Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00099/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 January 2019	**On 1 April 2019**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

NA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A. Adebayo, Solicitor
For the Respondent: Ms S. Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal comes back before me following a hearing on 21 September 2018 which resulted in my finding that the First-tier Tribunal ("FtT") erred in law in its decision on the appellant's appeal, such as to require its decision to be set aside. The hearing before me is for the re-making of the decision.

2. The decision promulgated after the hearing before me on 21 September 2018 is attached as an annex to this decision. It is headed "Decision and

Directions" and I shall refer to it otherwise as the error of law decision. It is convenient at this point to quote the opening paragraphs of the error of law decision which explains the background to the appeal as follows:

> "1. The appellant claims to be an undocumented Bidoon from Kuwait although the respondent contends that he is from Iraq and whose identity is other than that he has given.
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> 2. He came to the UK in July 2011 and claimed asylum the day after his arrival. He was granted refugee status as an undocumented Bidoon from Kuwait on 20 September 2011 with leave to remain granted until 19 September 2016. He was subsequently granted indefinite leave to remain ("ILR").
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> 3. However, on 20 July 2017 a decision was made to revoke his refugee status pursuant to paragraph 339AB of the Immigration Rules and to revoke his ILR pursuant to s.76(2)(a) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") (wrongly referred to as s. 76(2)(A) of the Immigration Rules in the First-tier Tribunal Judge's and the respondent's decisions).
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> 4. The appellant appealed against those decisions and his appeal came before First-tier Tribunal Judge S J Clarke ("the FtJ") on 19 April 2018 which resulted in the appeal being dismissed on all grounds. Permission to appeal in relation to the FtJ's decision [having been granted], the appeal came before me.
>
> 5. The further background to the appeal is that on 29 November 2012 the appellant's spouse and six children made applications for entry clearance for family reunion via Amman in Jordan, which applications the appellant sponsored. Those applications were refused on 27 February 2013. The FtJ's decision records that the appeals against those decisions were allowed but the applications were refused again on 6 July 2017 on the basis that the appellants (in relation to the entry clearance applications) were Iraqi nationals and not Kuwaiti Bidoons as was claimed.
>
> 6. The respondent's decision, which is the subject matter of this appellant's appeal, refers to the respondent being in receipt of evidence to the effect that the appellant is not a Kuwaiti Bidoon but an Iraqi national."

3. In relation to certain evidence which the respondent contended, and still contends, should not be disclosed to the appellant, I concluded that the FtT erred in its consideration of an application made under s.108 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). Anticipating that at the re-making of the decision the respondent would similarly seek to withhold disclosure of that evidence, I said the following and gave the following directions, amongst others:

> "42. The following directions are made to which the parties are to have careful regard.
>
> DIRECTIONS
>
> (a) No later than 7 days before the next date of hearing the respondent is to notify the Tribunal and the appellant, in writing, as to whether it is proposed to make an application

under s.108 of the Nationality, Immigration and Asylum Act 2002 and setting out the legal and factual basis upon which the application is to be made.

(b) The respondent is to note that in default of compliance with direction (a) above, the Tribunal may very well decide to refuse to consider any s.108 application."

S.108/rule 14 application

4. On the day of the hearing for the re-making of the decision I was provided with a written application on behalf of the respondent to withhold disclosure of the same evidence which was in issue before the FtT. The application is dated 17 January 2019. Mr Adebayo accepted that it had been e-mailed to him, or his practice, on the evening before the hearing.

5. The application accepts that it was not made in compliance with my directions, that is to say that it should have been provided no later than seven days before the hearing. The explanation for non-compliance with that direction was that the Presenting Officer did not comply with the direction "due to being in preparation for maternity leave". It then states that due to "internal procedure and allocation of resources" the Presenting Officer attending the resumed hearing was unable to address the failed compliance until 17 January.

6. The application continues on the basis that the s.108 application is renewed, as follows. Firstly, that the documents relied on are central to discharging the respondent's burden of proof to the effect that the appellant made a material misrepresentation when applying for asylum as an undocumented Kuwaiti Bidoon. Secondly, that the misrepresentation represents a forgery intended to mislead the respondent into providing him with asylum. Thirdly, that the disclosure of the documents would be contrary to the public interest "because they would expose a member of the public who in good faith provided the evidence" (sic). Fourthly, that disclosure would also prejudice the respondent's position in relation to future matters to be investigated. Fifthly, that it was in the public interest to investigate such matters to avoid fraudulent applications.

7. The application continues that in the alternative an order was sought prohibiting disclosure of the specified documents pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules ("the Rules") 2008.

8. Ms Cunha reiterated the explanation for the lateness of the application but her position was that in fact the s.108 application was no longer pursued, it being accepted that on the basis of what I said in my error of law decision the respondent was not entitled to rely on s.108. Thus, the application was put on the basis of rule 14 only.

9. Initially, Ms Cunha said that the application related to a document examination report, and to the other evidence which was considered by the FtT. However, as I pointed out, the document examination report was

already disclosed in the respondent's bundle, and indeed is referred to in the FtT's decision. In those circumstances the application was confined to the other material, namely that which was considered by the FtT.

10. As is clear from my directions that I issued following the initial hearing, the respondent was on notice that in default of compliance with the direction as to notification of the application within the specified time limit I may very well decide to refuse to consider any application for non-disclosure. My reference in those directions to s.108 reflects the fact that that was how the argument was previously framed but the directions plainly covered any non-disclosure application in relation to the same material.

11. I decided to refuse to entertain the non-disclosure application for the following reasons. Firstly, my directions were not complied with in terms of the timeliness of notification of the application, both to the Tribunal and to the appellant's representatives. Secondly, I was not satisfied that the explanation for non-compliance was a satisfactory one. I considered that it was a matter of great significance to withhold disclosure of evidence from one party to the proceedings and thus the timely notification of such an application was very important. Fourthly, contrary to my directions, the basis of the application was not properly explained in the written application put before me on the day of the hearing. I was not satisfied that the legal and factual basis for the application was properly set out. For example, the application sought to resurrect the s.108 application which I had already ruled in the error of law decision was misconceived, for the reasons I explained.

12. In addition, the basis upon which it was sought to invoke rule 14 was not properly delineated, for example no consideration appeared to have been given to whether the information should be disclosed to the appellant's representative, as distinct from it being disclosed to the appellant. Furthermore, rule 14(2)(a) requires the Tribunal to be satisfied that disclosure would be likely to cause the person concerned or some other person serious harm. Although Ms Cunha suggested that it was implicit that serious harm would be caused in this case, that again was not a matter that was addressed in the written application in terms of its application of rule 14. Lastly, I was not satisfied that in all the circumstances it was in the interests of justice to entertain the application.

The oral evidence

13. In examination-in-chief the appellant adopted his witness statements. He said that he was not an Iraqi national and the Iraqi ID card (K6 of the respondent's bundle and page 7 of the appellant's bundle) does not bear his photograph. He identified photographs showing him in front of the Iraqi Embassy in London (where he says in his witness statement he went on 16 April 2018 in order to be interviewed).

14. In cross-examination he said that that was the first time that he went to the Iraqi Embassy. As to whether he had ever been to Iraq, he said that

he went on a visit in 2004, to visit the Holy Shrines. He went via Jordan and then to Iraq. As to how he secured entry to Iraq, he had a passport from London. He agreed that he had used a British passport to enter Iraq. However, eventually it was established by agreement between the parties that the appellant does not have a British passport and is not a British citizen. The appellant clarified that he went in 2014 rather than 2004. The document he used was a travel document.

15. He knows that it was 2014 that he visited Iraq because he remembers. In 2017 he applied for a travel document to go to Greece. He had applied for indefinite leave to remain at that time and for what he described as a different kind of travel document.

16. His family went to Jordan on false Iraqi passports. He was not aware of it at that time but his wife was in touch with an agent who arranged it.

17. The appellant accepted that the documents with which his wife and other family members applied for entry clearance were false. They had informed the British Embassy in Amman who had confirmed that they were false. His family left Kuwait and then went to Syria. However, the war in Syria meant that the embassy was closed. They then returned to Iraq and then to Jordan.

18. Asked why his family did not obtain a false Kuwaiti or Jordanian passport to enter Jordan, he said that it was not possible to obtain false Kuwaiti or Jordanian passports. However, there are plenty of false Iraqi passports available. He rejected the suggestion that the Iraqi passports that his family had were genuine; they were false.

19. He came to the UK directly from Kuwait, with a non-Kuwaiti false passport. It was a European passport which the agent provided but he does not know which country it related to. That was not the same agent who helped his wife. His Kuwaiti friend, Turkey Al Hazza, paid the agent as he did not have money to pay. The same Kuwaiti friend paid the agent on behalf of his wife.

20. There was no re-examination. In answer to my questions he said that the ID card had been shown to him by his lawyer. The photograph does not look like him. He could not see very clearly in any event because his vision is not good.

21. One of the appellant's sons, whom I shall identify as AONA, gave evidence through an interpreter who said that the language was Arabic, Kuwaiti dialect. He adopted his witness statement in examination-in-chief. He too rejected the suggestion that the appellant is from Iraq, stating that he had nothing to do with Iraq, was born in Kuwait and is a Kuwaiti citizen without formal ID.

22. In cross-examination he said that he came to the UK on 7 July 2015 through France to Dover. He had never visited Iraq and has no connection with Iraq. As to the appellant, he had never heard that he had visited Iraq.

23. As to whether the appellant had ever left the UK since arriving in 2011, he had not. He had applied for asylum in the UK. Nor has he, the witness, travelled out of the UK. He is still studying English.

24. When he came to the UK via France he did not use any passport. He came on a lorry and police arrested him. He had no documents with him. They used smugglers who have their own ways. He was young at that time. They obtained photographs from them and used false passports. Because they were young they did not carry passports. They do not have any type of documents. They are called Bidoons from Kuwait. As to whether it would have been easier to obtain a false Kuwaiti passport with which to travel, he does not know. It depends on the smuggler. It may be that it was impossible to get a Kuwaiti passport.

25. Shown the ID card which purports to have a photograph of the appellant on it, the witness said that the photograph was not clear. It was not his father, the appellant.

26. Referred to a translation of that same identity card, he said that he recognised the name [ONO], stating that that is his father's name (although then giving the appellant's last name as it appears on the Tribunal's documents). Asked about another name on the translation of the ID card, [NH], he did not know the name. As to the name [MG], that is his mother. He has not seen the person named as [SM]. He then said that his father had married more than once and in answer to a question from me said that [SM] is his father's wife.

27. Further cross-examined he said that he did not know his father's date of birth but he is about 70 years of age.

28. In re-examination he said that since coming to the UK his father had gone to Greece to visit his, the witness's, mother but his mother is now in the UK.

29. I then asked him why he had earlier said that the appellant had never travelled out of the UK. He said that he thought he was being asked whether he had left the UK to apply for asylum in another country.

30. A witness whom I shall identify as KONA also gave evidence through the interpreter who again said that the language was Arabic, Kuwaiti dialect. The witness adopted his witness statements in examination-in-chief.

31. I raised with the witness a question in relation to the spelling of his surname regarding whether there is or is not an 'A' at the end of the last name. The matter having been explored, no issue was raised in respect of it on behalf of the respondent and it appears to me that the difference in spelling between documents is likely to be a matter of transliteration.

32. The witness confirmed that the appellant is his father. He denied that the appellant is an Iraqi, saying that he is a non-documented Bidoon, like he is, from Kuwait.

33. Asked about names on the translation of the ID card, he said that he did not know who [ONO] was. As to another name (under the section "Spouse's Name") he said that that is his father's wife, [MG], his mother. The other name under that section, [SM], he initially said was his mother but she had died. The court interpreter indicated that the appellant had said that the name was [SHM], spelt slightly differently. The witness then clarified that [MG] was his father's wife, although they call her mother. He and his brother, the witness AONA, had different mothers.

34. In cross-examination he said that he had come to the UK from Kuwait through France. The first step was from Kuwait to Turkey using a false passport. He did not know the nationality on the passport because he is illiterate.

35. The next witness, whom I shall identify as ASA, also gave evidence in Arabic in the Kuwaiti dialect. He adopted his witness statement in examination-in-chief. He said that the appellant is from Kuwait. As to the Home Office saying that he is from Iraq, he was living with them in Kuwait and is a Bidoon like they are. He did not mean that they were living in the same house, just that he was living in Kuwait.

36. In cross-examination he said that he was living in Sulibiyah and he had known him since 2010. He then said that he had known him since 2008. He does not know when the appellant came to the UK.

37. As to how he knows the appellant, he is a friend of his son, KONA, who had just given evidence. He had visited the family and knew them very well. KONA's mother is called [S]. KONA told him that she was dead.

38. His mother married again and he was told that her name is [M].

39. He does not recognise the photograph of the person on the ID card. He did not think that it looked like the appellant.

Submissions

40. Ms Cunha relied on the respondent's decision dated 20 July 2017. It was submitted that the appellant had used misrepresentations to suggest that he was an undocumented Kuwaiti Bidoon. The document examination report indicated that the Iraqi passports used by the appellant's family with applications for entry clearance were genuine.

41. The evidence given at the hearing was inconsistent. The appellant had said that he went to Iraq in 2014 but other family members did not support that part of his evidence and the appellant did not say that he went to Greece.

42. Ms Cunha referred at this point to what was said to be a lost property report indicating that the appellant had reported his travel document lost. However, that report was not relied on because it was accepted that it had not been disclosed to the appellant's representatives and had not formed part of the respondent's case hitherto. It was nevertheless maintained that there was inconsistency in terms of whether the appellant travelled to Iraq or Greece, and when. The appellant's evidence on this was inconsistent it was submitted. Furthermore, it was not clear how he was able to travel in 2014 if he was not granted refugee status until 2011 and could not apply for a travel document until five years later.

43. It was further questioned as to why the family would procure false Iraqi passports when they intended to go to Syria or Turkey, rather than Kuwaiti or Jordanian passports.

44. As regards the letter from the Kuwaiti Community Association, no one from that organisation attended and the letter should therefore be afforded little weight.

45. In relation to the ID card, although the appellant says that the photograph on it is not of him, it does have his spouse's details on it, although it was accepted on behalf of the respondent that the photograph is unclear and that a colour copy had been asked for. Nevertheless, the translation has key facts which are true.

46. In his submissions Mr Adebayo accepted that I ought to consider the issue of cancellation of refugee status with reference to the UNHCR's Note on the Cancellation of Refugee Status of 22 November 2004. He relied on his skeleton argument put before the FtT.

47. So far as the ID card is concerned, it is not known how the respondent obtained it. In any event, even the respondent's decision letter dated 20 July 2017 states on page 6 that that ID card is insufficient to establish his true identity and thus discharge the respondent's burden of proof.

48. In relation to the letter from the Ministry of Foreign Affairs relied on by the respondent, only the translation has been provided and even that is not signed. The original has not been produced and nor was it provided at the hearing before the FtT or subsequently. Where it states that it confirms "the credibility of the ID card", it is not clear what that means.

49. So far as the document examination report is concerned, it refers to the date of the check as being 29 December 2014 although for some reason the report was not written until 16 November 2015. Furthermore, it is not clear how the respondent was able to examine any original passports since the appellant's family members never provided them to the respondent.

50. In any event, the evidence is that Iraqi passports are easy to forge. I was referred to background material in that respect. Likewise in relation to

false Iraqi ID cards. The evidence is that an ID card is needed to obtain a passport.

51. When I enquired as to whether it was now being said on behalf of the appellant that he accepted that the ID card was his, but it was false, and used in order to obtain the false Iraqi passports for his family, it was then submitted that his case was that it was not his photograph on the ID card but if it was it was used to obtain false Iraqi passports. The further submission was to the effect that another false ID card could have been used to obtain the passports, not the one relied on by the respondent.

52. In terms of whether the document examination report does in fact demonstrate that the Iraqi passports were (somehow) obtained by the respondent, Mr Adebayo submitted that it was not clear how they were obtained.

53. I was referred to answers given by the appellant in his asylum and screening interviews which, it was suggested, indicated that he was an undocumented Kuwaiti Bidoon, and which answers prompted the respondent to grant him refugee status.

54. Similarly, the letter from the Kuwait Community Association was relied on, and the fact that two of the appellant's sons were accepted, after appeals, as being undocumented Kuwaiti Bidoons. Likewise, ASA was found to be credible in his appeal. The decision in *Devaseelan* was also relied on in this context.

Assessment and Conclusions

55. S.76(2)(a) of the 2002 Act provides that the Secretary of State may revoke a person's indefinite leave to enter or remain in the United Kingdom if the leave was obtained by deception.

56. The relevant Immigration Rules as they applied at the date of the decision in question provide as follows:

> **"Revocation or refusal to renew a grant of refugee status**
>
> 338A. A person's grant of refugee status under paragraph 334 shall be revoked or not renewed if any of paragraphs 339A to 339AB apply. A person's grant of refugee status under paragraph 334 may be revoked or not renewed if paragraph 339AC applies.
>
> ...
>
> **Misrepresentation**
>
> 339AB. This paragraph applies where the Secretary of State is satisfied that the person's misrepresentation or omission of facts, including the use of false documents, were decisive for the grant of refugee status."

57. In the UNHCR letter dated 20 June 2016, in response to the respondent's letter indicating an intention to cancel the appellant's refugee status, there is reference to the UNHCR's Note on the Cancellation of Refugee Status dated 22 November 2004. At [20] of that document it states the following:

> "Where fraud is considered as the ground for cancellation, States' legislation and jurisprudence consistently require the presence of all three of the following elements:
>
> (a) objectively incorrect statements by the applicant;
>
> (b) causality between these statements and the refugee status determination; and
>
> (c) intention to mislead by the applicant."

58. It is clear, and not disputed on behalf of the respondent, that the burden of proof rests upon the respondent to establish the basis for the cancellation of refugee status.

59. There are two letters of decision from the respondent, the first dated 20 July 2017 is headed "Revocation of Refugee Status". That gives the detailed reasons for the decision to revoke the appellant's indefinite leave to remain ("ILR") and his refugee status. The decision dated 24 July 2017 is headed "Notice of the Immigration Decision". That refers to the revocation of ILR and refugee status but goes on to deal with human rights in terms of article 8, private and family life.

60. In submissions before me on behalf of the appellant it was initially suggested that the passports of the appellant's family members could not have been examined because no passports were provided to the respondent. This submission evolved into the suggestion that it was not clear how any such passports came into the respondent's possession. However, as I indicated in the course of submissions the only conclusion to be drawn from that submission was that the author of the document examination report was either mistaken in providing the report or was not telling the truth. With all due respect to Mr Adebayo, both contentions are patently absurd. There obviously was an examination of the passports provided by the appellant's family members and the conclusion obviously was that they were genuine passports. That conclusion was based on an examination, it would appear, of genuine examples, not only of Iraqi passports but of the entry and departure stamps in them.

61. Equally, the position on behalf of the appellant put before me in submissions in relation to the Iraqi ID card is similarly problematic for the appellant. On the one hand it is said that an Iraqi ID card is necessary to obtain a passport, and there is background evidence which tends to support that, but on the other hand that the Iraqi ID card relied on by the respondent is not his and does not bear his photograph. Those positions are not absolutely inconsistent but as near to inconsistent as makes no difference. In relation to the ID card, the respondent's decision dated 20 July 2017 refers on page 5 to the appellant having said, or it having been

said on his behalf, in "mitigation" dated 7 April 2016, that the agent provided forged passports for the family "and a forged ID card for yourself". It goes onto state that the appellant claimed to have been unaware that his wife had arranged this on his behalf. Although I have not seen any written representations made on behalf of the appellant dated 7 April 2016, that aspect of the decision letter has not been disputed on behalf of the appellant.

62. I bear in mind that a colour copy of that ID card had been requested on behalf of the appellant and even now has not been provided by the respondent. However, it is clear from the evidence of the appellant's sons, and from that of the supporting witness, that the translation of the ID card contains details of the appellant's spouses, which each of his sons respectively, identified as their mother. Regardless therefore, of what could be said about the photograph in terms of its clarity or age, there is sufficient information in the translation to link the appellant to the Iraqi ID card.

63. Furthermore, notwithstanding that each of the witnesses, including the appellant, denied any resemblance between the photograph on the ID card and the appellant, for my part I consider that there is a resemblance, even accepting that the photograph is said to have been taken some 13 years ago.

64. The appellant's evidence was that there was no resemblance and that in any event he was unable to see it clearly because of poor eyesight. Whether or not the supporting witnesses genuinely believe there to be no resemblance, or whether the appellant himself was not fully aware of what ID card photograph was put before him, matters not. As I have indicated, I am satisfied that there is a resemblance. That resemblance can, incidentally, also be seen from comparing the copy photograph on the ID card in the appellant's bundle at page 7 with the photograph of the appellant outside the Iraqi Embassy at page 8A. Admittedly the photograph on the copy of the ID card is not very clear, but the resemblance is in my view unmistakable. That, combined with the details on the ID card to which I have already referred and which match those of the appellant's spouses, satisfies me that the Iraqi ID card does relate to the appellant. Whether or not it is a false document is another matter.

65. The appellant relies on the UNHCR document dated 18 February 2016 in relation to the availability of fraudulent identification documents, including passports and national identity cards, starting at page 59 of the appellant's bundle. It states in paragraph 1 that there is a high percentage of Iraqi documents that are found to be false or counterfeit. At paragraph 4.1 it refers to Iraqi passports bought on the black market as costing around US$100 to US$300 depending on the quality of the false documents. There is reference to a Landinfo Report stating that according to Norway's police authorities:

> "Iraqi passports are relatively easy to manipulate…one method of forgery has been to take out the personal page in a genuine passport and replace one of the layers of the page with the new one."

At paragraph 4.2 the Landinfo Report states that false ID cards can be purchased on the open market at a very low price and that many people do this to save time since it can take several months to get the card issued properly.

66. To some degree at least, the respondent deals with the issue of the availability of false Iraqi passports by the fact of the document examination report. However, the detail in that report is sparse. The conclusion that the Iraqi passports are genuine, unaltered documents is stated to be "Based on comparisons with known genuine examples". It refers to the immigration entry and departure stamps also being compared to known genuine examples and refers to the authorities of Jordan and Iraq also having concluded that the passports were genuine. However, in relation to the comparison points, no detail is given. Whether or not such information is sensitive in terms of disclosure is not stated, and no such assertion is made on behalf of the respondent. Furthermore, there is little basis for the assertion that the Jordanian and Iraqi authorities concluded that the passports were genuine simply by reason of there being entry and departure stamps in them. Again, the points of comparison are not stated. In terms of the entry and departure stamps, it is reasonable to conclude that false Iraqi passports do bear comparison with genuine documents, quite simply so that they will be accepted as genuine.

67. The document examination report is evidence in support of the respondent's case, but it has the limitations to which I have referred.

68. So far as the Iraqi ID card is concerned, I bear in mind the translation of the letter said to be from the Ministry of Foreign Affairs of Iraq, dated 30 March 2017. However, even now the Arabic version of that document has not been provided by the respondent and there is no explanation for that fact. The letter states that "We are honoured to confirm the credibility" of the ID card, with the number given. That to my mind is not an altogether satisfactory way of expressing a conclusion that the document is a genuine one. The translation of the letter from the Ministry of Foreign Affairs gives the date of the card as 11 October 2005 but the translation of the card itself states that the year is not clear, although it gives the same 11 October date.

69. The witness ASA has been found to be an undocumented Kuwaiti Bidoon, his appeal in January 2017 having been determined in his favour on that issue. The evidence before me from that witness to the effect that he knows the appellant from Kuwait undermines the respondent's case that the appellant is Iraqi.

70. Likewise, in relation to KONA, although the copy of the FtT's determination of his appeal in the appellant's bundle is incomplete, the first and title page being missing, the letter from the FtT enclosing a copy of the determination does give that witness's name, although without the first page of the determination it cannot be said for certain that it relates to that particular witness. On the other hand, there are details at, for example, [5]-[6] of the decision, which do tie it to the witness, although not categorically. In any event, it was not disputed on behalf of the respondent but that that witness has been found by the FtT also to be an undocumented Kuwaiti Bidoon. Of course, the significance of that finding is that he is one of the appellant's sons.

71. On the other hand, in relation to that witness, I note from [5] of the FtT's decision that the conclusion that he is an undocumented Bidoon itself relies in part on the fact that the *appellant's* claim to be an undocumented Bidoon had been accepted. Therefore, reliance on the decision in KONA's appeal is circular. Nevertheless, the conclusion of the FtT in that witness's case provides some support for the appellant, or more accurately, undermines the respondent's conclusion that the appellant is not in fact an undocumented Kuwaiti Bidoon but is an Iraqi citizen.

72. Lastly in this respect, I bear in mind that the appellant's other son, AONA, has also been found by the FtT in June 2016 to be an undocumented Bidoon. Nevertheless, the same reservation applies in relation to the conclusions of the FtT in his case, because the FtT took into account that the *appellant* had been found to be an undocumented Kuwaiti Bidoon which supported that witness's claim in that respect.

73. It seems to me that the decisions in those other appeals are good illustrations of the point that each case depends on its own facts. On the basis of the evidence that was before the Tribunals in those cases, the conclusions were that they were all undocumented Kuwaiti Bidoons. However, it must be apparent that those findings are not by any means determinative in terms of this appellant's appeal.

74. The letter from the Kuwaiti Community Association is plainly highly relevant. The letter states that for individuals without documents they ask for two witnesses from the Kuwaiti Bidoon community and conduct a short interview with the individual in question. It states that the verification process, comprising the interview and witness statements, "is tedious and time-consuming for our organisation, the clients and the witnesses". It states that they undertake that verification service because, amongst other things, it reduces the number of people from other Arabic-speaking countries who falsely claim to be Kuwaiti Bidoons. It also states that they do not issue a letter of support to clients that they believe are not genuine Kuwaiti Bidoons. It is apparent therefore, that the Kuwaiti Community Association has an interest in ensuring that the verification process is a sound one.

75. Brief details are given of the questions that the appellant was asked in an interview with that Association that took place on 5 December 2017. The conclusion in that respect is that the appellant has knowledge of someone who has been living in Kuwait and in the Asulibiyah area. The two witnesses who gave witness statements in support of the appellant's claim to be an undocumented Kuwaiti Bidoon are named, one of whom is the witness ASA. It states that both witnesses are known to the Association as undocumented Bidoons and are known to the community members as well as the Home Office as such.

76. Significantly, it seems to me, is the fact that in the letter from the Association it states that they also contacted "Recourses" which I take to be 'resources' to verify and check the address and the appellant's "situation" in Kuwait. The conclusion of the "investigator" (in Kuwait) was the appellant is indeed an undocumented Bidoon, and it gives his address in Kuwait.

77. It is true that no one from the Association attended to give evidence to support the contents of the letter. On the other hand, nothing was put before me, and no submissions were made, which otherwise undermines the contents of the letter, either in terms of its plausibility or consistency. I do consider that it is significant evidence in support of the appellant's appeal.

78. So far as the answers that the appellant gave in the screening and asylum interviews are concerned, I do not consider that it could be said that the answers he gave could only be given by someone who is an undocumented Kuwaiti Bidoon. The information provided could, it seems to me, be relatively easily learnt, or be information in relation to undocumented Kuwaiti Bidoons generally, which may very well be common knowledge in the region.

79. The evidence relied on by both parties has its deficiencies, as I have sought to demonstrate. However, the burden of proof is on the respondent. Having considered all the evidence carefully, I am not satisfied that the respondent has established on a balance of probabilities that the appellant's ILR was obtained by deception, or that his grant of refugee status involved misrepresentation or omission of facts, including the use of false documents.

80. I am not satisfied therefore, that the respondent was entitled to cancel his ILR or to cease his refugee status. Accordingly, I allow the appeal.

Decision

81. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision having been set aside, I re-make the decision by allowing the appeal.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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

Upper Tribunal Judge Kopieczek 29/03/19

ANNEX

IAC-AH-SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00099/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 September 2018	.....

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

NA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Adebayo, Solicitor
For the Respondent: Ms A Fijiwala, Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

1. The appellant claims to be an undocumented Bidoon from Kuwait although the respondent contends that he is from Iraq and whose identity is other than that he has given.

2. He came to the UK in July 2011 and claimed asylum the day after his arrival. He was granted refugee status as an undocumented Bidoon from Kuwait on 20 September 2011 with leave to remain granted until 19 September 2016. He was subsequently granted indefinite leave to remain ("ILR").

3. However, on 20 July 2017 a decision was made to revoke his refugee status pursuant to paragraph 339AB of the Immigration Rules and to revoke his ILR pursuant to s.76(2)(a) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") (wrongly referred to as s. 76(2)(A) of the Immigration Rules in the First-tier Tribunal Judge's and the respondent's decisions).

4. The appellant appealed against those decisions and his appeal came before First-tier Tribunal Judge S J Clarke ("the FtJ") on 19 April 2018 which resulted in the appeal being dismissed on all grounds. Permission to appeal in relation to the FtJ's decision, the appeal came before me.

5. The further background to the appeal is that on 29 November 2012 the appellant's spouse and six children made applications for entry clearance for family reunion via Amman in Jordan, which applications the appellant sponsored. Those applications were refused on 27 February 2013. The FtJ's decision records that the appeals against those decisions were allowed but the applications were refused again on 6 July 2017 on the basis that the appellants (in relation to the entry clearance applications) were Iraqi nationals and not Kuwaiti Bidoons as was claimed.

6. The respondent's decision, which is the subject matter of this appellant's appeal, refers to the respondent being in receipt of evidence to the effect that the appellant is not a Kuwaiti Bidoon but an Iraqi national.

7. The further background to the appeal is best illustrated with reference to the FtJ's decision.

The FtJ's decision

8. The FtJ further summarised the respondent's decision in that it is contended that the appellant has a genuine Iraqi ID card bearing the same photograph of the appellant as that held on UK Visas and Immigration ("UKVI") systems. The Iraqi passports used by his family members are said by the respondent to be genuine Iraqi passports which indicated that false identities and nationalities were provided by the appellant's family members in support of their applications for entry clearance sponsored by the appellant. Their passports are said to contain numerous immigration stamps from Jordan and Iraq. A document examination report ("DER") of 16 November 2015 confirmed the passports to be genuine and unaltered.

The respondent's decision referred to pre-decision submissions by the appellant to the effect that the Iraqi passports were forgeries and were bought to facilitate entry into Jordan so that his family could apply for family reunion. The appellant had asked the respondent to seek confirmation from the Iraqi authorities that the passports were not genuine.

9. At [8] of her decision the FtJ said as follows:

> "At the start of the hearing Mr. Briant made an application for a statement to be admitted under Section 108 of the 2002 Act and I made a preliminary ruling after evaluating the evidence that I would read the document, the Appellant and his representative went out of the room for me to examine the evidence. I admitted the document into evidence. Mr. Adebayo applied for an adjournment which I refused because it was fair to proceed having regard to the Section 108 evidence, and there was no other evidence the Appellant wanted to garner which he had not already tried to do and he had not requested the Respondent to provide further evidence before the hearing. I heard evidence from the Appellant who adopted his witness statement, and from his two sons [KONA] and [AONA], and Mr. [ASA], and each witness adopted their statement prepared for the hearing and I heard submissions by the representatives and a note of what was said is contained on the court record".

10. At [9] the FtJ said that the respondent had discharged the burden of proof on a balance of probabilities that the appellant was a national of Iraq and that he had made a material misrepresentation when he applied for asylum as an undocumented Bidoon from Kuwait. At [10] she said as follows:

> "I place weight upon the Section 108 document together with the document examination report found at Annex J of the Respondent's bundle. My reasons for placing weight upon the Section 108 document is because it is very reliable, the fear that it is based upon ill-feeling or grudge is something I have considered very carefully but there appears to be no basis for this in the case, and it clearly places the Appellant and his wife and descendants as Iraqi nationals and not undocumented Bidoons from Kuwait".

11. The FtJ then went on to state that the appellant's wife and children all produced documents which have been examined and found to be genuine, with the stamps within their passports also having been identified as genuine. She referred to background evidence relied on behalf of the appellant and a submission in relation to the type of passports used being ones that are often subject to a particular method of forgery. However, at [13] she said that she had considered that evidence very carefully but when balanced against the "very strong" s.108 evidence, which showed that the appellant was a national of Iraq, she concluded that it was more likely than not that the (Iraqi) passports were genuine and have not been altered in any way. She stated that:

> "I do not find the witnesses reliable preferring the Section 108 evidence which I find more reliable because there is no basis for the unidentified person stating that the Appellant is Iraqi unless he is of this nationality".

12. The FtJ referred to a UNHCR letter dated 20 June 2016 and the appeal decisions in the cases of his two sons who were granted refugee status following successful appeals. She referred to the appellant's wife apparently living in Greece with some of the children, with others being in Turkey and again others in the UK. She said that the appellant gave slightly different answers regarding the exact number of children living in which country.

13. In the next paragraph she referred to the Iraqi ID card said to contain a photograph of the appellant. That card provided the names of both of his wives. The FtJ said that the photograph matched the records of UKVI and although the photocopy in the respondent's bundle could have been better, she concluded that it did show a resemblance such that it was more likely than not to be the appellant.

14. She next referred to the translation of a letter from the Ministry of Foreign Affairs, dated 30 March 2017, noting that the untranslated Arabic document was not provided by the respondent. She concluded that the translation was a document that she was entitled to place weight on and further noting that the name of the translator and their role was given. The letter confirmed that the ID card belonged to an Iraqi national [ONO], and was issued on 11 October 2005. The FtJ said that she took into account the date of issue when finding that there is a resemblance to the appellant some 13 years ago. She concluded that if the appellant had provided that ID card when he claimed asylum, he would not have been granted refugee status and that it was the withholding of such a document and the bogus claim to be an undocumented Bidoon from Kuwait which led to the grant of refugee status.

15. The FtJ thus concluded that the respondent was entitled to revoke the appellant's refugee status.

16. In relation to Article 8 of the ECHR, she noted that the appellant had no partner living in the UK and no dependent children under the age of 18 years. She concluded that he did not meet the requirements of paragraph 276ADE of the Rules. She found that there were no "insurmountable obstacles" as she put it, to his returning to his own country (Iraq). She found that the appellant's wife and some of his children living in various countries have the ability to return to Iraq and live with the appellant there, or he would be able to return alone and re-establish his life there. She found that there was no evidence to suggest that he could not return to Baghdad. She found that there were no reasons meriting a grant of leave outside the confines of the Article 8 Rules.

The grounds and submissions

17. To summarise, the grounds of appeal contend that the FtJ ought not to have acceded to the s.108 application because s.108 was inapplicable in circumstances where the respondent was not suggesting that a document was a forgery but was suggesting in fact that the Iraqi ID card was *genuine*. The provisions of s.108 therefore, did not apply, it is argued. The decision in *OA (Alleged forgery; section 108 procedure) Nigeria* [2007] UKIAT 00096 is relied on. Various arguments in relation to the fairness of the proceedings are advanced in that context.

18. It is further argued that the FtJ erred at [13] in her conclusion that the passports of the appellant's family members were genuine Iraqi passports, the argument on behalf of the appellant being that no passports were available for the FtJ to examine and thus it was impossible for her to conclude that the passports were not altered. It is argued that the FtJ's conclusion in relation to the passports is speculative in that she would need to have physically examined them before coming to the conclusions that she did.

19. It is further argued that the FtJ was wrong at [17] to place reliance on an unsigned translation of a document in circumstances where the original was not provided. It is contended that an unsigned translated document without the original is inadmissible as evidence.

20. Lastly, it is contended that there was an error of law in the FtJ's conclusions in respect of the Iraqi ID cards said to have been the appellant's. Firstly, the copy document was very unclear and the appellant's solicitor had written to the respondent to provide a clear colour copy of that document, but that was not done. Secondly, given the poor quality of the photograph the FtJ was not entitled to conclude that the document was genuine by reason of the asserted resemblance between the photograph and the appellant, in circumstances where the photograph was taken about 13 years ago.

21. In submissions, Mr Adebayo relied on the grounds. He referred me to s.108 of the 2002 Act. He highlighted [25]–[27] of *OA (Nigeria)*.

22. In relation to the passports, those related to family members and not to the appellant. He pointed out that, as revealed at [8], there had been an application for an adjournment in the light of the s.108 application.

23. For her part, Ms Fijiwala submitted that s.108 did cover situations such as those that were before the FtJ. She did however, agree that whereas s.108 refers to a public interest consideration in terms of disclosure relating to the detection of forgery, the FtJ's decision does not apparently make an assessment of the public interest.

24. However, it was submitted that the respondent could have made an application pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. In other words, as I understood this submission, it was to the effect that the FtJ would

have been entitled to withhold the s.108 evidence from the appellant in any event and there were good reasons to do so.

25. So far as the lack of the original or a copy of the untranslated Arabic document is concerned, that was a matter of weight and the translation did identify the person who had translated the document.

26. In relation to the FtJ's assessment of the resemblance between the appellant and the photograph on the Iraqi ID document, that is a matter that needed to be seen in the context of the other evidence.

Assessment and Conclusions

27. At the hearing I informed the parties that I was satisfied that there was an error of law in the FtJ's decision in respect of her acceding to the s.108 application, although I indicated that I had not come to a concluded view in relation to the other grounds. I further indicated that the error of law that I was at that stage satisfied of in relation to s.108 was such as to require the decision to be set aside and for the appeal to be remitted to the First-tier Tribunal. As to remittal, having reflected further in that regard, I no longer consider it appropriate for the appeal to be remitted to the First-tier Tribunal, for reasons given briefly below. The following are my reasons in relation to the s.108 issue and my conclusions in respect of the remainder of the grounds.

28. S.108 of the 2002 Act states as follows:

> "**Forged document: proceedings in private**
>
> (1) This section applies where it is alleged –
>
> (a) that a document relied on by a party to an appeal under section 82 … is a forgery, and
>
> (b) that disclosure to that party of a matter relating to the detection of the forgery would be contrary to the public interest.
>
> (2) The Tribunal
>
> (a) must investigate the allegation in private, and
>
> (b) may proceed in private so far as necessary to prevent disclosure of the matter referred to in subsection (1)(b)".

29. I consider that there is force in the submission made on behalf of the appellant to the effect that the purpose for which the respondent sought to invoke the s.108 procedure was a purpose which that provision does not provide for. The section applies where it is alleged that a document relied on by a party to an appeal under s.82 is a forgery.

30. Ms Fijiwala sought to persuade me that although the respondent contended that the Iraqi ID card was a genuine document and that it

related to the appellant, the appellant contended that it was a forgery, thus the provision did apply because a party (the appellant) alleged that a document (the Iraqi ID card) was a forgery.

31. That submission has a very superficial attraction but closer examination of s.108 reveals the fallacy in the respondent's argument. S.108(1)(a), the part of the section relied on for the respondent's argument, must be read in conjunction with subparagraph (b). It is clear from the conjunctive "and" that subsections (a) and (b) must be read together. The effect is that it is the party seeking to withhold information in relation to the detection of the forgery which will be the party alleging that a document is a forgery and thus the 'applicant' in terms of reliance on s.108.

32. In any event, it was no part of the FtJ's reasoning in terms of acceding to the s.108 application that it was the appellant who was seeking to rely on a document that was a forgery. It is apparent from the FtJ's decision that she did not consider the precise words of s.108 in this context. The suggestion on behalf of the respondent before me to the effect that she would in any event have been entitled to invoke the s.108 procedure has no merit.

33. There is a further difficulty with the FtJ's consideration of this provision. Subparagraph (b) provides that consideration needs to be given to the public interest in the withholding of disclosure. Sometimes it can readily be deduced what the public interest is. However, that does not absolve a judge from the necessity of making an assessment of the public interest. Even if the nature of the information is such that explaining too much in the judge's written decision would undermine the s.108 procedure, there must be at least some recognition that the public interest issue has been considered. In this respect I am also satisfied that the FtJ erred in law.

34. The error in the FtJ's consideration of the s.108 issue is in itself a sufficient basis from which to conclude that her decision must be set aside. One also has to consider the seriousness of the matter in issue here, being revocation of refugee status, and the fundamental principle that usually fairness demands that evidence relied on by a party should be disclosed to the opposing party. That is not to say that the document in issue here must to be disclosed, but the public interest issue is informed by an assessment of all the circumstances.

35. So far as the other grounds are concerned, I am not satisfied that there is any error of law in the FtJ's conclusions in relation to the passports. She had a document examination report in relation to them and examining the passports for herself is unlikely to have informed her assessment in this respect.

36. In relation to the letter said to be from the Ministry of Foreign Affairs in Iraq, being a translation of another document, although the FtJ took into account that the Arabic version, whether by means of the original or a copy, was not provided, I am satisfied that she erred in law in her

conclusions in relation to that document. Without the original, neither the appellant nor the FtJ was able, even in a cursory way, to match the Arabic version with the English version. It seems to me that the appellant was entitled at least to see the Arabic version which it is said the English document is a translation of, or to be provided with some explanation as to why that document was not available. Having said that, if that had been the only error in the FtJ's assessment of the evidence, I would not have decided to set her decision aside.

37. As regards the complaint made about the FtJ's comparison with the appellant of what is said to be a copy of a 13 year old photograph of him, I note that the FtJ herself took into account the quality of the photocopy and the interval of time between the appearance of the appellant before her and what is said to be a photograph of him. However, the complaint in the grounds is that the appellant's representatives wrote to the respondent to ask to be provided with a clear colour copy of that photograph. On the face of it that was a reasonable request. It is not disputed on behalf of the respondent that such a request was made. In the circumstances, I am satisfied that there was unfairness in the proceedings in relation to the FtJ's conclusion that the appellant resembled the person in the photograph on the ID card such that it was more likely than not that the photograph was of the appellant.

38. No complaint is raised in the grounds about the FtJ's refusal to adjourn the hearing and Mr Adebayo did not advance any persuasive reason as to what an adjournment would achieve so far as the appellant was concerned in terms of the s.108 procedure.

39. The errors of law made by the FtJ are material in the light of the decision letter, and the skeleton argument before the FtJ in which various arguments are advanced in terms of the documentary evidence and the basis upon which it is contended that the appellant is in fact an undocumented Kuwaiti Bidoon, rather than an Iraqi national. For example, on behalf of the appellant reliance is placed on a letter from the Kuwaiti Community Association which is said to support his case. I make no comment about the lack of reference by the FtJ to that evidence since it is not a matter raised in the grounds.

40. Nevertheless, I am satisfied that the errors of law in the FtJ's decision are such as to require her decision to be set aside.

41. Whereas, as indicated above, my provisional view was that the appropriate course was for the appeal to be remitted to the First-tier Tribunal, after further reflection I consider that the decision should be re-made in the Upper Tribunal. I have considered paragraph 7.2 of the Practice Statement of the Senior President of Tribunals and taken into account the extent of any fact-finding required in the re-making of the decision. I am also mindful of the potentially difficult legal and practical matters that will need to be resolved.

42. The following directions are made to which the parties are to have careful regard.

DIRECTIONS

(a) No later than 7 days before the next date of hearing the respondent is to notify the Tribunal and the appellant, in writing, as to whether it is proposed to make an application under s.108 of the Nationality, Immigration and Asylum Act 2002 and setting out the legal and factual basis upon which the application is to be made.

(b) The respondent is to note that in default of compliance with direction (a) above, the Tribunal may very well decide to refuse to consider any s.108 application.

(c) In relation to any further evidence relied on by either party, there is to be a further paginated and indexed supplementary bundle of documents to be filed and served no later than seven days before the next date of hearing.

(d) In relation to any witness whom it is proposed should give oral evidence, there must be a witness statement drawn in sufficient detail to stand as evidence-in-chief such that there is no need for any further examination-in-chief.

(e) At the next hearing the parties must be in a position to make submissions as to what findings of fact, if any, made by the FtJ can be preserved.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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

Upper Tribunal Judge Kopieczek 2/11/18