



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: AA/09745/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 3 September and 21 October 2015

Decision & Reasons Promulgated  
On 2 November 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NA (KUWAIT/IRAN - NATIONALITY DISPUTED)  
(ANONYMITY DIRECTION MADE)

Respondent/Claimant

**Representation:**

For the Secretary of State: Mr Tufan (03.09.15) and Mr Jarvis (21.10.15), Specialist Appeals Team  
For the Respondent/Claimant: Mr Miah, Counsel instructed by Hattin Solicitors

**DECISION AND REASONS**

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Bird sitting at Taylor House on 3 February 2015) allowing the claimant's appeal against the decision of the Secretary of State refusing to grant him asylum as an undocumented Kuwaiti Bidoon and against her concomitant decision to make directions for his removal to Iran. The First-tier Tribunal did not make an anonymity direction, but as the claimant asserts a well-founded fear of persecution in the country to which he says he would have to go if refused asylum (namely Kuwait) I consider it is appropriate that he should be accorded anonymity for these proceedings in the Upper Tribunal.

## **The Reasons for the Grant of Permission to Appeal**

2. On 17 March 2015 First-tribunal Judge Levin granted the Secretary of State permission to appeal for the following reasons:
  2. The Appellant's nationality was in dispute. The Respondent's notice of immigration decision which is the subject of the Appeal states that the removal is to be to Kuwait or Iran. It follows therefore that the Judge's assertion in para 23 of her decision that no removal directions to Iran had been set was factually incorrect. Given that the Appellant's nationality was the core finding that the Judge was required to make it is arguable that this factual error has infected the Judge's finding that the Appellant is Kuwaiti and not Iranian.
  3. It is also arguable that the Judge erred in her consideration of the Appellant's nationality by failing to have regard to, and to resolve with her finding that the Appellant was Kuwaiti, the fact that the Appellant declared that he was an Iranian national in his visa application form and in his asylum screening interview and that he entered the UK using an Iranian passport. It is arguable that that the Judge further erred by failing to have regard to, and to resolve with her nationality finding, the issue raised by the Respondent in para 33 of the RFRL that the fact that the Appellant travelled to the UK using an Iranian passport constituted prima facie evidence that he is an Iranian national.
  4. It is also arguable that the Judge erred in allowing the Appellant's appeal under Article 8 given her failure to carry out a detailed proportionality assessment and in particular her failure to have regard to the factors set out at section 117B of the 2002 Act.

## **The Factual Background**

3. On 5 March 2014 the claimant applied for entry clearance as a visitor, tendering an apparently valid and genuine Iranian passport. The application was made to the British High Commission in Kuwait City. The passport had been issued to the claimant by the Iranian Embassy in Kuwait on 24 May 2012 and it was valid until 25 May 2017. In his application form, he represented that he had a residency permit which enabled him to reside in Kuwait as an Iranian national. He had been refused a visa to travel to Italy on 12 September 2012, but he had been able to use his Iranian passport to travel to Malaysia for a visit on 6 October 2012 and to the United Arab Emirates on 17 September 2013. He said he was employed full-time as a decoration designer for a wedding company in Kuwait, and he had started this job on 4 July 2012. He wished to visit the United Kingdom for eight days, and he proposed to stay in the Bayswater Inn Hotel in London.
4. The application was refused on 6 March 2014 as the Entry Clearance Officer was not satisfied the bank statements he had provided accurately reflected his personal and financial circumstances.
5. The claimant claims to have left Kuwait on 20 June 2014 and flown to the UK via a stopover in another country. On 26 June 2014 he requested an appointment at the Asylum Intake Unit in Croydon, and he formally claimed asylum on 9 July 2014. He gave a slightly different surname from that given in the Iranian passport. He said that he had been unemployed in Kuwait. When asked about how he had entered the United

Kingdom, he said he used a passport provided by an agent. He did not know the details of it, including its colour. He was asked whether he had had his own national passport, and he answered yes: his father had made an Iranian passport for him. He could not produce his own national passport today as he did not know where it was. The passport which he had used to enter the UK had been retained by the agent.

6. At his substantive asylum interview, he said he was not an Iranian national, but an undocumented, and hence stateless, Kuwaiti Bidoon.
7. In a letter dated 3 November 2014 the Secretary of State gave her reasons for refusing to recognise the claimant as a refugee, or as otherwise requiring international protection. She did not accept that he was a stateless Kuwaiti Bidoon as opposed to an Iranian national. The key part of the Secretary of State's reasoning is to be found in paragraphs 33 and 34 of the decision letter, which I reproduce below:

33. It is noted that you originally produced a passport to an Immigration Officer on arrival to the UK and obtained entry to the UK. You did not state to the Immigration Officer that this was not a passport to which you were entitled, when you had ample opportunity to do so, and you have only claimed that it was not a passport and nationality to which you were not entitled when you claimed asylum. It is noted that paragraph 93 of the UNCHR Handbook states:

'Nationality may be proved by the possession of a national passport. Possession of such a passport creates a prima facie presumption that the holder is a national of the country of issue, unless the passport itself states otherwise. A person holding a passport showing him to be a national of the issuing country, but who claims that he does not possess that country's nationality, must substantiate his claim, for example, by showing that the passport is a so-called 'passport of convenience' (an apparently regular national passport that is sometimes issued by a national authority to non-nationals). However, a mere assertion by the holder that the passport was issued to him as a matter of convenience for travel purposes only is not sufficient to rebut the presumption of nationality. In certain cases, it might be possible to obtain information from the authority that issued the passport. If such information cannot be obtained, or cannot be obtained within reasonable time, the examiner will have to decide on the credibility of the applicant's assertion in weighing all other elements of his story.'

34. It is noted that you assert that your father arranged for all your family to be in possession of Iranian passports in order to access a better standard of living within Kuwait, however in line with the guidance above from the UNCHR Handbook it is not considered that your explanation for being in possession of an Iranian passport which has facilitated your travel to the United Arab Emirates and Malaysia, as well as the UK, is sufficient enough to rebut the presumption of your Iranian nationality.

### **The Hearing Before, and the Decision of, the First-tier Tribunal**

8. At the hearing before Judge Bird, the claimant appeared in person and the Secretary of State was represented by a Presenting Officer. In oral evidence, the claimant said that his father had managed to obtain Iranian passports for all the family. One of his grandmothers was an Iranian. His father had to renew the Iranian residence permit

issued to him by the Kuwaitis every year or every two years. Any documents the family had were Iranian documents. He did not have any Kuwaiti ID documents. He and his siblings had attended an Iranian school with the help of their Iranian documents. He had travelled out of Iran with a friend of his father's. He had gone to Qatar, Dubai and Malaysia.

9. In her subsequent decision, the judge addressed the question of the claimant's disputed nationality at paragraphs 17 and 18, which I reproduce below.
  17. The appellant's account was not accepted by the respondent who did not accept that the appellant was a Kuwaiti Bidoon. It was the respondent's view that the appellant was Iranian. No evidence has been adduced by the respondent to show that the Iranian passport on which the appellant travelled was a genuinely issued Iranian passport.
  18. The respondent maintains that because of the passport upon which the appellant travelled he is an Iranian and is not an undocumented Bidoon from Kuwait. There is no evidence before me to show that this document was genuinely issued by the Iranian authorities. I find that the evidence that the respondent relies on to show that the appellant is Iranian is a passport which the appellant presented when he applied for his entry clearance. The appellant accepts that this was a passport that had been obtained by his father after payment of money to an Iranian official at the Iranian Embassy. There is no evidence before me to show that this is a genuinely issued document or that it is accepted by the Iranian authorities that the appellant is Iranian.
10. Having resolved the disputed issue of the claimant's Iranian nationality in favour of the claimant, Judge Bird went on to find that on the oral evidence that she had received, together with the birth certificate of the claimant's father which had been produced, she was satisfied to the lower standard of proof that the claimant was an undocumented Bidoon and as such he faced persecution in the country of his birth. Although the Secretary of State stated he could be returned to Iran, the judge held (erroneously) that no removal directions to that country had in fact been made.

### **The Error of Law Hearing**

11. At the hearing before me to determine whether an error of law was made out, Mr Miah sought to defend the decision of the First-tier Tribunal, arguing that the judge had taken all the relevant evidence into account, and had reached a finding that was reasonably open to her. I ruled that an error of law was made out, and gave my reasons for so finding in short form. My extended reasons are set out below. There was then a discussion about the remaking of the decision, and it was agreed that there should be a resumed hearing in the Upper Tribunal before me to remake the decision, and that none of the findings of fact made by the First-tier Tribunal would be preserved.

### **Reasons for Finding an Error of Law**

12. The reasoning of the judge discloses a clear error of law as she wrongly shifts the burden onto the Secretary of State to prove that the Iranian passport tendered by the claimant for the purposes of seeking entry clearance as a visitor was genuine, rather than the burden resting with the claimant to prove his case that the passport was false. It was a key

element of the asylum claim that the claimant was not an Iranian national, but had somehow managed, in common with the rest of his family, to pose as an Iranian national using either forged documents or documents which were false in the sense that they conveyed a false message. As I understand it, the claimant's case was that the Iranian passport he had used for the purposes of seeking entry clearance as a visitor had been genuinely issued, but it was fraudulent in that he was not actually an Iranian national; and so he not genuinely entitled to hold an Iranian passport.

13. In accordance with general principles, the burden rests with an asylum claimant to prove, albeit to the lower standard of proof, all elements of the claim. Thus, the burden rested with the claimant to prove that his apparent Iranian nationality was a fraud, rather than (as the judge wrongly directed herself) on the Secretary of State to prove that the Iranian authorities recognise the claimant to be an Iranian national.
14. Moreover, the judge failed to engage with the evidential presumption discussed in paragraph 33 of the refusal decision, and about which the decision of the judge is completely silent. The claimant showed himself to be in possession of an Iranian passport when applying for entry clearance as a visitor, and this engenders a presumption that the claimant is a national of the country of issue, namely Iran. So the burden of proof on the claimant on this particular issue is particularly onerous, as he has to rebut the presumption of legality.
15. I note that at the beginning of paragraph 33 of the refusal letter it is asserted that the claimant produced his Iranian passport to an Immigration Officer on arrival in the UK. This is in fact disputed by the claimant. His case is that he presented a different passport to that which he used to travel to other countries, and different to that which he used to seek entry clearance as a visitor. It is not clear to me that the Secretary of State actually has any concrete evidence as to what passport the claimant used to enter the UK, and to that extent Judge Bird may well have been right to say there was no evidence before her to show that the document on which the claimant entered the UK was genuinely issued by the Iranian authorities. But this does not change the fact that only a few months before his date of claimed entry to the UK the claimant used a passport which was on the face of it genuinely issued by the Iranian authorities, and indeed it is not part of the claimant's case that the passport relied on was forged. So the judge has not given adequate reasons for resolving the disputed issue of the claimant's nationality in favour of the claimant, rather than in favour of the Secretary of State.
16. The resolution of this issue has a knock-on effect on the credibility findings in respect of the other aspects of the asylum claim, and it also has ramifications for the proper disposal of an alternative claim under Article 8 ECHR. Accordingly, the error of law is such that the findings on all issues are unsafe, and the decision must be remade in its entirety.

### **The Resumed Hearing**

17. It is convenient at this stage to rehearse the claimant's account of the circumstances which had led to him fleeing Kuwait. At the screening interview, he said he had come to the UK because his life was in danger. He got into an altercation with a police officer called J who was holding his sister's hand. The police officer put him in jail for ten days

where he was mistreated. Then he placed him in jail for another ten days. He was arrested again but managed to escape. This pattern had been going on for six months since 7 January 2014. He could not return to Kuwait as the police officer had said he was after him. He had told him that he was going to make a false accusation that he had tried to kill him.

18. At question 5.1 he was asked whether he had ever been arrested, charged with or convicted of an offence in any country. He answered he was arrested on 7 January 2014 but he was not charged with anything as the police officer said he could accuse him of anything he wanted. He was placed in jail for twelve days. He was arrested again but he could not remember the dates. He was arrested on the same grounds as before. He was placed in jail for three days.
19. He was asked whether he was subject to an arrest warrant. He answered that an arrest warrant was issued for attempted murder as the police officer saw him carrying a metal bar. He did not know when the warrant was issued.
20. In a letter dated 22 July 2014 the claimant's then solicitors said their client had had the opportunity to review the screening interview notes and wished to amend the answer to question 4.1. He had not said in answer to question 4.1 that his first period of detention was ten days, and his second period of detention was ten days. The answer recorded for question 5.1 was correct. The first period of detention was twelve days, and the second period of detention was three days.
21. The claimant attended a substantive asylum interview on 24 October 2014. He was asked about the work he had done in Kuwait. He said he did not have a permanent job but sometimes he distributed newspapers. Other times he was a street vendor. He had a stand. He had recently worked with his father's friend.
22. He was asked about the level of education he had obtained in Kuwait. He said he had gone to an Iranian school. As he was smart, he learnt Arabic, not just the Iranian language.
23. In answer to question 44, the claimant gave a detailed account of his dealings with the police officer. As he was going to work one day, he came across someone who was dragging his sister by her hand, and his maternal aunt was screaming as the man would not let her go. He approached the man and pushed him. The man fell over thus releasing his sister and she ran away with his aunt. The man stood up and asked him whether he knew who he was and slapped him. He showed him his ID card which showed that he was a member of the CID. He threatened to harm him and destroy him. He ordered him to get into his car. He took him to the CID bureau. There he and his colleagues started to beat the claimant up. He would not let him sleep at night, but made him stand on his feet towards the wall. While he was being beaten up, the officer said that there had been a lot of theft occurring recently without the perpetrators being apprehended. So he had to choose one of those crimes in order to give the police officer a justification for his detention. He also showed him hashish or a drug, saying that they did not know who this drug belonged to, and therefore he had to claim responsibility for the drug.

24. During his twelve days' detention, his family did not know where he was being detained. They were trying to break his pride by insulting him and beating him up. Eventually his father asked his friend to intervene in order to get him released.
25. After his release, the officer threatened him that he would not give up about him. As a result of the beatings and the insults, he started to have psychological problems. He could not go out of the home. He could not go to work in order to support his family who really needed his support. After his father insisted that he go out of the house, there was an occasion when he was with his friend when the same officer stopped his car, and asked them both to show their ID cards. His friend was able to show his ID card, but he could not. The officer ordered him to get into his car. The officer knew that he was Bidoon, and therefore did not have an ID card. He took him to the police station where he was detained for five days. After five days he was released.
26. The third incident with the police officer was when he was at home. His sister had gone out to the grocery shop. He suddenly heard screaming. When he went out he saw the officer with someone else, in a black coloured car, trying to abduct his sister. He could not stand the situation. So he picked up a piece of metal and went towards him trying to save his sister. They set her free, but they came towards him accusing him of having an intention to kill because he was carrying a piece of metal. He threw the piece of metal away and escaped. He was so afraid that he ran for an hour towards his aunt's home which was situated between high buildings.
27. He was asked to give further details about his detention and torture. He said he was beaten up everywhere, including on the soles of his feet. They put salted water on the beaten spots in order to hide the scars. This was the scars on his feet. At question 71 he was asked whether he had sustained any injuries and scars as a result of the ill-treatment and detention. He said no. But after two weeks or one month he was not able to walk normally.
28. With reference to the third incident, he confirmed that the officers had tried to pursue him when he fled the scene. He was able to flee them because he was running fast and going through buildings and he was familiar with the area. He fled to his paternal aunt's house which was by car probably five to ten minutes away. She was married to a Kuwaiti national. He stayed with her until his father could arrange his exit from the country. His aunt went to the family home and brought back news. The authorities had gone to his home and they had permission to search the house. He did not know when the authorities had first gone to the family home to arrest him for intending to do a killing. His family were not given a copy of the arrest warrant.
29. Before revealing that he was in possession of a copy of the claimant's earlier visa application, the interviewing officer asked the claimant whether he ever visited any other countries other than the UK and whether he had ever made any applications for a visa. He answered no to both questions. When the interviewing officer revealed that he had a copy of the claimant's visa application dated March 2014, the claimant said he did not know about it. He was with the agent and his father. He was not aware that he had got fingerprinted for a visa application. He thought it was for stamping a passport.

30. The interviewer then revealed that he had a copy of a legitimate Iranian passport in the claimant's identity. The claimant answered that he did not know what he should do. He was only going with his father annually to renew their leave to remain in Kuwait. He had to go every year or every two years to renew the permission. He used his Iranian passport to register at school, and also to be able to live in Kuwait, including being able to go to hospital. When he had to comply with any formalities and when he was asked about his ID card, after seeing his Iranian passport, people in Kuwait considered him to be Iranian. He confirmed that the rest of his family were also documented with Iranian passports.
31. His explanation for having previously denied visiting any other countries other than the UK was that he understood the interviewing officer to have asked him whether he had *lived* abroad. He had gone to Dubai, Malaysia and Qatar for the purposes of working. His father's friend was a wedding contractor, and he had gone with his father's friend on wedding business, such as for the marriage of one of the emirs in Qatar.
32. At the resumed hearing, the claimant gave evidence through a Kuwaiti interpreter. He adopted as his evidence-in-chief his witness statement which he signed in my presence. He insisted he was a Kuwaiti Bidoon. He had married F, a British national, at a nikah ceremony which had taken place in a mosque in Kuwait. At the time of their marriage, his wife's family were not present as they were not really happy with their relationship.
33. He had wanted his wife to be present at the screening interview. But as his wife's family were not willing to accept their relationship and her nephew was in hospital at the time, they both agreed this was not the best time for her to speak to her family. That was why he had not mentioned his wife during the interview. She was not mentally and emotionally stable, as her nephew had been diagnosed with cancer and he had no chance of surviving according to the doctor's diagnosis.
34. The only evidence he had to show that he was a Bidoon was his father's birth certificate which clearly stated his father's nationality. His father had also provided a signed witness statement dated 14 January 2015 (this is in fact the date of the certified English translation) in which he stated he was a Bidoon.
35. Now his wife's family had accepted their marriage. He and his wife had had a child together who was born on 8 February 2015. Although his wife had visited him in Kuwait on a number of occasions, Kuwait was not where she wanted to live permanently and also she had all her close family in the United Kingdom. She would find it very difficult to adjust to life in Kuwait having been raised in the UK since the age of 4.
36. The claimant was cross-examined, and he also answered questions for clarification purposes from me. He produced the original of his father's letter and birth certificate which had been sent from Kuwait by DHL on 15 November 2014. The letter from his father was typed, and the birth certificate was a photocopy.
37. He was asked about his work in Kuwait, and it was pointed out that in his witness statement at paragraph 7 he had not mentioned his work in the weddings business. The



claimant thought that he had. The claimant confirmed that he had distributed newspapers by car as well as by foot.

38. He was asked how many times he had been detained. He said it had been twice, but he could not recall the exact date. He could not even recall the month in which he had been detained. It was put to him that he appeared to have had a better recollection at the time of his screening interview. He said that he had been through so much and he was trying to forget. He had a child now. He was doing the best he could: the first detention had lasted approximately twelve days and the second detention had lasted for approximately five days. He had been beaten everywhere with wooden sticks, and he had also been punched and kicked. He had not been able to walk for a month on his release. He had also been incontinent for the first few days following his release, and he was still suffering from nightmares.
39. His relationship with F had begun in 2013. She had visited him in Kuwait on three occasions, but he could not remember when. He could remember that she had visited him "during their engagement" at the end of 2013. He was asked whether she had visited in May 2014, and he said he could not remember. He confirmed that their child was a "full term baby". It was put to him that his wife must have conceived in May 2014. He agreed that this must be the case. But when it was put to him that therefore she must have been with him in Kuwait in May 2014, he said he could not recall.
40. He was asked about the visit visa application. It was the agent who had applied for a visit visa. He did not know why the agent had not used his Iranian passport to bring him here subsequently. It was put to him that he knew he could not qualify for entry clearance as the spouse of a British national, so he had entered the country illegally with a view to making a false claim for asylum. He denied this. He did not know why his father had not mentioned in his letter that an arrest warrant had been issued after he left the country, and also why his father had not mentioned frequent visits by the authorities to the family home. Both of these claims were made by his aunt.
41. The first arrest had been unlawful, and so it had not been recorded. The second arrest had been lawful, and so it had been recorded. The second arrest was on suspicion of not having an ID card, and the suspicion had been allayed by the production of his Iranian passport containing his residence permit.
42. His family had not complained about the harassment of his sister by the police officer. This was because he had more power than them and nothing would happen. It also would create a public scandal which would impugn the family's honour. The police officer had harassed her on a few other occasions, with the result that his sister had moved to live at his aunt's house in another part of Kuwait. He had carried on living with his parents until his departure from Kuwait. He could not recall when his sister had moved out to live with his aunt. He confirmed that the address of the sender on the DHL envelope was not his parents' address, but was probably the address of a friend of his father's. He did not know why the letter from his father and the birth certificate had been sent from a friend's address, rather than from the family's home address.
43. F was called as a witness, and she adopted as her evidence-in-chief her witness statement which she signed in my presence. She had been born in Iraq on 9 May 1991.

Her family were Iraqi nationals who had resided in Kuwait until Kuwait was invaded by Iraqi forces in 1990. She had been her mother's carer since the age of 17, and she regularly travelled to Kuwait with her mother for holidays. As her mother had been born and raised in Kuwait, she enjoyed visiting her extended family there. It was during one of those visits that F had first met her husband N. Their relationship progressed, and they became closer. N spoke to her in Arabic, a language which she spoke fluently. They got married in secret, except that his sisters knew that they were going to get married. After getting married, she visited him on a regular basis, but they were not living together as a couple because their respective families were not aware of the marriage. On one occasion when she was with him, N seemed really down and upset. N kept reassuring her that there was nothing wrong. She decided to speak to his family, and they said that his sister had been harassed and he tried to save her and as a result he was beaten and detained for twelve days in prison without being charged. Eventually he was released after his father's friend, who had connections with the police and government, intervened. She was really upset and wanted to stay with N in Kuwait during this difficult time. But she had to return back to the United Kingdom because she had been informed by her family that her nephew had been diagnosed with cancer. On or around 23 June 2014 she received a call on her phone, and it was N. He said he was in the United Kingdom and he was accompanied by an agent who provided him with travel documents which he had used to travel to the UK. She was relieved that N was safe because she was aware of the difficulties he was encountering in Kuwait. She had since introduced N to her family, and they had accepted him. They had moved in together, and they were currently residing at an address in London NW8. If N was removed to Kuwait, she would not be able to go with him as her mother was emotionally and mentally dependent on her. She was her mother's registered carer. So she could not leave her mother and move to Kuwait where she had no close ties.

44. Mr Miah referred F to a letter dated 7 October 2010 from a doctor at the Marven Medical Practice addressed To Whom It May Concern. The letter was in respect of Mrs H, date of birth 18 September 1959, who resided at a flat in London SW1. The doctor confirmed that she had known this pleasant lady for a considerable amount of years. She had become heavily dependent on the care of her young daughter who stayed at home and was involved in the washing of her and taking her to the toilet. Mrs H was unable to perform these functions in her home and found it very difficult to mobilise because of her chest and lumbar stenosis problems. She was awaiting a coronary stent because of her debilitating angina.
45. Mr Miah also referred F to a letter at page 27 of the bundle which was from Dr Jalani, associate specialist in rheumatology at Chelsea and Westminster Hospital in London SW10. It was apparent from this letter that Mrs H now resided at a flat in London NW8, and was now registered with a Health Centre in London NW8. Dr Jalani thanked the GP for referring the patient who complained of longstanding back and neck problems for which she had been seen in a pain clinic. He had requested a dedicated MRI scan of the spine and sacroiliac joints. He would review her back in the clinic with the results of the investigations requested today.
46. In cross-examination, F said that she now lived in separate accommodation from her mother. The council had re-housed herself, her husband and their child in separate

accommodation fifteen minutes away from her mother as the previous accommodation had become overcrowded. They had been re-housed last month. She was still receiving a carer's allowance for the care of her mother, and she had now begun a part-time job in a supermarket. She was working sixteen hours a week at £6.50 an hour. The job started last month.

47. She had come with her family to the United Kingdom from Iraq in 1997. She did not know on what basis they had come here, or on what basis they had been allowed to stay. In 2001 she had been issued with her first British passport. She had been born in Baghdad.
48. She had first met N on a visit to Kuwait at the beginning of 2013. It was on the occasion of her second visit to Kuwait in December 2013 that they had undergone an Islamic marriage in a mosque. She also visited Kuwait with her mother in March 2014 for a couple of weeks, but had to go back because she had received news of her nephew's diagnosis of cancer. She did not have her passport with her so as to be able to show the dates when she was in Kuwait. She agreed that her child had been a full-term baby, and she recognised that there was a difficulty with the dates and that prima facie the child could not have been conceived in March 2014, and she was not suggesting that the child had been conceived as late as the end of June 2014. She said that maybe she was in Kuwait in April or May 2014, but she could not recall. She denied that the claimant had arrived in the UK earlier than 20 June 2014. But she was really finding difficulty with the dates. On the occasion of her third visit to Kuwait, she had seen N twice. He told her that he was having problems, but he did not give her any details as he did not want to worry her. She had spoken to one of his sisters, who said he had a problem with an officer who tried to harass his sister. It was put to her that she was lying to assist her husband, and she denied this.
49. At the time that she underwent an Islamic ceremony in Kuwait, she did not have any long-term plans. She had married him in order to be able to have sexual relations with him. When she left Kuwait after her third visit, she thought she might not see him again. Despite the uncertainty over their future together, she had not thought about birth control.

### **Discussion and Findings**

50. Mr Miah submits that the country information and guidance on Kuwaiti Bidoon issued by the Home Office on 3 February 2014 is supportive of his client's claim. Undocumented Bidoon experience discrimination so severe that amounts to persecution (1.1.2). There is evidence that some individuals of other nationalities claim to be Kuwaiti Bidoon in an attempt to gain asylum (1.1.9). The latest country guidance case **NM** has set out what the key document is that determines whether a Bidoon is documented or not. However, there are a range of other types of documentation that Kuwaiti Bidoon might hold which are relevant to determining their nationality. In addition, a Bidoon may hold false ID documents from another nationality (1.1.11). Some individuals may claim to be Bidoon, however, they may be nationals of another country, such as Iraq. These individuals are not stateless (1.1.25). Some individuals may have regularised their status in Kuwait by admitting to having another nationality. The Kuwaiti government

treats these claimants as legal foreign nationals and issues them with civil ID cards. These individuals are not stateless (1.1.26).

51. The documentary evidence indicating that the claimant falls into this latter category (the category of an individual who has regularised his status in Kuwait by admitting to having another nationality) is much more persuasive and compelling than the documentary evidence relied upon as showing that the claimant is an undocumented, and hence stateless, Bidoon.
52. The birth certificate is manifestly unsatisfactory as the original has not been produced, but only a photocopy which must easily disguise a forgery.
53. The letter purporting to come from the claimant's father is typed, and it was not sent from the father's address. But even if credence were to be given to the birth certificate, and thus to the father's Bidoon origins, this would in no way undermine the proposition that the claimant and the rest of his family (including his father) have successfully "admitted" to an Iranian nationality, and thus have been, and continue to be, treated as legal residents by the Kuwaiti authorities.
54. On the claimant's own account, prior to the alleged series of incidents involving a police officer called J, he was able to live and work in Kuwait as a legal resident, and he did not suffer any acts of discrimination or persecution that he would have suffered as an undocumented Bidoon.
55. Accordingly the core claim lacks credibility from the outset, as it is based on the premise that his sister was a vulnerable *undocumented* Bidoon who could be sexually harassed with impunity by a police officer, because of her lack of status. Similarly, the claimant's alleged unlawful detention and ill-treatment in detention is also predicated on the claimant being perceived as an undocumented Bidoon who could be ill-treated with impunity. Neither of these strands of the claim is credible, precisely because the Kuwaiti authorities would perceive the claimant and his sister to be legal residents with full civil rights.
56. Moreover, the claimant's account of the alleged catalyst for his flight from Kuwait is internally inconsistent, and also inconsistent with the account given by his wife. He has departed from the account given in his screening interview (as amended and clarified in subsequent correspondence) as to the length of his two detentions, and generally he has been extraordinarily vague about the timing of the alleged incidents. All three alleged incidents involving the police officer were very significant events in the claimant's life. Even if he personally had difficulty in recalling the precise dates on which each of them occurred, or the precise length of the detentions which ensued, he could have consulted close family members for assistance in jogging his memory. If his account of torture on the occasion of the first detention was true, he would have been severely traumatised and very likely to require medical assistance on his release. But the claimant has provided no medical evidence to support his claimed symptoms on release, which are said to be ongoing. In his oral evidence the claimant indicated that he had remained at home until he left Kuwait, whereas his sister (the one who was being harassed by the police officer) had gone to live with his aunt in order to stay out of the police officer's

way. But previously his case was that it was he who had gone to live with an aunt after the third incident. He did not mention this at all in the course of his oral evidence.

57. The claimant and his wife were in agreement that the child must have been conceived around May 2014, but neither of them was able to give a credible or consistent account of being together in May 2014. I accept that the claimant is the father of F's child, and therefore the most likely explanation is that, having failed to secure entry clearance as a visitor in March 2014, the claimant entered the UK illegally in April or May 2014.
58. For the reasons given above, I find that the claimant has not discharged the burden of proving, even to the lower standard of proof, that the core of his claim is true. There are not substantial grounds for believing that he left Kuwait because he had a genuine, still less well-founded, fear of persecution at the hands of a rogue police officer who was pursuing a vendetta against him for intervening to prevent him from sexually harassing one of his sisters. There are also not substantial grounds for believing that, following his departure, the authorities came to the family home with a warrant for his arrest on account of the claimant having approached the police officer brandishing a metal bar.
59. On the issue of risk on return, there are not substantial grounds for believing that the claimant is, or is perceived to be, an undocumented Bidoon in Kuwait, as opposed to an Iranian national who has legal residence in Kuwait. Accordingly, the claimant does not have a well-founded fear of persecution on return to Kuwait. By the same token there are not substantial grounds for believing there is a real risk of him facing Article 3 ill-treatment on return to Kuwait.
60. Alternatively, the claimant has not rebutted the evidential presumption that he is a national of Iran, and therefore that he can be legally removed to Iran, although he has never lived in Iran.
61. Accordingly, the claimant does not qualify for recognition as a refugee, and he is not otherwise eligible for international protection.
62. He advances an alternative claim under Article 8 ECHR, based on the family life which he has established in the UK with F and their child. As submitted by Mr Jarvis, he is not eligible for leave to remain under the partner route in Appendix FM, as F does not fall to be treated as his partner under Appendix FM. She does not count as his unmarried partner, as they have not been living in a relationship akin to marriage for at least two years. She does not meet the definition of a spouse, because they have not contracted a civil marriage. He can apply for entry clearance from Kuwait to join her here as her fiancé, but he cannot make an in-country application to remain here as her fiancé.
63. In any event, there are not insurmountable obstacles to the claimant carrying on family life with his wife and child in another country, with Kuwait being the obvious destination, and with Iran or Iraq being possible alternatives. It is F's very strong preference not to settle in Kuwait, but she knew when she embarked upon a relationship with him, and when she chose to become pregnant by him, that there was no guarantee that she would be able to carry on married life with him in the country of her choice. The only obstacle of any real substance that she has raised is her role as her mother's carer. But her mother is now living in separate accommodation, so she must be able to cope

independently; or she is coping with the assistance of someone else. Alternatively, it would not be unreasonable to expect F's mother to accompany F to Kuwait. F's mother used to live in Kuwait and she has strong family connections there. As a British national, there is nothing to prevent Mrs H from returning to the UK from time to time to access medical treatment on the NHS. The fact that F's mother has been able to visit Kuwait in recent times with F shows that her medical condition is not so severe as to prevent her from travelling to and from Kuwait.

64. Turning to an Article 8 claim outside the Rules, I accept that questions one and two of the **Razgar** test should be answered in the claimant's favour as the threshold for the engagement of private life rights is relatively low. Questions three and four of the **Razgar** test must be answered in favour of the Secretary of State. On the crucial issue of proportionality, the best interests of the couple's child are a primary consideration. As the child is a British national, he is a qualifying child for the purposes of Section 117B(6) of the 2002 Act. But the child is still very young, and so his best interests lie overwhelmingly in him remaining with his parents wherever they happen to be. Therefore it is reasonable to expect him to go with his parents to Kuwait, if the couple decide to settle in Kuwait.
65. Alternatively, the couple face the reasonable choice of the claimant returning to Kuwait, and making an application for entry clearance from Kuwait. This will lead to a separation of uncertain duration. But it is a reasonable and proportionate outcome in the light of the following: firstly, the claimant does not presently qualify for limited leave to remain on relationship grounds under Appendix FM; secondly, it has not been shown that the claimant can be adequately maintained and accommodated in the United Kingdom without recourse to public funds; and, thirdly, in the light of my primary findings of fact on the asylum claim, the claimant entered illegally in order to carry on a relationship with F. So there is a strong public interest in requiring him to return to Kuwait (or Iran) in order to regularise his status. Alternatively, it is reasonable in all the circumstances for the family to relocate to Kuwait.

### **Notice of Decision**

66. The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the claimant's appeal is dismissed on asylum and human rights grounds.

### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the claimant 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.

Signed

Date

Deputy Upper Tribunal Judge Monson