



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004796

First-tier Tribunal No:
RP/50049/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

22nd January 2024

Before

UPPER TRIBUNAL JUDGE GLEESON
DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

R G (AFGHANISTAN)
aka
J K (INDIA)

(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr Esen Tufan, a Senior Home Office Presenting Officer

For the Respondent: Ms Kezia Tobin of Counsel, instructed by Simman Solicitors

Heard at Field House on 11 December 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the claimant has been granted anonymity, and is to be referred to in these proceedings by the initials R G. No-one shall publish or reveal any information, including the name or address of the claimant, likely to lead members of the public to identify the claimant.

Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. The Secretary of State challenges the decision of the First-tier Tribunal allowing the claimant's appeal against his decision on 16 March 2023 to revoke her refugee status and that of her children, pursuant to paragraph 339AB of the Immigration Rules HC 395 (as amended).
2. The claimant's primary nationality is disputed. She was granted asylum as an Afghan Sikh. The Secretary of State now considers her to be an Indian citizen.
3. **Mode of hearing.** The hearing today took place face to face.
4. For the reasons set out in this decision, I have come to the conclusion that the Secretary of State's appeal succeeds. I substitute a decision dismissing the claimant's appeal against revocation of refugee status.

Background

5. The claimant and her three dependent children claimed international protection on the basis of their asserted Afghan nationality and Sikh religion. The appellant's Sikh religion is not challenged, but the Secretary of State considers that there is no risk of persecution or serious harm for Sikhs in India, in contrast to the situation for Sikhs in Afghanistan.
6. The claimant's husband's father accompanied her to make her asylum claim. He has since died. The claimant asserted that her husband had disappeared in Afghanistan in 2017, probably at the hands of the Taliban, that she was pressurised to change her religion, and that Taliban members wanted to marry her daughters.
7. The claimant and her three daughters were granted refugee status on 9 July 2019 until 7 July 2024. On 23 October 2019, the claimant's husband reappeared in the UK and claimed asylum, providing the Secretary of State with his Afghan passport and taskera, and the Indian passport on which he had travelled to the UK. His evidence was that the claimant and the couple's three daughters had Indian passports, to enable them to live in India, the passports being genuine but the supporting documents false.
8. On 20 September 2018 and 19 October 2019, a person using the claimant's Indian identity was fingerprinted for a United States visa, relying on a valid Indian passport. The fingerprints of the claimant and her children matched those taken in the Afghan identity.
9. The 17 October 2019 application was successful but the visa was later revoked as the claimant had made an asylum claim in an M5 country. Migration 5 (M5, formerly the Five Country Conference on migration) is a conference of the immigration authorities of Australia, Canada, New Zealand, the United Kingdom, and the United States of America. The five

countries work together to "enhance the integrity, security and efficiency of their immigration and border services" including the sharing of certain overseas visa application centres. In 2009, the Five Country Conference agreed to a data-sharing protocol which facilitates the sharing of the biometric data of up to 3000 people per year in order to assist with asylum applications.

10. The Indian authorities were approached and confirmed that the Indian passports were genuine. UNHCR was contacted and provided views, noting the absence of a satisfactory explanation by the claimant. The Secretary of State therefore made a deprivation decision.
11. The claimant appealed to the First-tier Tribunal.

First-tier Tribunal decision

12. The First-tier Judge was satisfied that the Secretary of State had discharged the evidential burden of demonstrating the use of deception. Applying the decision in *Qadir*, the First-tier Judge concluded that the claimant had advanced an innocent explanation and that '[in] those circumstances, the burden rests on the [Secretary of State] to prove the use of deception on a balance of probabilities'.
13. The Judge concluded that the Secretary of State had not discharged that burden. The Judge placed little weight on the evidence of Tosin Pratt for the Secretary of State about the occasion when the claimant's fingerprints were taken by the US authorities. He did not consider that he could place reliance on the Secretary of State's email evidence as to the Indian authorities' acceptance that the passports were genuine. The First-tier Judge noted that in the claimant's appeal skeleton argument on 10 July 2023, it was accepted that the Indian passports were genuine, albeit based on false documents. The claimant's husband had openly raised the existence of a false Indian passport in his own asylum claim. The claimant's daughter's evidence, which was not challenged, was that they lived in Afghanistan and her father lived in India, where the family visited him.
14. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

15. Permission to appeal to the Upper Tribunal was granted on the following basis:
 - “...2. The grounds [assert] that the burden of showing the Indian passport was unreliable lay with the Appellant and the Appellant accepted the passport was issued to them by the authorities. It is argued that the Judge did not refer to *Hussein* [2020] UKUT 250 (IAC), the presumption the holder of a passport is a national of the issuing state.

3. The Judge arguably approached the case on an erroneous basis and failed to address the point made in *Hussein* and appears to have overlooked that the burden lay on the Appellant on this issue.

4. The grounds disclose arguable errors of law and permission to appeal is granted.”

16. There was no Rule 24 Reply on behalf of the claimant.

17. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

18. The oral and written submissions at the hearing are a matter of record and need not be set out in full here. We had access to all of the documents before the First-tier Tribunal.

19. For the Secretary of State, Mr Tufan relied on his grounds of appeal. He accepted that the Home Office Presenting Officer in the First-tier Tribunal did not refer to *Hussein*, but the Judge had applied the wrong burden of proof and the decision was unsafe. It was not possible to know what the Judge would have decided had the correct burden of proof been applied. The appeal should be allowed and the decision remade by the Upper Tribunal.

20. For the claimant, Ms Tobin argued that the Secretary of State had not relied on *Hussein* before the First-tier Tribunal and that it was inapplicable. At the First-tier Tribunal hearing, both parties had been clear that the burden was on the respondent. The claimant’s children were now naturalised British citizens. Her husband had refugee status as an Afghan Sikh.

21. Although the photograph in the Indian passport was that of the claimant, and her fingerprints had been taken and matched in 2018, she continued to dispute that they had been taken in 2019. People travelled on false documents all the time and it was not for the claimant to disprove her Indian nationality. Alternatively, the claimant had provided an innocent explanation by credible witnesses. The Judge had not erred in applying *Qadir* and not *Hussein*.

Conclusions

22. Reliance on *SM and Qadir (ETS - Evidence - Burden of Proof)* [2016] UKUT 229 (IAC) (21 April 2016) is inappropriate here and does not avail the claimant. In *SM and Qadir*, the Upper Tribunal was dealing with the complexities of proving deception in the ETS/TOEIC series of cases. However, in the present case, the Indian passports were accepted to be genuine by the Secretary of State, the claimant, and her husband.

23. The case of the claimant and her husband relied on their having knowingly obtained those passports on the basis of false documents and then used

them to travel to the UK. In the alternative, those passports were genuine and the Afghan taskera and passports were false and had been put forward fraudulently to obtain international protection. Either way, deception must have taken place and no innocent explanation has been provided. It is not an innocent explanation for the claimant or her husband to say that they did not personally provide the false documents on which the admittedly genuine Indian passports were obtained: instead, they used an agent whom they knew would do so. That is not an innocent explanation.

24. The decision in *Hussein* is plainly relevant and material. It is right that it was not argued below, but the First-tier Judge is taken to know the law. The Upper Tribunal's guidance in *Hussein* was this:

"1. A person who holds a genuine passport, apparently issued to him, and not falsified or altered, has to be regarded as a national of the State that issued the passport.

2. The burden of proving the contrary lies on the claimant in an asylum case.

3. Foreign law (including nationality law) is a matter of evidence, to be proved by expert evidence directed specifically to the point in issue."

25. It is not necessary to remit this appeal for further findings of fact or to reconvene the Upper Tribunal hearing to do so. The case can be determined on the evidence already given by the parties. In this appeal, the claimant and her husband have both given evidence accepting that the Indian passports are genuine, albeit both say they were fraudulently obtained. There is no corroborative evidence of that. They fall, therefore, to be treated as Indian citizens.

26. Accordingly, we set aside the decision of the First-tier Tribunal and substitute a decision dismissing the claimant's appeal against revocation of her refugee status.

Notice of Decision

27. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

We set aside the previous decision. We remake the decision by dismissing the claimant's appeal.

Judith A J C Gleeson
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 14 January 2024