



**First-tier Tribunal  
(Immigration and Asylum Chamber)      Appeal Number: AA/04624/2015**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 29<sup>th</sup> January 2016**

**Decision & Reasons  
Promulgated  
On 16<sup>th</sup> February 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE ZUCKER**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**And**

**MO  
(ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**

For the Appellant: Ms A Everett, Senior Home Office Presenting Officer  
For the Respondent: Ms A Benfield, Counsel instructed by CK Law Solicitors, Ashford Kent

**ANONYMITY**

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 an anonymity order is made in respect of each of the Appellants. Unless the Upper Tribunal or other competent Court orders otherwise, no report of any of the proceedings herein or any form of publication thereof shall, directly or indirectly, identify any of the Appellants. This prohibition applies to, amongst others, all parties.

## **DECISION AND REASONS**

1. For the purposes of this decision I shall refer to the Appellant as he was in the First-tier Tribunal, Mr MO. He is a person whose nationality is in contention. His date of birth is recorded as 24<sup>th</sup> April 1982.
2. On 12<sup>th</sup> August 2014 the Secretary of State decided to give notice of removal pursuant to Section 10 of the Immigration and Asylum Act 1999. MO appealed and his appeal was heard on 5 February 2015 by Judge of the First-tier Tribunal Shergill sitting at Taylor House. The substance of the appeal is not material given the issues that are before me but it was the Secretary of State's firm contention that the Appellant was a citizen of India. That was not MO's case. There was evidence before Judge Shergill by way of a SPRAKAB Report but the author of that report could not determine whether MO was Indian or Pakistani. It also was part of the Secretary of State's case that MO might be from Saudi Arabia. In issue was whether that was his country of habitual residence.
3. Given that the Secretary of State positively asserted that MO was a citizen of India contrary to the Appellant's own case, the burden of proof was upon the Secretary of State. She has guidance on point: 'The Nationality, Doubtful, Disputed and Other Cases, Version 5' valid from 26<sup>th</sup> October 2013. There is no issue before me that the burden of proof in the appeal before Judge Shergill was indeed upon the Secretary of State.
4. Judge Shergill was of the view that the appeal succeeded to the limited extent set out in directions which were made by him which directions included a direction that the Secretary of State should permit and consider further evidence in relation to nationality and other pertinent issues.
5. The Secretary of State did consider the matter and on 25<sup>th</sup> February 2015 a further decision was made. However, on this occasion the Secretary of State had altered her position. Instead of positively asserting that MO was Indian she left open the issue of nationality on the basis that she could not determine the matter. Nationality was categorised as "doubtful".
6. The effect of that change of position was that the burden of proof shifted back to the Appellant because nationality is an ingredient of the definition of a refugee under the 1951 Refugee Convention. If there were any doubt about where the burden of proof lay, then I am assisted by the guidance in the case of **MA [2009] EWCA Civ 289** which followed the Upper Tribunal decision in **MA (disputed nationality) [2008] UKAIT 00032**. It is now common ground amongst all concerned that the burden of proof was upon the Appellant.
7. The Appellant appealed and his appeal was heard on 26<sup>th</sup> October 2015 before Judge of the First-tier Tribunal Fox sitting at Hatton Cross. Judge Fox clearly had in mind the judgment of Judge Shergill and, though both parties were represented, it would seem that they did not give Judge Fox much assistance. He was misled, though I do not say intentionally. He

was left to believe that the burden of proof was upon the Secretary of State, it was not. Judge Fox finding that the Secretary of State failed to satisfy the burden of proof upon her (which it was not) went on to allow the appeal.

8. The Secretary of State made application for permission to appeal on the basis that the burden of proof was in fact upon the Appellant and also that the issue of statelessness ought to have been considered, as ought the issue of the Appellant's human rights which were hardly touched upon in the decision of Judge Fox.
9. On one view the Secretary of State now complains that the judge fell into error in circumstances in which she offered very little assistance and arguably conceded the point. However a concession of fact is one thing, a concession of law is another. The judge simply got the law wrong. The burden of proof was on the Appellant and that means because clearly that error was fundamental and therefore material, that the decision of the First-tier Tribunal is to be set aside.
10. The question is what then should I do? My initial view expressed to both parties was that I ought simply to re-make the decision by dismissing the appeal on the basis that the Appellant had the burden of proof and he did not discharge it. But after some discussion with both parties' representatives to whom I am extremely grateful, I agree that little is achieved by that approach because a finding eventually must be made. The Appellant simply cannot be left indefinitely in limbo. It was urged upon me by Ms Benfield that some judicial findings need to be made and indeed, although Ms Everett made no concessions on the merits of the appellant's appeal in the First-tier Tribunal, she agreed.
11. It is to be noted that the grounds submit that the Appellant's human rights position at the very least needs to be considered. In those circumstances, with the agreement of the parties, I have decided that the proper course is to remit the matter to the First-tier Tribunal. There will be no preserved findings. The matter will start afresh but for the avoidance of doubt I remind everyone that in this case the issue of nationality is one which must be established and the burden is upon the Appellant. If the judge in the First-tier Tribunal is not able to determine the nationality of the Appellant then it will be for that judge, upon hearing submissions, to decide what follows, including a proper consideration of the Appellant's Article 3 and Article 8 ECHR rights.

## **Decision**

12. The appeal of the Secretary of State to the Upper Tribunal is allowed. The decision of the First-tier Tribunal is set aside to be remitted to the First-tier Tribunal to be heard afresh before a judge other than Judge Fox or Judge Shergill.

**Signed**

**Date**

**Deputy Upper Tribunal Judge Zucker**