

BY NATURALIZATION: Iranian citizenship may be acquired upon fulfillment of the following conditions: Person must be at least 18 years of age, have resided in Iran for five years, not be a military service escapee, and not have been convicted of a major crime in any country.

The wives and minor children (under 18) of naturalized Iranian citizens are also considered Iranian citizens.

DUAL CITIZENSHIP: NOT RECOGNIZED. Exceptions: Child of an Iranian father, who acquires citizenship due to birth in a foreign country. A foreign woman who marries an Iranian is automatically granted Iranian citizenship, whether it is requested or not.

LOSS OF CITIZENSHIP:

VOLUNTARY: Person seeking to voluntarily renounce Iranian citizenship must have reached the age of 25, have performed military service, have settled all affairs in the country, and acquired the permission of the Council of Ministers. Though the rules for renunciation of citizenship are stated in Iranian Law, practical experiences have shown that Council permission is difficult to obtain, thus hindering legal renunciation of Iranian citizenship.

INVOLUNTARY: Voluntary acquisition of a foreign citizenship does not lead to automatic loss of Iranian citizenship. According to Iranian law, any Iranian national who acquires foreign citizenship without due observance of legal procedures will not have a renunciation of citizenship recognized by the government of Iran. In the eyes of the government, a male (and, in some cases, his wife and children) is still considered a citizen of Iran, regardless of the individual's status in the new country of citizenship."

18. In relation to Afghanistan it says this:

"AFGHANISTAN

CITIZENSHIP: Citizenship laws are based upon the Official Gazette of the Ministry of Justice for the Republic of Afghanistan dated March 19, 1992.

BY BIRTH: Birth within the territory of Afghanistan does not automatically confer citizenship. Exception is a child of unknown/stateless parents.

BY DESCENT: Child whose mother or father is a citizen, regardless of the country of birth.

MARRIAGE: Foreign national who marries a citizen of Afghanistan is granted citizenship upon application.

BY NATURALIZATION: Afghan citizenship may be acquired upon fulfillment of the following conditions: Person was born in Afghanistan and has resided continually in country for at least five years.

DUAL CITIZENSHIP: NOT RECOGNIZED. Exceptions: A former citizen of Afghanistan, who fled the country due to political instability or war and has acquired new citizenship, may still hold "unofficial" Afghan citizenship. This is recognition that those who fled the country might some day want to return as Afghan citizens without losing new citizenship.

The Afghani spouse of a foreign national is not required to renounce Afghan citizenship unless demanded by the spouse's country.

LOSS OF CITIZENSHIP:

VOLUNTARY: Voluntary renunciation of Afghan citizenship is permitted by law. Contact the Embassy for details and required paperwork. The following persons are

not allowed to renounce citizenship: Person who has continuing financial obligations to the government or other institutions. Person who has been convicted of a crime and sentenced to jail. Persons involved in national security, whose loss to the country might endanger Afghan security.

INVOLUNTARY: The following is grounds for involuntary loss of Afghan citizenship: Person voluntarily acquires foreign citizenship and does not fall under the exempted status described under "Dual Citizenship." Persons concerned with dual citizenship should not assume their Afghan citizenship was lost by default. Embassy should be contacted and citizenship formally renounced."

19. It is accepted by the parties that the appellant is a citizen of Iran. That is the respondent's position and so it was found by the FtJ, as agreed by the parties. Whilst it is true that the appellant has not hitherto raised the issue of dual citizenship in relation to Afghanistan, one cannot simply ignore the country material relied on by the respondent in relation to citizenship. From that material it would seem that the appellant would not be entitled to Afghan citizenship because dual citizenship is not recognised and the appellant is already a citizen of Iran. The exception set out there does not apply to him. That is in fact consistent with the law on citizenship document which in its entirety was produced on behalf of the respondent before me. Article seven states that "Anyone who, according to the orders of this law, is citizens (sic) of the IEA [Islamic Emirate of Afghanistan] cannot hold a double citizenship position".
20. The website, Citizenship Laws of the World, in relation to Iran explains the basis upon which a person may voluntarily renounce Iranian citizenship. On the face of it, the appellant would not be able to renounce Iranian citizenship voluntarily because he has not reached the age of 25 and has not performed military service, quite apart from what else is said in that document as to the renouncing of citizenship of Iran and its difficulty.
21. As I have indicated, this is the source material for the extracts provided by the respondent in the respondent's decision and the parties were given the opportunity to explore it further at the hearing before me but both declined.
22. In any event, even if the appellant would be able to renounce his Iranian citizenship or for some reason would not fall foul of the Afghan 'no-dual citizenship' restriction, he nevertheless relies on the evidence of his contact with the Afghan Embassy as set out in the supplementary bundle of documents before me. I shall summarise it.
23. There is a statement from a solicitor, Mr Humaira Kanwal Ali, from the firm of solicitors representing the appellant. The statement is dated 7 November 2018. It states that he contacted the Iranian Embassy on 1 November 2018 and spoke to an individual who he names. Previous contact was confirmed by that individual. The arrangements for an interview were discussed. The solicitor was informed that the appellant should provide various documents and information so as to establish his identity. It was confirmed that in the event that the embassy was not able to assist the appellant, no further action would be taken by the embassy. No formal letter refusing the application for identity documents or a passport would be issued. The

solicitor was also informed that the embassy would not be forwarding an email confirming the position. If the embassy was able to assist the appellant then they would proceed with making their enquiries and notify him of their decision.

24. Copies of correspondence between the appellant's solicitors and the embassy are also in the bundle, as well as an attendance note from an individual from the solicitors.
25. There is a statement from the appellant dated 9 November 2018 in which he says that he went to the embassy on Monday 5 November 2018, describes his purchase of the tickets for travel and his stay with a friend the night before. It describes how he found the embassy and his interactions with staff there. The statement continues that he told a member of staff in Farsi that his mother was Iranian and his father was Afghani and he asked if he would be able to obtain a passport for Afghanistan. He was told to go upstairs and wait.
26. After about 15 minutes he was approached and taken to an office where he repeated his circumstances. The statement continues that he was told that he could not get a passport from the embassy in the UK and that he would need to go to Afghanistan to make an application. He was also told that if he did go to Afghanistan to make a passport application it would not be possible without his father's consent. He was further told that as he did not have anything to identify himself he would not get a passport.
27. The appellant's witness statement continues that the individual he spoke to did not take any details from him and did not ask him to do anything further. After speaking to him he was told to leave. He asked for a letter to say that he came to the embassy but was told that such confirmation is not provided. He was not given any documents or papers from the embassy.
28. He then describes his journey home and his efforts to contact his representatives whilst he was at the embassy.
29. The bundle also contains a copy of the appellant's return coach tickets from Birmingham to London, and photographs of various stages of his journey and his presence at and departure from the embassy.
30. Before me there was no challenge to the evidence in the supplementary bundle in terms of the efforts made by the appellant to obtain confirmation of his entitlement to Afghan citizenship or his efforts to obtain a passport. It was not suggested on behalf of the respondent that in terms of his and his solicitor's interactions with the embassy there was anything further that could or should have been done. The only suggestion made on behalf of the respondent was that the appellant would be able to obtain documentary evidence from family (his mother) in Iran.
31. The appellant's oral evidence before the FtJ recorded at [9] was that he last spoke to his sister eight months prior to the hearing but he had been asked not to contact "them" again although he did not know why. He said that he had not called them before because he did not want to cause any danger, presumably to them. He said

that he had not spoken to his mother but that he understood that she was still living in the house [10].

32. At [21] the FtJ said that he found that the appellant was, on the whole, a credible witness as to the core elements of his claim. The FtJ did not suggest that any credibility issue arose in relation to the evidence he gave about contact with his family.
33. More to the point however, is that the FtJ accepted at [24] that the appellant's father passed away about 13 years ago and he has no documentation in relation to his father and no documentation relating him to his father. Quite apart then from the issue of whether there is any documentation in existence, the appellant's evidence, not challenged before the FtJ it would appear, is that his family have asked him not to contact them. That is all consistent with the FtJ's findings in relation to events that befell the appellant in Iran.
34. In all the circumstances, I am satisfied that the appellant has taken reasonable steps to establish his entitlement to Afghan citizenship and to obtain documents confirming the same, but without success. To reiterate, the evidence in relation to his efforts in this respect was not challenged before me. I am satisfied that the efforts he has made accord with the guidance to be found in *MW* and *MA (Ethiopia)*.
35. For the foregoing reasons I am not satisfied that there is another country in respect of which the appellant would be entitled to citizenship such that he is not entitled to the surrogate protection of the UK.
36. Accordingly, I re-make the decision, allowing the appeal on asylum and Article 3 grounds.

Decision

37. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision having been set aside, I re-make the decision by allowing the appeal on asylum and Article 3 grounds.

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 his 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.

Upper Tribunal Judge Kopieczek

20/12/18