



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

Case No.: UI-2024-000942

First-tier Tribunal Nos:  
PA/51401/2023  
LP/02982/2023

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**

On 9<sup>th</sup> of May 2024

**Before**

**UPPER TRIBUNAL JUDGE KAMARA  
DEPUTY UPPER TRIBUNAL JUDGE MONSON**

**Between**

**M S  
(ANONYMITY ORDER MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr David Ball, Counsel instructed by Woodman Laks Associates

For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

**Heard at Field House on 22 April 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 appeals against the decision of First-tier Tribunal Judge Raymond promulgated on 23 January 2024 (“the Decision”). By the Decision, Judge Raymond dismissed the appellant’s appeal against the decision of the respondent made on 15 February 2023 to refuse his fresh claim for asylum that was based on new evidence not previously considered.

### **Relevant Background**

2. The appellant last entered the United Kingdom as a visitor on 29 March 2018, using an Indian passport. On 14 February 2019 the appellant claimed asylum on the ground that he had entered the UK on a false Indian passport; his estranged wife had denounced him to the Indian Police for using false passports; it was true that he had been using false Indian passports without having any lawful entitlement to Indian nationality; and therefore if he was sent back to India he would be at risk of being returned by the Indian authorities to Afghanistan, his true country of nationality, where he would face persecution as a Sikh.
3. The appellant’s asylum claim was refused on 31 July 2020, and his appeal against that refusal was dismissed by First-Tier Tribunal Judge Hussain on 21 June 2021.
4. Judge Hussain accepted that the appellant had been born in Afghanistan as shown by his “*Afghan taskira*”. This was because the details in the taskira were consistent with his Indian passport, including the fact that the passport stated that the appellant had been born in Afghanistan. This might or might not qualify him to be an Afghan national. The appellant had produced an email evidencing his approach to the Afghan Embassy in the UK for the issue to him of an Afghan passport.
5. However, Judge Hussain did not accept the appellant’s parallel claim that he was not also an Indian national, or that he did not hold a genuinely-issued Indian passport. His reasoning was that the appellant had successfully applied for and was issued a UK visit visa in February 2014. The application was made using an Indian passport issued in his own name, which he used to travel to the UK in May 2014. He then returned to India at the end of his visit. He had made two subsequent successful visa applications and visits to the UK in 2015 and 2017. In addition, he had applied for and was issued visas to travel to China and Thailand. He did not believe that the appellant would have been able to do all these things were he not travelling on a genuinely issued passport.
6. Even if the appellant had Afghan nationality by birth, on his own case he fled Afghanistan in 1990 with his family and he had lived in India ever since. It was clear that, at some point, the appellant had acquired Indian

nationality. In addition, he confirmed that his sister here, who had now acquired British citizenship, had legitimately acquired Indian nationality.

7. In conclusion, Judge Hussain held that there was insufficient evidence to rebut the presumption that the appellant had been issued with a genuine Indian passport and that he thus possessed Indian nationality.
8. The appellant became appeal rights-exhausted on 6 July 2021. The appellant lodged further submissions on 3 September 2022. In a covering letter dated 26 August 2022, the appellant's representatives relied upon two pieces of new evidence. The first of these was the appellant's Afghan passport, which had been issued on 23 May 2021, but had not been received by him until January 2022 owing to delays due to the Covid-19 pandemic. The second new item of evidence was an Indian Nationality Expert Report prepared by Mr Shantanu Mohan Puri dated 22 August 2022, which confirmed at paras 26-56 that the acquisition by MS of an Afghan passport was sufficient for him to lose Indian nationality pursuant to section 9 of the Indian Citizenship Act 1955, and that he was no longer an Indian national. Mr Puri also highlighted in his report that fraudulent Indian passports were prevalent in India.
9. In the refusal decision of 15 February 2023, the respondent acknowledged that Mr Puri was a genuine expert on legal matters that could possibly affect the appellant's case in India. In simple terms, Mr Puri stated that now that the appellant had an Afghan passport, his Indian nationality was revoked. He relied upon case law and news articles to arrive at this decision.
10. The appellant's claim hinged on whether or not he could prove that he was an Afghan national. He had provided no explanation as to why, as a person who currently resided in the UK, he had not been able to acquire his passport from the Embassy in London, and had instead travelled to Bonn in Germany to obtain it.
11. The appellant had provided no paperwork to confirm that his Indian nationality had been removed.
12. He claimed to have always been an Afghan national, having been born in Afghanistan. However, he had resided in India since 1990 without any issues relating to his "dual" nationality. He had given no explanation as to why his dual nationality had only become an issue recently. Therefore, it was not accepted that he would be treated any differently on return to India than he had been previously.
13. If he voluntarily chose to disclose his Afghan nationality to the authorities in India, there was no evidence that proved that he would be returned to Afghanistan as a result. Therefore, it was not accepted that he feared return to India for any Convention reason.
14. In addition, consideration had been given to the Indian Consulate Website, where it was stated that a person could renounce their second

nationality and reacquire their Indian citizenship. Therefore, regardless of whether or not he was in receipt of a genuine Afghan passport, he would be able to renounce his Afghan nationality and reapply for Indian citizenship. He had not provided any evidence that would indicate that he would be prohibited from following this process.

15. The bundle of evidence filed by the appellant's solicitors for his appeal against the refusal of his further submissions included at pages 66-68 a letter from the Ministry of External Affairs of the Government of India; and at pages 69-95 an expert report from Dr Zadeh.
16. In the letter from the Ministry of External Affairs dated 11 July 2023, a Section Officer said that an enquiry had been received at their Department regarding the citizenship status of MS born on 10 May 1972. The enquiry raised two questions. The first was whether MS was a citizen of India, and the second was whether the passports bearing numbers A1726636 and H6637644 were issued to MS by the Government of India.
17. The Section Officer confirmed that, according to the Indian Citizenship Act 1955, MS was not a citizen of India by registration or naturalisation. Furthermore, the passports in question were not valid, and were not issued by the Government of India.
18. In his report, Dr Zadeh explained that applications from the UK for Afghan passports were issued in Bonn, Germany. He had checked the contents of the colour scan of the passport issued to MS. It showed the correct components and correct hallmarks of a genuine Afghan passport applied for in London, and issued in Bonn. The appointment at the London Embassy pre-dated the date of issue of the passport in Bonn, and this was a sign of consistency of application procedure. In his expert opinion, the passport was genuine.

### **The Decision of First-tier Tribunal Judge Raymond**

19. The appellant's appeal came before Judge Raymond sitting at Hatton Cross on 19 December 2023. The hearing took place on a face-to-face basis, and both parties were legally represented, with Mr Ball of Counsel appearing on behalf of the appellant. The appellant gave oral evidence, and he was cross-examined by the Presenting Officer.
20. In his findings, the Judge accepted that the taskira could well have formed the basis of the appellant obtaining an Afghan passport on 23 May 2021. However, he found that there was a peculiar feature of the issue of such a passport to the appellant, arising from the real paradox of whether it could have been genuinely issued to him, given that he was a Sikh. This obvious question arose because all the objective evidence showed that the Taliban, who dominated the authorities in Afghanistan, had waged a brutal campaign of oppressive and discriminatory measures against the Afghan Sikh community. Against the backdrop of this objective evidence, it seemed incredible that any Afghan Embassy would have welcomed the appellant with open arms, so as to issue him with an Afghan passport,

ostensibly enabling him to return to a country where the Taliban were known persecutors of Sikhs.

21. At para [21], the Judge said that there was no evidence from either the London or Bonn Embassies to confirm that the passport was properly issued to the appellant.
22. At para [25], the Judge said that the report by Dr Zadeh failed to address the obvious question, which was the elephant in the room, of how and why any official would have issued this passport to an applicant who was very obviously a Sikh.
23. At para [27], the Judge said that because of the incredible feature of the Taliban authorities in effect inviting a Sikh to return to Afghanistan, he found that no reliance could be placed upon the probative value of the passport, even if the passport itself might give every appearance of having been printed off an appropriate passport-printing machine.
24. At para [28], the Judge found that these very serious doubts over the appellant having genuinely acquired Afghan nationality should be seen in the light of similar doubts that attached to his claim that he had never had Indian nationality, which the previous Judge did not accept.
25. At para [44], the Judge said that while Mr Puri may well be right in asserting that corruption was rampant in India - thus facilitating the acquisition of false Indian passports for a measly sum - the other side of the coin was that it would also be relatively easy to obtain in the same way an apparently official confirmation that someone is not an Indian national, such as in the letter from the Ministry of External Affairs, which made no attempt to explain why the appellant was not an Indian national.
26. At para [45], the Judge said that in light of the serial flaws in the evidence relied upon by the appellant, there was no risk of the appellant being returned from India to Afghanistan. There was also no credible basis for considering that the appellant had irretrievably lost his Indian nationality.
27. At para [47], the Judge said there was no credible evidence that the Indian authorities would return a Sikh to face persecution in Afghanistan. At para [48], he said that he therefore agreed with the finding of the previous Judge that the appellant could not qualify as a refugee because he could avail himself of the protection of India, of which he was a national.

### **The Grounds of Appeal to the Upper Tribunal**

28. Mr Ball settled the appellant's grounds of appeal to the Upper Tribunal. Ground 1 was that the Judge had misdirected himself as to the status and effect of the Afghan passport. Ground 2 was that the Judge had failed to give adequate reasons for rejecting the expert evidence as to the authenticity of the Afghan passport. Ground 3 was that the Judge had failed to apply the correct burden and standard of proof on the question

whether the passport was a genuine Afghan passport, and whether the appellant was an Afghan national as claimed.

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

29. On 6 March 2024 First-tier Tribunal Judge Gumsley granted the appellant permission to appeal on all grounds.
30. Judge Gumsley observed that the Decision was (as was accepted) commendably detailed in many areas, and detailed a number of aspects of evidence which plainly weighed against the appellant's assertions in the case in general. However, it was arguable that the Judge had erred in the approach taken to the issue which related to the Afghan passport. Although the points made as to the presumption of nationality arising from possession of a passport of course also applied to the Indian passport, it was arguable that in rejecting the genuineness of the Afghan passport Judge Raymond failed to give any or any adequate weight to the presumption that applied, and to the expert evidence available, and failed to provide adequate reasons for rejecting these aspects of evidence, or affording them little weight. Judge Gumsley continued:

"Further, and of potential greater significant in the context of this case, I consider it is arguable that when weighing all the evidence the FtT Judge was acting on the basis that the Taliban were in control of Afghanistan when it is said the passport was issued, which was a fundamental mistake of fact."

### **The Hearing in the Upper Tribunal**

31. There was no Rule 24 response from the respondent opposing the appeal, and at the outset of the hearing before us to determine whether an error of law was made out, Mr Tufan conceded that the Judge had erred in his approach to the Afghan passport, as he had proceeded on the mistaken basis that the Taliban were in control of Afghanistan at the time that the passport was issued, which was clearly wrong.
32. However, he initially took the position that the error was not material, as the appellant's Indian passport had to be accepted to be genuine, following the previous decision of Judge Hussain, and therefore the Judge had not erred in law in finding that the appellant was a national of India.
33. Mr Ball submitted that the error of law acknowledged by Mr Tufan was plainly material because, as he had set out in the grounds, the effect of the issue of the Afghan passport was that any Indian nationality the appellant had acquired ceased. This was the effect of section 9 of the Indian Citizenship Act 1955 as explained in the expert evidence of Debmalaya Ganguli (Advocate of the Supreme Court of India) and the expert report of Shantanu Puri (Advocate of the Bar Council of Punjab and Haryana). It was the appellant's case that even if Judge Hussain was right and he had acquired Indian nationality, then he subsequently lost it on the issuing of the Afghan passport.

34. As we were satisfied that the error of law conceded by Mr Tufan was material, we invited submissions on the forum in which the decision of the First-tier Tribunal should be remade, and on whether any further evidence was required.
35. Mr Ball submitted that the appeal should be retained in the Upper Tribunal for remaking, and that there was no need for a further hearing or for further evidence. He submitted that we had all the material that we needed to remake the decision.
36. While not disputing the course of action proposed by Mr Ball, Mr Tufan invited us to remake the decision in the respondent's favour on the ground that there was no evidence that the appellant's Indian nationality had been revoked, and that we should treat the appellant as still being deemed by the Indian authorities to be an Indian national, and thereby returnable to India.
37. In reply, Mr Ball submitted that it was absurd to suggest that the appellant was required to go to the Indian Embassy to obtain proof that he was not an Indian national, and so was not returnable to India. His absence of Indian nationality was established on the evidence before us.
38. We agreed to retain the appeal for remaking, and we reserved our decision as to how the decision under appeal should be remade.

### **Discussion and Conclusions**

39. Although the respondent concedes that Judge Raymond erred in law, it is helpful to analyse the extent of his error, as this has a material bearing on the process that is required to remake the decision.
40. It is clear from the Judge's line of reasoning that the main ground on which he was incredulous about the appellant having been issued with a genuine Afghan passport was his mistaken understanding that the Taliban were in control of Afghanistan at the material time, and therefore he could not believe that Taliban-controlled Embassy staff could have issued him with a passport, given that he was a Sikh. The other way the Judge put it was that because Afghanistan was governed by a criminal regime consisting of thugs, gangsters and extortioners, it was effectively impossible to place reliance on any documentation produced by such a regime, including documentation ostensibly produced by Embassy staff.
41. As is submitted in Ground 3, the Judge thereby subverted and misapplied the standard of proof. The Judge was clearly wrong to hold that because the Taliban were thugs and gangsters, any Embassy staff were by extension thugs and gangsters. In addition, the Judge's reasoning was predicated on a mistake of fact amounting to a material error of law, because at the time that the passport was issued on 23 May 2021, Afghanistan had not yet been taken over by the Taliban. As set out in the Country Policy Information Note before the Judge, the Taliban did not assume *de facto* control of the country until 15 August 2021.

42. In addition to Ground 3 being made out, as is accepted by Mr Tufan, we consider that Grounds 1 and 2 are also made out.
43. As to Ground 1, the Judge failed to recognise that, in the absence of evidence that the passport was forged, the appellant had to be regarded as a national of Afghanistan as passports have international recognition as assertions and evidence of nationality. As is stated in the headnote of *Hussein & Anor (Status of passports: foreign law)* UKUT 00250 (IAC):
- “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.”
44. As to Ground 2, the respondent did not allege in the refusal decision that the passport had been forged or altered. The respondent questioned its validity on the mistaken understanding that the appellant had travelled to Bonn to obtain it, rather than the passport being issued by the Aghan Embassy in London. However, the evidence filed for the appeal included uncontroverted expert evidence from Dr Zadeh confirming the passport’s authenticity and explaining why the passport had been issued in Bonn, despite the appellant applying for it in London. The only reason given by the Judge for rejecting Dr Zadeh’s evidence was his disbelief that Embassy staff would have issued a passport to a Sikh, and he was clearly wrong to reject Dr Zadeh’s evidence on this basis.
45. The upshot is that, as we indicated at the hearing, the decision of the First-tier Tribunal is vitiated by material errors of law such that it must be set aside in its entirety, with none of the Judge’s findings of fact being preserved.
46. On the issue of remaking, our starting point is that the appellant has established on the balance of probabilities that he is an Afghan national who holds a genuinely issued Afghan passport. The concerns raised in the refusal decision about how and where the appellant obtained the passport have been adequately addressed in the expert evidence of Dr Zadeh, and Mr Tufan has not sought to persuade us that there remains any genuine doubt about the appellant holding a genuine Afghan passport and being genuinely of Afghan nationality. Our finding on this issue is in line with the finding of fact made by Judge Hussain, who accepted that the appellant might well be of Afghan nationality by birth.
47. On the issue of whether the appellant does not have Indian nationality, we accept that the appellant has three main obstacles to surmount. The first is the finding by Judge Hussain that the appellant is an Indian national; the second is the presumption inherent in the appellant being a holder of an apparently valid Indian passport (albeit that its validity is now impugned by the Indian Ministry of External Affairs); and the third is the fact that the appellant has, on his own case, managed to reside in India from 1990 to 2018 and has successfully travelled in and out of India for many years as an Indian national.



48. However, we consider that the appellant has brought forward significant new evidence that was not before Judge Hussain, which has the effect of transforming the landscape.
49. In effect, the only argument that Mr Tufan is left with is the argument that the appellant's loss of Indian nationality is still theoretical, as the Indian authorities do not know about it. We are satisfied that the thrust of the uncontroverted expert evidence from Debmalya Ganguli (Advocate of the Supreme Court of India) and Shantanu Puri (Advocate of the Bar Council of Punjab and Haryana) is that, by obtaining a validly issued Afghan passport, the appellant has already lost his Indian nationality - if he ever had it in the first place, which is very doubtful given what is said by the Ministry of External Affairs - and we are not persuaded that the appellant needs to take a further step to prove that he is not an Indian national.
50. We also do not consider that as a condition precedent of claiming refugee status the Appellant is under an obligation to renounce his Afghan citizenship with a view to acquiring or re-acquiring Indian citizenship.
51. Moreover, on the evidence cited in the refusal decision, the appellant would not be eligible to register as an Indian citizen following such a renunciation, as he would not be an individual who has ordinarily resided in India for seven years before making the application. The appellant ceased to reside at all in India when he came here in March 2018, which is now over six years ago.
52. Accordingly, the appellant qualifies for recognition as a refugee, as he is outside the country of his nationality, and he has a well-founded fear of persecution on return to his country of nationality, Afghanistan, for a Convention reason. By the same token, there are substantial grounds for believing that in the event of his enforced return from the UK to Afghanistan, the appellant would face treatment of such severity as to cross the threshold of Article 3 ECHR.

### **Notice of Decision**

**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:**

**This appeal is allowed on asylum and human rights (Article 3 ECHR) grounds.**

### **Anonymity**

The First-tier Tribunal made an anonymity order in favour of the appellant, and we consider that it is appropriate that the appellant continues to be protected by anonymity for the purposes of these proceedings in the Upper Tribunal.

Appeal Case Number: UI-2024-000942  
First-tier Tribunal Nos: PA/51401/2023  
LP/02982/2023

Andrew Monson

Deputy Judge of the Upper Tribunal  
Immigration and Asylum Chamber  
7 May 2024