



**The Upper Tribunal  
(Immigration and Asylum Chamber)  
AA/08766/2015**

**Appeal number:**

**THE IMMIGRATION ACTS**

**Heard at North Shields  
On March 16, 2016**

**Promulgated on April 12,  
2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE ALIS**

**MR S D F  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

Representation:

Appellant

Mr Saeed (Legal Representative)

Respondent

Mr Mangion (Home Office Presenting Officer)

**DECISION AND REASONS**

1. I make an anonymity order under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended) in the light of the sensitive matters raised in this appeal arising out of the appellant's international protection claim. This order prohibits the disclosure directly or indirectly (including by the parties) of the

identity of the appellant. Any disclosure in breach of this order may amount to a contempt of court. This order shall remain in force unless revoked or varied by a Tribunal or Court.

2. The appellant is a citizen of Kuwait. He arrived in the United Kingdom on December 17, 2014 and he claimed asylum the following day. He was served with Form IS151A as an illegal entrant. On May 27, 2015 the respondent refused the appellant's asylum claim under paragraph 336 HC 395.
3. The appellant appealed that decision on June 8, 2015 under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 and the matter came before Judge of the First-tier Tribunal McAll on November 3, 2015.
4. In a decision promulgated on November 16, 2015 he dismissed the appellant's refugee and human rights claims but allowed his appeal on humanitarian protections grounds.
5. Both parties appealed the Judge's decision on November 30, 2015 and permission to appeal was granted to both parties by Judge of the First-tier Tribunal Osborne on December 17, 2015.
6. The matter came before me on the above date.

### **PRELIMINARY ISSUE**

7. In allowing the appellant's appeal on humanitarian protection grounds the Judge found that having read the country guidance decision of AA (Article 15(c)) Iraq CG [2015] UKUT 00544 (IAC) he noted the issue raised was both complex and required anxious scrutiny. Taking all of the circumstances of this case in the round the Judge concluded the appellant was in need of humanitarian protection.
8. Mr Mangion relied on the grounds of appeal and submitted that the Judge had erred in granting humanitarian protection because having stated the complex and required anxious scrutiny he then failed to give any reasons for finding the appellant needed humanitarian protection. Mr Mangion submitted the respondent had the appellant's passport details and this would enable him to obtain a new passport or a laissez passer. As return was feasible it was incumbent on the Judge to have considered the issue of return and by failing to do so he erred.
9. Mr Saeed disputed the passport details held by the respondent belonged to the appellant but he accepted it was difficult to argue the Judge's approach was correct.

10. The Tribunal made clear in AA that where return to Iraq was feasible the Judge would have to consider the alleged risk of harm. As the Judge found the the appellant had a valid Iraqi passport it was incumbent upon the Judge to then consider the issue of risk and if there was a risk of harm then he should give reasons. This he failed to do and accordingly the respondent's grounds of appeal has merit and in those circumstances I find the Judge erred in allowing this appeal on humanitarian protection grounds and I set that decision aside.
11. I indicated to the parties that I would then hear submissions regarding the appellant's cross appeal.

### **SUBMISSIONS**

12. Mr Saeed submitted that the Judge's finding that the appellant was an Iraqi national as against an undocumented Bidoon was irrational. The evidence about the passport itself was contained in an unsigned statement and the witness had not been called to give evidence. The Judge erred by attaching weight to that statement.
13. The appellant's claim was he was an undocumented Bidoon and the Judge failed to attach sufficient weight to the evidence adduced by him. In particular, the Judge had evidence from his half-brother. He had been accepted as an undocumented Bidoon and the Judge accepted they shared the same father. The Judge accepted he had been living in Kuwait, the appellant had married in Kuwait in the 1990's and that his father had a residence document and evidence he was a guard for the Ministry of Interior in Kuwait and so his finding that he was able to obtain Iraqi nationality was irrational.
14. The only document the Judge relied on for finding the appellant was able to obtain Iraqi nationality was a document that had not been before him. That evidence had to be considered against all of the other evidence about the appellant, his half-brother and father and if the Judge had properly considered the evidence then he would not have found he was an Iraqi national. The appellant's half brother was accepted as an undocumented Bidoon and it therefore lacked credibility that the appellant, who shared the same father, was not.
15. Mr Mangion submitted the Judge's findings were open to him. He had carefully analysed all of the evidence and had given reasons for distinguishing between the appellant and his half-brother. His reasons for finding the appellant was entitled to an Iraqi passport was clearly open to him because he had concluded he had obtained his citizenship between 2006 and the date he came to the United Kingdom. The Judge found his father fitted the profile, identified in the article referred to in paragraph [28] of his decision, of a person moving to Iraq as a migrant worker.

## **DISCUSSION AND FINDINGS**

16. In granting permission to appeal Judge of the First-tier Tribunal Osborne found it arguable, in an otherwise detailed and focussed decision, that the Judge had erred in positively finding the Appellant was an Iraqi national in circumstances where the appellant's father's nationality and half-brother's national was Kuwaiti.
17. In assessing whether the Judge erred I have had regard to the Judge's full decision, the submissions made today, the grounds of appeal and the documents before the Judge.
18. In opposing the application Mr Mangion appeared to be submitting that there was no dispute that at sometime the appellant was an undocumented Bidoon as was his father and half-brother but sometime between 2006 and the date he came to the United Kingdom the appellant gained Iraqi nationality and was therefore no longer an undocumented Bidoon because he could be returned to Iraq.
19. The Judge found his asylum account to lack credibility and those findings have not been appealed.
20. Crucial to the appellant's appeal therefore is whether the judge's finding on his Iraqi nationality was irrational as Mr Saeed has submitted.
21. The Judge came to the conclusion he was an Iraqi national because:
  - a. He made an application from Baghdad for a visit visa in his own name on May 20, 2013.
  - b. A witness statement confirms the visa application was made by him as the photograph and fingerprints matched the appellant's.
  - c. The Judge rejected his claim that he had travelled with an agent to Iraq to obtain a visa and found his answers in his substantive interview did not support his explanation of how and why he went to Iraq.
  - d. The Judge found his explanation at the hearing about who funded his trip to Iraq to lack any credibility and that the appellant fabricated his account preferring to conceal the truth about his application as he knew this would undermine his claim.

- e. Based on the Thigar Report (referred to in paragraph [28] of the decision) the Judge identified a method by which a Kuwait Bidoon of Iraqi origins could acquire Iraqi nationality.
22. Mr Saeed's submission is that whilst there were a number of adverse findings against the appellant the fact remained that the Judge failed to explain how the appellant would have been entitled to obtain an Iraqi passport and thereby apply for a visa and that the appellant's explanation that it was an agent who arranged it all requires further consideration especially as the procedure for obtaining Iraqi citizenship was not straightforward and required evidence that the appellant's father was Iraqi and the only evidence before the Judge was that he was Kuwaiti.
23. Having already accepted there is an error in the approach to the issue of humanitarian protection it seems to me that the issue of whether he can be returned to Iraq must be connected to whether he was able to legally obtain an Iraqi passport.
24. The Judge suspected that the appellant's brother may also have been entitled to Iraqi nationality but as there was insufficient evidence before the Judge who heard the brother's appeal and knowledge about a similar claim in relation to this appellant was clearly unknown to that Judge his brother's appeal was allowed.
25. Additionally, was it enough to find he cannot be an undocumented Bidoon because he was able to travel to the United Kingdom when undocumented Bidoons have little income.
26. There are many issues that undermine the appellant's claim and it was for these reasons that the Judge made the findings he did. However, for the reasons outlined in the grounds of appeal there remains unanswered questions which go to the core of this part of the claim.
27. Put simply I accept, just, that the Judge failed to explain how the appellant would have been able to secure Iraqi nationality and this undermines his decision as per the permission to appeal. I therefore find there is an error in law.
28. I raised with the parties where this appeal should be heard in the event there was an error in law.
29. Part 3, Section 7.1 to 7.3 of the Practice Statement states:

“Where under section 12(1) of the Tribunals, Courts and Enforcement Act 2007 (proceedings on appeal to the Upper Tribunal) the Upper Tribunal finds that the making of the decision concerned involved the making of an error on a point of law, the

Upper Tribunal may set aside the decision and, if it does so, must either remit the case to the First-tier Tribunal under section 12(2)(b) (i) or proceed (in accordance with relevant Practice Directions) to re-make the decision under section 12(2)(b)(ii).

The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:

- (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
- (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

Remaking rather than remitting will nevertheless constitute the normal approach to determining appeals where an error of law is found, even if some further fact finding is necessary."

- 30. Both parties agreed that the matter be remitted back to the First-tier on the basis fresh evidence would be needed. I agreed with their submissions.
- 31. Whilst I have considered preserving findings I feel that to do so would undermine any Judge rehearing this matter. Any Judge hearing this matter will have to grapple with the following issues:
  - a. Was the appellant an undocumented Bidoon or had he obtained Iraqi nationality?
  - b. If the appellant's parents were Iraqi when and how did they obtain Iraqi nationality?
  - c. If the appellant had Iraqi nationality when and how did he obtain that nationality?
  - d. The statement and documents from Matt Johnson confirm the appellant applied for a USA visa in Baghdad in 2013. How did the appellant travel to Iraq and was this an application based on false documents?
  - e. Who funded his trip to Iraq and subsequent trip to the United Kingdom?
  - f. If the appellant was an Iraqi citizen is he returnable to Iraq and if so where would he be returned to?

32. To assist the Judge hearing the appeal I direct that the parties serve skeleton arguments on these issues and that such arguments should be served on both the Tribunal and other party in accordance with the current Procedural Rules.

**DECISION**

33. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I set aside the decision.
34. The appeal is remitted back to the First-tier Tribunal for these issues to be addressed hearing under Section 12 of the Tribunals, Courts and Enforcement Act 2007.
35. The matter should be dealt with by a Judge other than Judge of the First-tier Tribunal McAll.

Signed:

Dated:

A handwritten signature in blue ink, appearing to read 'SPAL', with a horizontal line underneath it.

Deputy Upper Tribunal Judge Alis