IN THE UPPER TRIBUNAL Case No: UI-2023-004219

IMMIGRATION AND ASYLUM CHAMBER First-tier Tribunal No: RP/50077/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

1st March 2024

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

DEPUTY UPPER TRIBUNAL JUDGE COTTON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JA

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Secretary of State: Mrs A Nolan, Senior Presenting Officer

For Mr JA: Mr C Appiah, Counsel, instructed by Vine Court Chambers

Heard at Field House on 21 February 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, Mr JA is granted anonymity.

No-one shall publish or reveal any information, including the name or address of Mr JA, likely to lead members of the public to identify him. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. For the sake of continuity and ease of reference, we shall refer to the parties as they were before the First-tier Tribunal. Therefore, the Secretary of State is once again "the Respondent" and Mr JA is "the Appellant".

2. The Respondent appeals with permission against the decision of First-tier Tribunal Judge Adio ("the Judge"), promulgated on 23 June 2023 following a hearing on 12 June of that year. The Judge in fact made decisions on two separate, but linked, appeals brought by the Appellant. The first of these (RP/50077/2022) was against the Respondent's decision of 26 October 2022 to revoke the Appellant's refugee status. The second appeal (HU/58495/2022) was against the Respondent's decision of 8 November 2022, refusing the Appellant's human rights claim. The Judge allowed both appeals.

3. The Appellant has always claimed to be a stateless Bidoon from Kuwait. Initially, the Respondent accepted that claim and recognised the Appellant as a refugee on 19 July 2012. On 12 July 2016, the Appellant's wife and six children attempted to travel from Qatar to the United Kingdom on family reunion visas, but were refused boarding because

Iraqi passports and identity cards were found in their luggage. The Respondent took the view that they were all in fact Iraqi nationals and the family reunion visas were revoked. The Appellant, who had travelled out to Qatar to meet his family, returned to the United Kingdom on his own travel document whilst the rest of the family went to Iraq. The family members then travelled to Jordan and from there flew to United Kingdom and claimed asylum on the basis that they, like the Appellant, were stateless Bidoons from Kuwait.

4. The appeals of the family members were dismissed by First-tier Tribunal Judge Dilks ("Judge Dilks") in a decision promulgated on 22 February 2019 (PA/06566/2017, PA/06560/2017, and PA/06562/2017). That decision was not successfully challenged. In summary, Judge Dilks made the following findings of fact in relation to the Appellant's wife and two of their children:

   (a) they had lived in Kuwait for some time;

   (b) their evidence about the experiences of undocumented Bidoons in Kuwait was vague;

   (c) little weight was given to supporting witnesses and a letter from a community organisation in the United Kingdom (the Kuwaiti Community Association - "KCA");

   (d) the Appellant had not taken part in a demonstration in 2011, as claimed;

   (e) the Iraqi passports and identity cards had been confirmed by the Iraqi authorities as genuine;

   (f) it was likely that they were nationals of Iraq and not undocumented Bidoons from Kuwait.

5. It is to be noted that the Appellant was a witness in the appeals of his wife and two children. Judge Dilks did not make a finding on the Appellant's nationality. Judge Dilks found aspects of the Appellant's evidence before him to be inconsistent and unreliable, particularly in relation to the circumstances surrounding the Iraqi passports and identity

cards. It is also to be noted that one of the Iraqi identity cards deemed to be genuine by the Iraqi authorities was in the Appellant's name.

6. A few months after Judge Dilks' decision was promulgated and once avenues of potential challenge had been exhausted, the Respondent initiated revocation action against the Appellant by serving a stage 1 letter in July 2019. It then took over three years before the revocation decision itself was made. The Respondent asserted that, when originally claiming asylum in the United Kingdom and at all stages thereafter, the Appellant had misrepresented his circumstances and/or omitted facts which were decisive to the grant of his refugee status and that he did not otherwise qualify for such status, pursuant to paragraph 339AB of the Immigration Rules.

7. On 27 June 2017, the Appellant made a human rights claim. This was refused in the second of the decisions against which Appellant appealed. That claim was essentially based on his family and private life. The Respondent refused his family life claim on the basis that he was not eligible under Appendix FM to the Immigration Rules as his wife was in the UK but without immigration leave, and his children were in the UK but did not qualify as "eligible children" within the meaning of the Immigration Rules. The Respondent refused his private life claim on the basis that he had previously made false representations, did not meet the long residence requirements of the Immigration Rules, and would not face very significant obstacles were he to be removed to Iraq.

8. The appellant sought, as part of the same application, indefinite leave to remain under the protection route. This was refused on the basis that a decision had already been made to cancel his refugee status. The Respondent concluded that his lead to the Appellant not satisfying the Immigration Rules, namely the requirements under paragraph 339R(ii). The appellant does not appear to have appealed this, instead seeking to secure his refugee status through challenging its revocation.

The Judge's decision

9. It is clear from his decision that the Judge appreciated that he was dealing with two separate appeals: the appropriate appeal references appear on the first page of the decision; the Respondent's two decision letters are referred to at [1]; the issues relevant to each appeal were identified at [5]; and the "Notice of Decision" relates to separate bases on which the appeals were allowed (we note that the grounds of appeal based on the ECHR is not available in a revocation appeal and therefore what the Judge said at [28] can only relate to the human rights appeal).

10. Having summarised the procedural history, the evidence, the parties' submissions, and the legal framework, the Judge then set out his findings and reasons at [13]-[26]. He confirmed that the decision of Judge Dilks was to be treated a starting point, but noted that this did not prevent a different conclusion in relation to a subsequent appeal brought by, for example, another family member. References to Judge Dilks' decision are made at [14], [15], [21], [22], and [24].

11. The Judge heard from two witnesses (neither of whom appeared before Judge Dilks) who claimed to have known the Appellant in Kuwait. Overall, the Judge found them to be credible: [17]. The Judge placed weight on an expert report and a letter from the KCA: [18] and [23]. It was noted that the Appellant had never been found in possession of an Iraqi passport: [19]. Having considered country information and the country guidance case of NM (documented or undocumented Bidoon; risk) Kuwait CG [2013] UKUT 356 (IAC), the Judge found that Bidoons used counterfeit documents in order to obtain visas and that it was possible to obtain genuinely issue documents with the use of false information: [20]-[21]. He accepted the Appellant's account of how and why the documents were obtained: [22]. At [23], the Judge said the following:

> "23. I find that the overall evidence based on the Appellant's interview with the Home Office… that the Appellant is a Kuwaiti undocumented Bidoon. I find that despite the use of Iraqi documents which he and his family members are not entitled to he has shown with his historical background and his current evidence before the court, both the subjective and

background evidence, that he is a Kuwaiti undocumented Bidoon and I find that the Secretary of State has not shown that the Appellant's misrepresentation or omission of facts including the false documents were decisive for the grant of refugee status. I find that there is other evidence available in favour of the Appellant which is decisive in him being granted refugee status particularly his interview, the expert report from the Kuwaiti Bedoons Movement as well as the report from the Kuwaiti Community Association."

12. At [24], the Judge went on to state that:

"24… I find in the Appellant's case it [use of the false documents] was more or less used for a means of getting his family members into the UK and in no way suggest that he is an Iraqi citizen. Whilst I am aware of the decision made in his family members case I find that the evidence before me concerning the Appellant is such that he has shown with the subjective and background evidence that he is a Kuwaiti Bidoon. Whilst his evidence was not totally consistent in his family members case his statement before me indicates the reason why he employed an agent to help his family in obtaining the documents they obtained."

13. In light of his assessment, the Judge accordingly allowed the Appellant's revocation appeal.

14. In respect of the human rights appeal, the Judge concluded that there were no suitability issues in play and that the Appellant's five-year residence in the United Kingdom as a refugee entitled him to indefinite leave to remain. Presumably on the basis that the relevant Immigration Rules were met, the Judge allowed the second appeal on Article 8 grounds.

The grounds of appeal and grant of permission

15. The Respondent's grounds of appeal are relatively lengthy, but can be distilled into the following two core contentions. *First*, it is said that the Judge failed to properly apply, or provide adequate reasons in respect of, the well-known Devaseelan guidelines, particularly in relation to the

documents found in the possession of the Appellant's wife in 2016. Reliance was also placed on Hussein (Status of passports: foreign law) [2020] UKUT 250 (IAC) in support of the assertion that the Judge erred when considering Judge Dilks' finding on the Iraqi passport. *Secondly*, the Judge erred in regarding evidence from the witnesses, the expert report, and the letter from the KCA as being of significance, given that Judge Dilks had previously accepted that the family unit had lived in Kuwait.

16. It is of significance that no challenge was brought against the Judge's decision in the human rights appeal.

17. Permission was granted on all grounds.

Rule 24 response

18. Mr Appiah provided a rule 24 response. This highlighted the absence of any challenge to the Judge's decision in the human rights appeal and the fact that the Respondent had borne the burden of proof in the revocation appeal.

Procedural history of this appeal

19. The error of law hearing was originally listed on 2 November 2023. In advance of that hearing, the Tribunal had issued standard directions for the Respondent to file and serve a composite error of law bundle which complied with those directions and the Presidential Guidance on CE-Filing and Electronic Bundles, dated 18 September 2023. The Respondent failed to provide any such bundle. As result, the hearing was adjourned.

20. Belatedly, the Respondent did provide an error of law bundle. However, that bundle suffers from certain deficiencies, not least the failure to have inserted appropriate bookmarks, as required by the Presidential Guidance.

21. We emphasise the importance of full compliance with the standard directions and the Presidential Guidance. The provision of a fully-compliant bundle is not particularly onerous. The purpose behind it is the efficient use of time, both at the pre-reading stage and at a hearing. It is an essential component of the need to ensure appropriate procedural rigour in this jurisdiction.

The hearing

22. Mrs Nolan relied on the grounds of appeal, without amendment. She took us through the relevant findings made by Judge Dilks, together with the expert report and the letter from the KCA. She emphasised the fact that although the Appellant had not had an Iraqi passport, he had an Iraqi identity card, which had been confirmed as genuine by the relevant authorities of that country.

23. Mr Appiah relied on his rule 24 response. The thrust of his submissions was that the Respondent had in effect simply relied on Judge Dilks' decision in order to try and discharge the burden of proof in the revocation appeal. No additional evidence had been provided by the Respondent, such as a document verification report on the Iraqi identity card. The Judge had been entitled to rely on the fact that the Appellant had not had an Iraqi passport. Mr Appiah re-emphasised the absence of any challenge to the human rights appeal.

24. In reply, Mrs Nolan submitted that the outcome of the human rights appeal had been entirely based on the Judge's conclusions on the revocation appeal: the two were inextricably linked and if there was an error in respect of the latter then the former could not stand.

25. At the end of the hearing we reserved our decision.

Conclusions

26. We begin by recognising the importance of exercising appropriate judicial restraint before interfering with a decision of the First-tier Tribunal. Our task is to determine whether there have been material errors of law, not to substitute our own view for that of the Judge, or to seek perfection in a decision.

27. This has not been an easy case to decide. With respect to both the Judge and the Respondent, neither the decision nor the grounds of appeal represent models of clarity or precision.

The revocation appeal

28. It appears that the Respondent had relied almost exclusively on Judge Dilks' decision in order to discharge the burden of proof in the revocation appeal. There was, for example, no additional evidence from the Iraqi authorities, or a document verification report in respect of the Iraqi identity card issued in the Appellant's name. On one view, the Respondent's approach might be said to have treated Judge Dilks' findings as being determinative, rather than a starting point.

29. On the other hand, it is clear that the Devaseelan guidelines applied to the Appellant's case: AL (Albania) v SSHD [2019] EWCA Civ 950. The Respondent had been entitled to rely on those guidelines in support of his case against the Appellant. The Judge was obliged to apply those guidelines to the case before him.

30. The Judge was cognisant of these guidelines and the need to treat Judge Dilks' findings as a starting point to the extent that they were relevant to the Appellant's case. The Judge was correct to note that those findings did not operate as a straitjacket if there was good reason to depart from the previous findings: [14].

31. Reading the Judge's decision sensibly and holistically, we conclude that he did materially err in law as regards the application of the Devaseelan guidelines in the particular context of this case.

32. The first error of law relates to the Judge's apparent finding that the Iraqi documents (passports and, importantly, the identity cards) were, if not entirely fabricated, genuinely issued on the basis of false information provided to the authorities. We say "apparent finding" because there is no clear statement on the point. The most we can find is the second sentence of [23]: "I find that despite the use of Iraqi documents which he and his family members are not entitled to…"

33. We regard that apparent finding as going directly behind the findings of Judge Dilks', both in respect of his conclusion that the family members were Iraqi nationals and also the genuineness of all of the Iraqi documents.

34. There are three principal difficulties with the Judge's approach. *First*, the Appellant's evidence on the provenance of the Iraqi documents had been disbelieved by Judge Dilks ([77] of his decision), an adverse finding acknowledged by the Judge at [15], but not seemingly actually treated as a clear starting point. *Secondly*, the country information relied on by the Judge was, as far as we can tell, the same as that before Judge Dilks. In particular, the Landinfo report was specifically considered in the 2019 decision. *Thirdly*, the Judge's assessment at [21] of the country information and the applicability of Hussein related to passports and not identity cards (the latter being relevant to the Appellant's case, the former not so).

35. Thus, the evidence relating to the Iraqi documents being put forward by the Appellant before the Judge was essentially the same as that considered by Judge Dilks. We cannot discern from the decision any adequate engagement with the guidance set out at paragraph 41(6) of Devaseelan. Nor can we discern any legally adequate reasons to justify going directly behind the findings of Judge Dilks.

36. We turn to the other central aspect of the Respondent's challenge. The Judge was plainly entitled to take account of evidence which had not been before Judge Dilks. This included the evidence from the two witnesses, the expert report, and the letter from the KCA. The weight

attributable to that evidence was, in principle, a matter for the Judge. However, that evidence had to be considered in the context of its contents and the Devaseelan guidelines.

37. As far as we can ascertain, the evidence as a whole was based almost exclusively on the Appellant's apparent knowledge of places in Kuwait, together with knowledge of sheep herding and certain terms relating to life in the desert. There was little, if any, explanation as to how the knowledge set out led to an opinion that the Appellant was in fact an undocumented Bidoon from that country.

38. As identified in the grounds of appeal, the problem with the Judge's reliance on that evidence was that Judge Dilks had previously found that the family unit had lived in Kuwait. Clearly, that of itself had not been sufficient to satisfy Judge Dilks that the Appellant's family members were undocumented Bidoons from that country. In the instant case, we cannot see any consideration of Judge Dilks' finding on residence in Kuwait when the Judge was assessing the new evidence.

39. In our view, the Judge failed to either consider the previous finding of residence in Kuwait, or to provide legally adequate reasons for why he was attaching material weight to that evidence despite the previous finding.

40. We have not forgotten that the burden rested with the Respondent in the revocation appeal. The new evidence had been provided by the Appellant. At first glance, it might be thought that any error by the Judge in respect of the new evidence would be immaterial to the question of whether the Respondent had made out his case. However, the fact is that the Judge relied on that new evidence when reaching his conclusions on the appeal as a whole. By implication, he found that the new evidence in effect undermined the Respondent's case against the Appellant. Thus, the Judge's error was material.

41. Bringing all of the above together, we conclude that the identified errors of law require us to set aside the Judge's decision in the revocation appeal. It would be artificial to preserve any of the Judge's findings of fact

and we do not do so. The findings of Judge Dilks remain the starting point for any future consideration of the revocation appeal.

The human rights appeal

42. Turning to the Judge's decision in the human rights appeal, we go back to what has been stated previously. The Respondent has not challenged that decision. It was a decision in a separate, but linked, appeal and any challenge thereto required either a separate application for permission to appeal, or, at least, specific grounds contained in a single application relating to both appeals.

43. In the absence of any challenge (whether initially put forward, or by way of amendment), this Tribunal simply is not seized of that matter. It is not for the Tribunal to effectively conduct litigation on behalf of the Respondent (or indeed any party). Otherwise, it seems as though the Tribunal was, in effect, being expected to make an application to appeal, then to formulate grounds of appeal, then to make a decision on permission, and then to reach a conclusion at the error of law stage. We cannot see that that is appropriate course of action to take.

44. Whilst not a particularly attractive position to arrive at, the Judge's decision on the human rights claim stands, notwithstanding the fact that it is inextricably linked to the outcome of the revocation appeal. It is a matter for the Respondent to decide how to address this state of affairs.

Disposal of the revocation appeal

45. We have had regard to the guidance set out in Begum (Remaking or remittal) Bangladesh [2023] UKUT 46 (IAC). Although the representatives suggested that the revocation appeal should be retained in the Upper Tribunal, we consider it appropriate to remit the case to the First-tier Tribunal. There will need to be a significant fact-finding exercise and it is likely that further evidence will be provided by both parties.

Anonymity

46. It is appropriate to maintain the anonymity direction in this case. The Appellant continues to be a refugee pending the outcome of his revocation appeal.

Notice of Decision

The making of the decision of the First-tier Tribunal in the revocation appeal did involve the making of an error on a point of law and that decision is set aside. On this basis, the Secretary of State's appeal to the Upper Tribunal is allowed.

The making of the decision of the First-tier Tribunal in the human rights appeal did not involve the making of an error of law and that decision stands. On this basis, the Secretary of State's appeal to the Upper Tribunal is dismissed.

We remit the revocation appeal to the First-tier Tribunal.

Directions to the First-tier Tribunal

1. **The revocation appeal (RP/50077/2022) is remitted to the First-tier Tribunal (Hatton Cross hearing centre) for a complete rehearing of that appeal, with no preserved findings of fact;**
2. **The remitted revocation appeal shall not be heard by First-tier Tribunal Judge Adio;**
3. **The findings of Judge Dilks shall be the starting point for the consideration of the remitted revocation appeal;**
4. **The First-tier Tribunal will issue any further case management directions, as appropriate.**

H Norton-Taylor

Judge of the Upper Tribunal

Immigration and Asylum Chamber

Dated: 26 February 2024