



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2024-003458

First-tier Tribunal No: PA/52651/2023

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On the 28 October 2024**

**Before**

**UPPER TRIBUNAL JUDGE O'BRIEN**

**Between**

**AS**  
**(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**Secretary of State for the Home Department**

Respondent

**Representation:**

For the Appellant: Mr P O'Shea of Counsel, instructed by Pride Law Solicitors Ltd

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

**Heard at Field House on 9 October 2024**

**Order Regarding Anonymity**

**Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant 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. Failure to comply with this order could amount to a contempt of court.**

**DECISION AND REASONS**

1. The appellant was born on 1 January 1987 and claims to be a national of Afghanistan. On 6 September 2022, the appellant made further submissions as to why he should be granted refugee status. The respondent refused the appellant's protection claim on 19 April 2023. Amongst other things, the respondent did not accept that the appellant was a national of Afghanistan.

2. After a hearing at Hatton Cross on 16 April 2024, First-tier Tribunal Judge Symes (the judge) dismissed the appellant's appeal. The judge recorded, following concessions by the respondent, that the appeal turned on whether the appellant could establish that he was in fact a national of Afghanistan. However, the judge found on the balance of probabilities that the appellant had not done so.
3. Permission to appeal was granted in the First-tier on 25 July 2024 on the single ground that the judge had applied the wrong standard of proof to the question of nationality. The permission judge stated (without further explanation), 'Noting the guidance of JCK (s32 NABA 2022) [2024] UKUT 00100 it is arguable that the IJ applied the incorrect standard and as such made an error of law.'
4. Before me, Mr O'Shea accepted that s32 of the Nationality and Borders Act 2022 required a decision maker 'first to determine on the balance of probabilities whether the asylum seeker had a characteristic which could cause them to fear persecution for reasons of... nationality...'. However, he argued that the decision maker was then required to revisit the question of nationality applying the lower standard of proof when deciding whether the appellant had a well-founded fear of persecution on those grounds. Whilst Mr O'Shea criticised certain aspects of the judge's analysis, he confirmed that that was purely to emphasise the need for re-assessment of nationality on the lower standard of proof, rather than to argue that the judge had erred in his assessment on the balance of probabilities.
5. Mr Melvin argued that the judge had unarguably correctly applied section 32 and so had an arguably applied the correct standard of proof to the question of the appellants nationality.

### The Law

6. The Nationality and Borders Act 2022 codified (and modified) the way in which decision-makers assess asylum claims made on or after 28 June 2022.
7. Section 30(1) of the Nationality and Borders Act 2022 provides that sections 31 to 35 of that Act apply for the purposes of determining whether a person is a refugee within the meaning of article 1(A)(2) of the refugee convention. However, those provisions only apply to claims made on or after the date of entry into force of s30 (28 June 2022).
8. Section 32 provides that:
  - (1) In deciding for the purposes of Article 1(A)(2) of the Refugee Convention whether an asylum seeker's fear of persecution is well-founded, the following approach is to be taken.
  - (2) The decision-maker must first determine, on the balance of probabilities—
    - (a) whether the asylum seeker has a characteristic which could cause them to fear persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion (or has such a characteristic attributed to them by an actor of persecution), and
    - (b) whether the asylum seeker does in fact fear such persecution in their country of nationality (or in a case where they do not have a nationality, the country of their former habitual residence) as a result of that characteristic.

(See also section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (asylum claims etc: behaviour damaging to claimant's credibility).)

  - (3) Subsection (4) applies if the decision-maker finds that—

- (a) the asylum seeker has a characteristic mentioned in subsection (2)(a) (or has such a characteristic attributed to them), and
- (b) the asylum seeker fears persecution as mentioned in subsection (2)(b).

(4) The decision-maker must determine whether there is a reasonable likelihood that, if the asylum seeker were returned to their country of nationality (or in a case where they do not have a nationality, the country of their former habitual residence)

—

- (a) they would be persecuted as a result of the characteristic mentioned in subsection (2)(a), and
- (b) they would not be protected as mentioned in section 34.

(5) The determination under subsection (4) must also include a consideration of the matter mentioned in section 35 (internal relocation).

9. In JCK at [13] Upper Tribunal Judge Bruce said:

The decision-maker is not required here to consider whether the characteristic, or imputed characteristic, has in fact attracted persecution, or whether it will do so in the future. The simple question is whether the claimant has a protected characteristic which could cause them to fear. In many cases this will be straightforward. Applicants fearing persecution because they have an outwardly obvious characteristic such as their gender or race will have little difficulty in discharging the burden of proving this matter on a balance of probabilities. Other, more opaque, characteristics could be more challenging to discern. Whether someone is gay, or holds a particular religious or political belief is not something that can be seen with the naked eye, or by making windows into souls. It is something that must be evaluated on the evidence in the round, but care should be taken not to automatically reject, at this first stage, a claimed characteristic by reference to the overall credibility of the claim. The focus must be on the characteristics. Thus in this case, the Respondent accepted that the Appellant is a Christian, and a member of the Herero tribe, even though he rejected the claim that he had suffered harm as a result. Put simply the question raised by s32(2)(a) is whether, taking the claim at its highest, there is a Convention reason.

- 10. It is not argued by the appellant that the judge failed to apply JCK correctly. Indeed, I am entirely unclear why the permission judge thought it arguable that JCK had been misapplied (let alone why permission should be given to appeal on a ground which did not appear to have been pleaded).
- 11. It was agreed between the parties that the appeal turned on whether the appellant could establish that he was a national of Afghanistan. In other words, all that needed to be established was the characteristic it was said could give rise to a fear of persecution. The claim to which the appeal related had been made by way of further submissions on 6 September 2022, after the entry into force of ss30-35 NABA. Consequently, the judge was obliged to determine the issue of whether the appellant had a characteristic which could cause them to fear persecution on the grounds of (amongst other things) nationality on the balance of probabilities per s32 NABA. To do that, the judge was required to, and manifestly did, evaluate the evidence in the round per JCK. It is not suggested that the judge was required to take the appellant's claim to be a national of Afghanistan at its highest and manifestly JCK does not require that he should have done so.
- 12. What the appellant does argue is that, because s32 merely provides that a decision-maker should 'first' decide that point on the balance of probabilities, the authorities require that the then go on to decide the point again applying the

lower standard of proof. Mr O'Shea relied on RM (Sierra Leone) [2015] EWCA Civ 541 where, at [35], Underhill LJ said:

What emerges from those cases – and would in truth be clear enough even in the absence of authority – is that what standard of proof applies to the question of an applicant's nationality depends on the legal issue to which it is relevant. If it is relevant to whether he will suffer persecution (whether by reference to the Refugee Convention or article 3), the lesser standard will apply. But if it is relevant to some other issue – such as whether it is in fact possible in practice for him to be returned, and any rights that may accrue if it is not – the standard is the balance of probabilities.

13. However, he was unable to explain what purpose such a double assessment would serve in this case, or at all. Of course, it is correct that, if it had been in issue that the appellant would be at risk on the grounds of nationality if found to be a national of Afghanistan, that issue would have to be decided. Moreover, pursuant to s32(4), that assessment would be undertaken applying the lower standard of proof. However, that was not the case in this appeal.
14. Even if it had been, and the appellant had proved that persons of his claimed characteristic would at real of persecution, he would still have had to prove first that he did in fact have that characteristic. Again, that issue would have had to be decided on the balance of probabilities.
15. In fact, Ms O'Shea's arguments can be dealt with simply. Section 32 itself prescribes what happens after a decision-maker 'first' determines the question of characteristic (and also whether the asylum seeker does in fact fear persecution as a result of that characteristic) on the balance of probabilities per s32(2): they should then decide whether there is a reasonable likelihood of persecution because of that characteristic (s32(4)(a)), whether they would have sufficiency of protection (s32(4)(b)) and whether they could relocate internally (s32(5) and s35). As for the dicta of Underhill LJ in RM (Sierra Leone), they represented the approach taken before Parliament enacted NABA and are not to be followed for claims made on or after 28 June 2022.
16. The judge applied the correct standard of proof to the question of the appellant's nationality and this appeal fails.

### **Notice of Decision**

1. The appeal is dismissed.
2. The decision of the First-tier tribunal did not involve the making of an error of law.

Sean O'Brien

**Upper Tribunal Judge O'Brien**

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**25 October 2024**