IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

UI-2022-006449
First-tier Tribunal Nos:
PA/52197/2021
IA/06417/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 25 May 2023

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BSA AKA PSS
NKS AKA HK
(ANONYMITY ORDER MADE)

Respondents

Representation:
For the Appellants/SSHD: Mr S Walker, Home Office Presenting Officer
For the Respondents: Mr D Bazini, Counsel instructed by Legal Justice Solicitors

Heard at Field House on 27 April 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the appellant] (*and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified*) is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant (*and/or other person*). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. I shall refer to the Respondents as the Appellants as they were known before the First-tier Tribunal.

2. The SSHD was granted permission by the First-tier Tribunal (Judge Dainty) to appeal against the decision of the First-tier Tribunal (Judge S Farmer) to allow the Appellants' appeal against the decision of the SSHD on 26 April 2021 to refuse their applications on protection grounds.

3. The first Appellant (hereinafter "the Appellant") says he is PSS, a citizen of Afghanistan born on 1 January 1985. The SSHD's case is that he is BSA, an Indian national born on 12 December 1982. His wife, the second Appellant says she is NKS, a citizen of Afghanistan born on 1 January 1989. The SSHD's case is that she is HK, a citizen of India born on 21 November 1983. The Appellants have two minor daughters born on 26 May 2008 and 3 April 2013.

4. The only issue before the First-tier Tribunal was the identity/nationality of the Appellants. At the hearing the SSHD conceded that should the Appellants be found to be citizens of Afghanistan their claim on protection grounds should be allowed.

5. The Appellants were in possession of Indian passports which they claimed to be false passports. The judge noted that they had been issued with multiple UK visas on their Indian passports. On 21 January 2012 the Appellants were issued with a visit visa until 31 July 2012. Using this they travelled to the UK between 5 and 15 April 2012. On 13 September 2012 they were issued with visit visas until 13 September 2014. The family were issued with visit visas on 6 November 2014 which they used to travel to the UK on three occasions between 2014 and 2016. On 2 March 2017 the family were issued with a UK visit visa which was valid until 2 March 2019. They claimed asylum on 20 June 2017. They claimed to be citizens of Afghanistan and that the Indian passports they had been using to travel were not genuine, in so far as that they were not in their identities.

6. The Appellants relied on copies of their Afghan passports, two Afghan birth certificates relating to the Appellant and his wife issued by the Embassy of Afghanistan in London on 19 June 2017, and a letter from Gurdwara Guru Nanak Darbar stating that the Appellants were being provided with emergency accommodation. There was a letter from Khalsa Diwan Afghanistan charity of 19 June 2017 stating that the Appellants are Afghan nationals.

7. The judge heard oral evidence from the first Appellant through an interpreter. The language was recorded as being Punjabi which the judge noted the Appellant clarified was the Kabuli dialect and that there were no issues with interpretation during the hearing.

8. The judge set out the legal framework identifying that the burden of proof was on the Appellant and he directed himself in relation to the case law concerning Article 8 and the country guidance case of TG and others (Afghan Sikhs persecuted) Afghanistan CG [2015] UKUT 00595.

9. The first Appellant's evidence (set out at paragraph 21 of the decision) was that he is an Afghan national and a member of the Sikh faith. In or around 2000 when

aged 15 he fled Afghanistan for India with the assistance of an agent. The Taliban had already taken his father's shop and threatened to take his family which is why his father sent him away as he was an only child. The first Appellant stayed in India for about five to six months before being taken to Russia with the help of an agent. In order to travel to Russia the agent made him a false Indian passport in the name of BSA, date of birth 12 December 1982. This is because the Appellant was under 18 and would have been unable to obtain a Russian visa. The first Appellant travelled to India in 2005 in the hope of finding his parents but he was unable to locate them. He met the second Appellant in December 2005 similarly a citizen of Afghanistan and a Sikh. She returned with the first Appellant to Russia. She also has an Indian passport in a false identity. He had tried to obtain an Afghan passport in Russia but he was advised that although this was possible, he would have to return to Afghanistan in order to obtain a visa to re-enter Russia. He felt this to be too risky. The Appellants remained in Russia. They ran into problems there in 2017. They no longer felt safe there and he and the family fled with the help of an agent.

10. The SSHD rejected the Appellants claims to be an Afghan nationals. They accepted that he they are members of the Sikh faith, but that they would not be at risk on return to India. The SSHD rejected the Appellant's account of what happened in Russia, but did not suggest that the Appellant could return there. The SSHD proposed to return the family to India.

11. The judge made findings and reached conclusions at paragraphs 31–51. The judge identified that the primary issue for him was to determine the Appellants' nationality. The judge referred to the SSHD's own guidance – "Nationality: disputed and unknown cases" and stated that "if the Home Office asserts the claimant to be a specific nationality other than that claimed, the burden rests with the Home Office to prove that assertion according to the balance of probabilities".

12. The judge noted that the Appellant relied on his Afghan passports, Afghan taskiras and translations and his Afghan birth certificate issued by the Afghan Embassy in London. He also relied on his interview and witness statements. The judge noted that the Indian Citizenship Act 1955 Part 9 states that if a person voluntarily acquires the nationality of another country, he will cease to have the citizenship of India. India does not accept dual nationality. The judge recorded that the Appellant relied on the background evidence which supports the prevalence of fraudulent identity documents from India and the ease with which he was able to acquire these via an agent.

13. The judge found at paragraph 35 that the first Appellant had "remained internally consistent in the details of his account throughout from his interviews, statements and oral evidence".

14. The judge took into account the submissions from the Presenting Officer that the Appellants had lived happily and "without issue" Indian documents for about seventeen years and been able to travel extensively. Moreover, when the first Appellant was asked whether he had ever encountered issues on his Indian documents he said that he had only once been stopped and questioned at Bombay Airport in 2005, however he paid a USD200 bribe and was able to travel through. The HOPO relied on the evidence of extensive travel to support the fact that the Indian passports were genuine. The judge said about this that "I accept that this is compelling evidence that the documents are genuine. However this is

accepted by the appellant, the real issue is whether the identity of the appellant in the document is his real identity".

15. The judge accepted the first Appellant's evidence that he had tried to obtain Afghan documents while in Russia but was told that he would have to return to Afghanistan in order to be issued with a Russian visa so that he could continue to live and work in Russia and that he did not want to risk returning to Afghanistan. The judge accepted this explanation.

16. The judge accepted the first Appellant's evidence concerning why he left Russia in 2017 (see paragraph 39). He accepted the Appellant's account of having been threatened by the Russian mafia. The judge had before him documents establishing that the Appellants' daughter was born in Moscow and a document relating to car registration connected to Moscow. The judge stated that he had not been addressed by the parties "on the allegations of why the appellant left Russia and I therefore find that this is a neutral factor when assessing his credibility".

17. The judge noted the first Appellant's oral evidence which he gave in order to explain how he had obtained Afghan documents. His evidence was that he had made an appointment at the Afghan Embassy in the UK. He took with him his taskira which he stated was an original document given to him by his father when he left Afghanistan in 2000. He used the document and he was interviewed in Dari and provided supporting documents from a Sikh Afghan charity. The Appellant also told the judge that he had relatives in the UK who provided their documents to support his application to the embassy. He was asked to attend the embassy on a second occasion when he was helped to complete the paperwork.

18. The Presenting Officer drew to the judge's attention that the first Appellant's relatives who he claimed helped with the passport application were not called as witnesses. The judge said that he had given careful consideration to the issue. He noted that the Appellant claimed to have family in the UK who are now British citizens. He said at paragraph 41:-

> "I find that the fact they are not present does lead me to question the credibility of the appellant's claim. He did not mention his uncles attending the Embassy in his witness statement. Although he does mention that he has relatives in the UK. It would have been helpful for them to provide evidence to the Tribunal on the appellant's claimed nationality. However, I must ask myself, does the absence of this evidence undermine the appellant's claimed nationality".

19. The judge said at paragraph 42 that the Appellant had lived on false documents for about seventeen years and that he had used them to travel widely as had his wife. He accepted this as a credibility issue. The judge at paragraph 43, in relation to the genuineness of the first Appellant's taskira, that the SSHD had not provided any evidence to counter his claim that it is genuine and that the Afghan authorities were prepared to accept that it was genuine.

20. The SSHD relied on the case of Hussein & Anor (Status of passports: foreign law) Tanzania [2020] UKUT 250. The judge said about this case as follows: -

> "[it] found that 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 that passport. The burden of proving the contrary lies on the claimant in an asylum case. I therefore accept the burden is on the appellant to establish his nationality. The difficulty in the present case is that the appellant has held genuine passports for India and Afghanistan. In respect of the Indian passport he says it does not contain his correct identity and so to that extent it is falsified".

21. At paragraph 45 the judge said that he had "weighed all the points in the balance and considered the evidence in the round". The judge said that he was mindful of the lower threshold that the Appellant must satisfy that he is an Afghan national. The judge said that he was satisfied that the Appellant is an Afghan national and not an Indian national. He said:-

> "I rely on his original Taskira, which was not materially challenged by the respondent, on the internally consistent account given by the appellant and the fact that the Afghan authorities have issued the appellant's Afghan documents and accepted his nationality. I am therefore satisfied that the appellant has discharged the burden on him to show that he is an Afghan national".

22. In relation to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (the 2004 Act) the judge stated as follows:-

> "46. Section 8 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 requires me to take into account as adversely affecting the credibility of the appellant's account any behaviour which I consider was designed or likely to result in concealment of information or to mislead or delay consideration of a claim. In particular this includes failure to produce a passport or production of an invalid passport as if it were valid, destruction of a passport or ticket, failure to answer a question, failure to take advantage of a reasonable opportunity to claim asylum in a safe third country, failure to make a claim promptly or failing to provide a reasonable explanation for these matters.
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> 47. In the present instance I find section 8 does not engage as the appellant did claim asylum reasonably promptly on arrival. I accept his account that he took advice from the Gurdwara and they advised him to claim asylum. I also find that he attempted to obtain his documents from the Embassy promptly on his arrival and this adds to his credibility. I find that the fact he didn't claim asylum in any of the European countries he visited or on prior visits to the UK because he was happily settled in Russia. It was only when he needed to leave Russia that he decided to claim asylum".

23. The judge allowed the appeal and did not go on to consider the appeal under Article 8 ECHR.

The Grounds of Appeal

24. The grounds of appeal assert that the judge made a material misdirection in law by misapplying Hussein & Anor (Status of passports: foreign law) Tanzania [2020]. The grounds set out the following paragraphs of Hussein & Anor:-

> "11. Passports have international recognition as assertions and evidence of nationality. On their face they constitute an address by the authorities of one State to the authorities of another at diplomatic level. The authority in whose name the passport is issued makes demands on the basis that the individual named in the passport is a national of and is entitled to be regarded as a national of the issuing state. Other States recognise that by treating the holder as a national of that State, and, in most circumstances, endorsing the passport to indicate that they have done so, particularly when a national border is crossed. Passports are the lubrication that allows international travel: without a reliable passport system each individual would have to prove identity, nationality and good standing by individualised evidence at every international border.
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> ... 13. Of course the target of these observations is a passport that genuinely has been issued by the named State to the person named in it, and that is why, all over the world and particularly at international borders, such attention has to be given to the detection of forgeries and alterations in passports. A document detected as deceptive will not have the effect of a genuine passport. But the converse is also true: a document not detected as a forgery does have that effect, both at the diplomatic level and in the way its holder is perceived in a country that is not his country of nationality.
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> 14. In the present case, nobody except the appellant and those speaking on his behalf say that there is anything wrong with his Tanzanian passport. It has survived scrutiny on many occasions. The appellant, who says it is not genuine, has no expert evidence in support of that claim, and is not entitled to be regarded as generally credible. His argument that he cannot, by Tanzanian law, be of Tanzanian nationality is unsupported by any evidence; and in any event would also depend on believing him about his actions and activities over the whole of a very long period, which there is no good reason to do: as the judge said, his account is fabricated.
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> 15. There is no reason to think the appellant's passport is not exactly what it appears to be. It is clear evidence that the appellant is a national of Tanzania, and it is evidence at such a level that the Secretary of State is not entitled to treat the appellant as not being a national of Tanzania. It follows that he falls to be treated as a national of Tanzania for the purposes of his asylum claim".

25. Whilst the Appellants state that the Indian passports are not reliable there was no expert evidence in support of that claim and so it should not be regarded as generally credible. It is asserted that the Indian passports had survived scrutiny on many occasions. It is submitted that properly applying the case of Hussein & Anor the SSHD has established beyond the requisite standard of proof, which is the balance of probabilities, that the Appellants are Indian nationals.

26. The second ground is that there is a failure to give adequate reasons for finding that the Appellants are Afghan citizens in view of their claims to have deceived the Russian authorities and the authorities of every country that they have entered relying on false passports. They are not reliable witnesses and will

deceive and change their evidence to suit their aim. The grounds rely on the information that the Appellant gave in various visa applications.

27. It is submitted that in finding that the Appellant has established he is an Afghan national the judge "reverses the burden of proof". The judge recorded at paragraph 43 that the Appellant claims his taskira is genuine and that the Respondent "has not provided evidence to counter this". It is submitted that it is for the Appellant to prove that the documents are reliable and not for the Respondent to prove that they are not. In applying Hussein & Anor the IJ "ought to have found that the Appellant is an Indian national and his Indian passport has survived scrutiny at airports and facilitated extensive travel, his Afghan ID documents have not".

28. The finding that India does not accept dual nationality is not supported with reference to expert evidence which is required properly applying Hussein.

29. The judge erred in finding that s.8 of the 2004 Act is not engaged because the Appellant claimed asylum promptly. This finding does not engage with the issue raised in the Reasons for Refusal Letter in relation to the Appellant having used false documents to facilitate prior entry to the UK.

Submissions

30. I heard oral submissions from the parties. Mr Walker said initially that he relied on the grounds. In submissions he resiled from the grounds relating to s8 of the 2004 Act. He said that he was no longer relying on it. Mr Bazini submitted that the decision of the judge was detailed and thorough. He said that the facts are different to those in Hussein. In this case the First-tier Tribunal accepted that the Indian passports were not in the Appellants' names. There was sufficient evidence to conclude that the Appellants are citizens of Afghanistan. The judge was aware that the Indian passports had been used many times. The Indian passports may be genuine documents, in that they were issued by the Indian authorities, but they do not provide the correct information.

Conclusions

31. The judge did not make an error of law. The SSHD's case as set out in the RFRL was that while the Appellants' Afghan nationality was disputed, if they are Afghan nationals the family's faith would not put them at risk on return there. This was not the position before the First-tier Tribunal. However, the SSHD maintained the position that Indian passports were genuine and the Appellants would be removed to India.

32. The Appellants' claim is that they cannot be returned to India because he and his family are not citizens of India. The Indian passports were applied for by an agent and issued in different identities (presumably on the basis of false documents or a bribe). The judge was mindful of the status of a passport and properly directed himself on the case of Hussein. In Hussein there was one passport and one identity/nationality in issue. This case concerns different identities. The Afghan and Indian passports cannot both be genuine in the sense of being effective because they do not contain the same identity details. The issue of identity was central to the case. The Indian passports may have been genuinely issued by the Indian authorities, but if they do not properly identify the Appellants, they cannot have the effect of genuine passports.

33. The judge was entitled to find the Appellants' evidence credible and attach weight to the Afghan passports and the documents produced to obtain them. The judge took into account that the Appellants had been able to travel on the Indian passports; however, he accepted the evidence about how these passports had come into being. What weight to attach to the evidence was a matter for the judge. The judge throughout the decision reminded himself of the burden of proof. The observations about the Afghan documents do not disclose a misapplication of the burden of proof. The judge resolved issues of conflict. He was entitled to conclude that the true identity of the Appellants was reflected in the Afghan passports. The findings are grounded in the evidence and adequately reasoned. The grounds are an attempt to re-argue the case and a disagreement with the findings.

34. Mr Walker did not pursue the ground relating to s8 of the 2004 Act. The expert issue is not material. The documents contain different details and in those circumstances cannot establish dual nationality.

35. There is no properly identified error of law in the decision of the First-tier Tribunal. The decision to allow the appeal stands.

Notice of Decision

36. The SSHD appeal is dismissed.

Joanna McWilliam

Judge of the Upper Tribunal
Immigration and Asylum Chamber

24 April 2023