



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: UI-2022-000211
PA/54269/2021; IA/12664/2021

THE IMMIGRATION ACTS

**Heard at Cardiff Civil Justice Decision & Reasons Promulgated
Centre
On 21 July 2022 On 29 September 2022**

Before

**C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE GRUBB**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**SY
(ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Ms S Cunha, Senior Home Office Presenting Officer
For the Respondent: Mr A Joseph, instructed by NLS Solicitors

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) we make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the respondent (SY). This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to contempt of court proceedings.

2. Although this is an appeal by the Secretary of State, for convenience we will, hereafter, refer to the parties as they appeared before the First-tier Tribunal: SY (appellant) and the Secretary of State for the Home Department (respondent).

Background

3. The Secretary of State appeals against a decision of the First-tier Tribunal (C H O'Rourke) which, in a decision dated 2 February 2020, allowed the appellant's appeal on asylum grounds, humanitarian protection grounds and under the ECHR.
4. The appellant came to the United Kingdom on 10 July 2018 and claimed asylum. That claim was refused by the Secretary of State on 6 February 2019 and his appeal against that decision was dismissed by the First-tier Tribunal on 9 August 2019. He was subsequently refused permission to appeal both by the First-tier Tribunal and the Upper Tribunal and he became appeal rights exhausted on 1 November 2019.
5. On 27 January 2021, further submissions were made to the Secretary of State on behalf of the appellant. He claimed that he was an Iranian national who had been born in Iraq to Iranian refugee parents and was a Christian convert who would be at risk on return. On 10 August 2021, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and under the ECHR. The respondent did not accept that the appellant is an Iranian national but rather determined he is an Iraqi national who would not be at risk on return to Iraq.

The Appeal to the First-tier Tribunal

6. The appellant again appealed to the First-tier Tribunal. In a decision dated 2 February 2022, Judge O'Rourke allowed the appellant's appeal.
7. First, he allowed the appellant's appeal on asylum grounds. He accepted that the appellant was the son of Iranian refugees who was born in a refugee camp in Iraq and that he was "unlikely to have Iraqi citizenship" (see para 20). The judge rejected the appellant's claim to be a practising Christian, although he accepted that the appellant "may have been born a Christian" (para 23). The judge accepted that the appellant would be at risk on return to Iran as a returning Kurd who was the son of Iranian Kurdish refugees (see para 22). Further, the judge found that if returned to Iraq the appellant would not have the required ID documents applying the country guidance decision of SMO & Others (Article 15(c); identity documents) Iraq [2019] UKUT 400 and so would be at risk on return and was likely to be destitute.
8. Applying those findings, the judge allowed the appellant's appeal under the Refugee Convention, on humanitarian protection grounds and under Arts 2 and 3 of the ECHR.

The Respondent's Appeal

9. The Secretary of State appealed against Judge O'Rourke's decision on two grounds. First, the judge had been wrong to allow the appeal both under the Refugee Convention and on humanitarian protection grounds. Secondly, the judge had failed properly to consider whether the appellant was, in fact, an Iraqi national and whether he would be able to obtain relevant ID documents.
10. On 1 March 2022, the First-tier Tribunal (Judge Rodger) granted the Secretary of State permission to appeal.
11. The appeal was listed on 21 July 2022 and we heard oral submissions from Ms Cunha on behalf of the Secretary of State and Mr Joseph on behalf of the appellant.

Discussion

12. As regards the first ground, having found in the appellant's favour on the asylum ground, the judge plainly erred in law in also allowing the appeal on humanitarian protection grounds. The latter basis for allowing the appeal was only open to the judge if, in fact, he had dismissed the appeal on asylum grounds. That follows from paragraph 339C of the Immigration Rules (HC 395 as amended) which provides, so far as relevant, as follows:

"339C. A person will be granted humanitarian protection in the United Kingdom if the Secretary of State is satisfied that:

...

- (ii) they do not qualify as a refugee as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;"

13. On the basis of the judge's findings and decision, the appellant did qualify as a refugee as defined in the 2006 Regulations and so the judge erred in law by also allowing the appeal on humanitarian protection grounds under para 339C.
14. The second ground concerns the asylum appeal and the appellant's claim based upon his being at risk of persecution if returned to his country of nationality or, if he had no country of nationality, his country of habitual residence.
15. The appellant's case was that, as the son of Iranian nationals who were refugees in Iraq, although he was born in Iraq he was an Iranian national. It was by reference to that country that any risk of persecution on return had to be assessed. The Secretary of State's position was that the appellant is a national of Iraq and that it was in relation to return to that country that any risk had to be assessed. It does not seem to have been any part of either party's case that the appellant was stateless and therefore the asylum appeal had to be determined on the basis of any risk in the country of his habitual residence which would, on the evidence before the judge, undoubtedly have been Iraq.

16. The judge made a finding in para 20 that the appellant was “unlikely to be an Iraqi citizen”. The judge did not, however, make a finding as to whether the appellant was, as he claimed, an Iranian national because his parents (in particular his father) was an Iranian national, although the judge did find at para 22 that, if the appellant were returned to Iran, he would be at risk of persecution.
17. During the course of the hearing, we identified with the parties Art 976 of the Iranian Civil Code. That recognises, inter alia, that an Iranian citizen includes a person who is born outside Iran and whose father is Iranian. Having considered this provision, and in the light of the judge’s finding that the appellant is the son of an Iranian father who was a refugee in Iraq where the appellant was born, Ms Cunha accepted that it was clear from the facts that it is likely that the appellant is an Iranian national and she did not ask us to reach any opposite conclusion. She also accepted that the Secretary of State had not challenged the finding in para 22 of the judge’s decision that, if returned to Iran, the appellant would be at risk of persecution. The judge said this:

“In any event, even if he could, somehow, obtain an Iranian passport, he would, as a ‘returning’ Kurd, the child of Iranian Kurdish refugees, be highly suspect by the Iranian authorities and therefore be at risk of persecutory behaviour, as a consequence (**HB (Kurds)**)”.
18. As we have said, Ms Cunha recognised that she was in some difficulty in this appeal if the appellant is indeed an Iranian national as that finding has not been challenged.
19. It seems to us that, on the basis of the judge’s findings and the clear acceptance by the parties that the appellant is in fact an Iranian national, the outcome of this appeal is inevitable. The appellant must succeed on asylum grounds. He is at real risk of persecution for a Convention reason on return to his country of nationality, namely Iran.
20. Consequently, we set aside the judge’s decision on the basis that there was an error of law. We substitute a decision allowing the appellant’s appeal on asylum grounds.

Decision

21. The decision of the First-tier Tribunal to allow the appellant’s appeal involved the making of an error of law. That decision cannot stand and we set it aside.
22. We re-make the decision allowing the appellant’s appeal on asylum grounds and under Art 2 and 3 of the ECHR.

Signed

Andrew Grubb

Judge of the Upper Tribunal
19 August 2022