IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2024-004446
UI-2024-004447
UI-2024-004460
UI-2024-004461
First-tier Tribunal No: EA/51953/2021
PA/59530/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 13 February 2025

Before

UPPER TRIBUNAL JUDGE LANDES

Between

S A H
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Chakmakjian, Counsel instructed by Descartes Solicitors
For the Respondent: Mr Tufan, Senior Home Office Presenting Officer

Heard at Field House on 29 November 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. As both SAH and the Secretary of State have appealed, to avoid confusion, I refer to SAH as the appellant throughout including the heading, and to the Secretary of State as the respondent.

2. I have considered "Guidance Note 2022 No 2: Anonymity Orders and Hearings in Private." I have continued the anonymity order made in the First-Tier Tribunal despite the public interest in open justice, bearing in mind the public interest in maintaining confidence in the asylum system by ensuring that vulnerable people are willing to provide confidential and complete information in support of their asylum applications. I also take into account that the appellant fears harm if he were to return to Iraq.

Background

3. Both the appellant and the respondent challenge the decision of Judge Hussain promulgated on 1 August 2024. Judge Hussain decided two appeals, one, which he dismissed, against a decision of 21 June 2021 refusing to grant the appellant a residence card as the durable partner of an EEA national, and one, which he allowed on asylum grounds, against the respondent's decision of 18 October 2023 excluding the appellant from international protection but granting discretionary leave on the basis that the appellant's removal would breach Article 3 of the ECHR. The deportation order made against the appellant had been revoked by the time the appeals came before Judge Hussain.

4. By way of general background, the appellant entered the UK in January 2001. He claimed asylum unsuccessfully, but was granted indefinite leave to remain outside the rules in August 2010. He was convicted of the index offence of possessing cocaine with intent to supply in September 2015 and sentenced to 64 months' imprisonment. The respondent notified him of her intention to deport him, his human rights' claim was refused, and he became the subject of a signed deportation order in February 2018. He appealed but was ultimately unsuccessful and became appeal rights exhausted in December 2019. Meanwhile, he had applied for an EEA residence card as the durable partner of a Hungarian national with whom he had a British citizen daughter (born in 2014). The application was refused with no right of appeal because the appellant had failed to provide a valid passport. The appellant applied again on 22 December 2020.

5. By letter of 21 June 2021, the respondent refused the residence card as it was not accepted it was appropriate to accept alternative identification in place of a valid passport as it was considered not sufficiently evidenced that the appellant had exhausted all avenues in his attempts to obtain a valid passport. However the respondent also considered whether it would be appropriate to issue the appellant with a residence card. Comments were made about the appellant's relationship with his partner and concerns raised as to the motivation behind such relationship. It was noted that it had not been possible to invite the couple for interview about the claimed relationship. Considering the appellant's criminality and its severity the respondent considered it would not be unduly harsh to refuse the application; the appellant had not entered into his daughter's life until after the conviction and the appellant's partner was fully aware of his circumstances when she decided to restart the relationship. Accordingly, the respondent said that the appellant would not be issued with a residence card.

6. By letter of 9 June 2023 the appellant made representations in support of his application to revoke the deportation order made against him. Submissions were made under Article 8 ECHR and it was also said that the appellant's return to Iraq was not feasible and that he possessed several "*aggravating factors*" including a 22 year absence, returning as a single lone male and failed asylum seeker, without documentation and with a Westernised profile which taken collectively demonstrated that the appellant had *"a much higher likelihood of being targeted and persecuted should he be forced to return to Iraq."* Details were given of each of those submissions. It was said that as a failed asylum seeker, the appellant would be arrested under the criminal code, he would be viewed with suspicion returning as a single man without any family support or anyone to vouch for him and he would not be able to access health care, accommodation or employment. He would not be able to obtain documentation and he would face persecution because he would be viewed as "*westernised*" in line with the ratio of YMKA & others ("westernisation") Iraq [2022] UKUT 16 because of his social and cultural attitudes and beliefs.

7. The respondent's decision of 18 October 2023 was headed *"Decision to exclude from protection and grant discretionary leave".* Under the heading *"Consideration of protection claim"* the respondent expressed that consideration had been given to the protection based submissions and it was accepted that if the appellant returned to Iraq, he would be at risk of treatment that would breach Article 3 ECHR, but it was, for the reasons given, considered appropriate to exclude him from both refugee and humanitarian protection. Under *"Consideration of protection claim"* with the subheading *" risk on return (assessment of future fear)"* it was accepted that the appellant's claim to fear return was objectively well-founded as in the light of SMO and KSP (Civil status documentation, article 15) (CG) Iraq [2022] UKUT 110 ("*SMO2")* it was accepted that the lack of documentation and male family members who could assist to obtain it, inability to travel to obtain documentation, and length of absence from Iraq, increased risk on return and consequently it was accepted that the appellant would face a real risk of persecution upon return. Under the subheading *"humanitarian protection"* it was accepted that the appellant had demonstrated a real risk of being subjected to unlawful killing, torture, inhuman or degrading treatment should he be deported. The respondent then considered *"exclusion from humanitarian protection"* and considered that under paragraph 339C (iv) of the immigration rules, there were serious reasons for considering that the appellant had committed a serious crime. It was accepted that sentence alone could not determine the seriousness of the offence, but the respondent explained why, taking everything into account it was considered the appellant was excluded from a grant of humanitarian protection.

8. The appellant's original skeleton argument of November 2021 relating to the appeal under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") referred to the belief that the question of identity and nationality was not a live issue given the acknowledgment that the decision carried a right of appeal and the acceptance in previous applications and appeals of the appellant's identity and nationality. It was considered that the relationship between the appellant and his partner had been accepted and so the issue for determination was whether it was appropriate to issue the residence card in all the circumstances. Detailed submissions were made in that respect. The respondent was asked to clarify, for procedural fairness purposes, if the position differed from the way described.

9. In the review of October 2022, the respondent accepted that there was an issue whether the exercise of discretion in refusing a residence card had been exercised appropriately under regulation 18 (5) of the EEA Regulations. It was said that there were relevant *Devaseelan* findings as the starting point and that refusal of the application due to the severity of the criminality would not be unduly harsh. The respondent said they maintained their position about failure to provide a valid passport and they did not accept that the appellant had exhausted all avenues in his attempt to obtain the same. The relationship between the appellant and sponsor and that the sponsor had obtained permanent residence was accepted.

10. The appellant filed a further skeleton argument in May 2024 after the protection decision in which the arguments about identity and nationality not being a live issue were repeated with the addition *"Furthermore, the 2023 Decision accepts, at para 25, that it is not possible for the Appellant to obtain Iraqi documentation."* It was said (at paragraph 27) that if the position regarding any of the issues differed from the way described, the respondent should give reasons so that the appellant knew the case he had to meet and such clarification and reasons needed to be provided well in advance of the hearing to ensure procedural fairness. The respondent did not file a further review relating to the EEA matter or respond further.

11. The part of the appellant's skeleton argument relating to the protection appeal maintained that the appellant faced a real risk of persecution due to being/being perceived to be "westernised" and that the Refugee Convention was engaged, because the appellant's social, political, cultural and atheistic beliefs were protected characteristics under the Refugee Convention as they related to actual and imputed political and religious beliefs. Submissions were made as to the facts on which the appellant relied.

12. It was averred that the respondent had used the wrong version of the immigration rules and the relevant version of rule 339D now required the respondent to demonstrate that the appellant was a danger to the community of the UK or a danger to the security of the UK and submitted that although the appellant had committed a serious offence, that was nearly a decade ago and he was now fully rehabilitated.

13. The respondent did complete a review but in March 2024 before the final version of the skeleton argument and in response to tribunal directions. The review does not read well. To the first issue in which the respondent was directed to set out their position as to the "Westernisation claim to engage the Refugee Convention" the response was *"the claim by the Appellant of being westernised will engage the Refugee Convention."* Unfortunately the review then becomes confused, says there is reliance on *SMO2* with reference to headnote 5 of *SMO2* (which does not relate to protection under the Refugee Convention, but rather humanitarian protection on the basis of risk of indiscriminate violence) and suggests that there would be no risk because the appellant is not going to be returned. The respondent ducks the question about whether the respondent asserted that the appellant was a danger to the community for the purposes of the Refugee Convention; the authority of Kakarash (revocation of HP; respondent's policy) [2021] UKUT 00236 is relied upon to say that exclusion from humanitarian protection could be by reference to either commission of a serious crime or constituting a danger to the community or security of the UK. It is not clear whether the respondent had realised that the appellant's case was that the

refusal decision relied on the wrong version of the immigration rules. The tribunal had directed that the respondent consider the EEA appeal in the context of the grant of leave to remain under Article 3 of the ECHR but unfortunately the respondent missed the point entirely by considering "durable partner" in the context of the EUSS.

14. Judge Hussain, in his decision when considering the EEA appeal, explained that he considered that the respondent as per the review was maintaining the decision that the appellant had failed to provide a valid passport in support of his application. He concluded that the wording of regulation 18 (4) of the EEA Regulations suggested that the requirement to produce a valid passport was a condition precedent to the exercise of the discretion to issue a residence card [39] and so the appeal could not be allowed [42]. He considered however that the appellant had not engaged in any further reprehensible conduct and had shown himself to be a responsible family man who had put aside his criminal past. He had now been out of prison for over 5 years and there was confidence that he would shy away from criminality and focus on enjoying his family life with his partner and child [41] so that in all the circumstances discretion should have been exercised in the appellant's favour, however the appeal could not be allowed because the production of a valid passport was mandatory.

15. So far as the protection appeal was concerned, Judge Hussain expressed the opinion to the parties that the respondent had decided the refugee application in the appellant's favour but had impliedly decided not to grant him refugee status because of his criminal conduct [44]. Although a section 72 certificate had not been issued, he said he would assess whether the provision applied.

16. Judge Hussain explained that he considered the refugee status application had been resolved in the appellant's favour because:

(i) It was obvious from the further submissions that the appellant was making an asylum claim [46];
(ii) The language used in the decision letter referred to protection-based submissions, to exclusion from protection of the refugee convention, to fear of return being objectively well-founded and to acceptance that the appellant would face a real risk of persecution upon return [47];
(iii) The use of that language *"together with the presenting officer not objecting to my reading of the letter as deciding the appellant's refugee status application, leads me, I hope reasonably, to the view that she did make a decision on his refugee status application. I should record that this was contrary to the position taken by the appellant's counsel, who said that the decision taken was in relation to humanitarian protection. For the reasons I have given, I respectfully disagree [48]."*

17. The judge then considered whether the appellant constituted a danger to the community, such that he should be excluded from the benefit of the Refugee Convention. The judge explained, based on the letter from the appellant's probation officer of November 2018 that he considered that the appellant was not a danger to the community (the letter referred to the appellant complying with all requirements, engaging well, there being no behavioural issues and no concerns in the community and the appellant was engaging in pro-social activities, presented as remorseful and evidenced his ability to recognise triggers to offending. He was described as making a conscious effort to avoid pro-criminal influences and appeared dedicated to desist from criminality). The judge

considered that there was nothing to suggest that the comments should be reviewed with the passage of time and the appellant appeared to have settled into family life with his partner and child [56] – [59].

18. The judge said he was not going to proceed to an assessment as to whether the appellant fell for exclusion from humanitarian protection because a person could not receive both refugee status and humanitarian protection. As the appellant was a refugee, not liable for exclusion he could not also go on to find that the appellant should be given humanitarian protection [61]. If he had been wrong to find that the appellant was a refugee and so had to make an assessment as to whether the appellant should be excluded from humanitarian protection he would have found in the appellant's favour for the same reasons that he found the appellant was not excluded from the Refugee Convention [61].

Appeals and cross appeal

The EEA appeal (UI-2024-004446)

The grounds

19. The appellant appeals, with permission granted by Judge Seelhoff on 25 September 2024, the dismissal of his EEA appeal. It is contended that the judge materially erred by failing to have reference to Regulation 42 of the EEA Regulations which provides that the respondent may accept alternative evidence of identity and nationality where a person is unable to produce the required document due to circumstances beyond their control.

20. It was said that the respondent had accepted that the appellant was unable to obtain documentation from Iraq and that was why in accordance with *SMO2* it had been accepted that removal would result in a breach of Article 3 ECHR. There had never been any dispute about the appellant's identity and nationality as he had been granted ILR in the past and the respondent had never advanced the lack of documentation as a reason to refuse on EEA grounds and had explicitly acknowledged the right of appeal. It was said that the issue was not raised during the hearing and the skeleton argument had clarified the position for the appeal without challenge. If the judge had considered regulation 42 of the EEA Regulations he would have allowed the appeal.

21. I note that the administration has issued a file reference (UI-2024-004460) for the respondent's cross-appeal. In fact, the only application for permission to appeal by the respondent was in relation to protection issues, but the respondent uploaded the application to the EA file rather than the PA file.

No rule 24 response – the submissions at the hearing

22. By email of 27 September 2024, the parties were sent standard directions, which included the direction (under the heading "Response (rule 24)") "*No later than 28 days from the date on which these directions are sent, the respondent must provide to the Upper Tribunal and the appellant any response to the grant of permission to appeal…"*.

23. At the hearing Mr Tufan said that he wanted to argue that Judge Hussain had not properly analysed the discretion point given the very serious criminality which was involved, given that in the exercise of discretion to issue a residence card even adverse immigration history could be taken into account.

24. Mr Chakmakjian objected that the respondent should have put in a rule 24 response. He said that the point was one which should be in such a response. There was no explanation he said why this was raised at the last possible minute without justification given the prejudice it necessarily caused. He referred me to the case of Secretary of State for the Home Department v Devani [2020] EWCA Civ 612.

25. At the time of the Court of Appeal decision in Devani rule 24 of the Tribunal Procedure (Upper Tribunal Rules (2008) ("the procedure rules") provided (rule 1A) that a respondent may provide a response to a notice of appeal and that the response must state whether the respondent opposes the appeal and the grounds on which the respondent relies *"including (in the case of an appeal against the decision of another tribunal) any grounds on which the respondent was unsuccessful in the proceedings which are the subject of the appeal, but intends to rely in the appeal"* (rule 24 (30 (e)). The Court of Appeal held, that even though rule 24 appeared to be permissive only, on a purposive construction the effect of rule 24 was that in a case where a respondent wished to rely on a ground on which they were unsuccessful below they were under an obligation to provide a response [31]. In fact, the time for providing a rule 24 response had not yet expired when Devani's case was heard by the Upper Tribunal, but the Court of Appeal concluded that "*it remained necessary, in the interests of fairness and in accordance with the over-riding objective (see rule 2), for the Secretary of State to put Mr Devani and the Tribunal on notice in advance of the hearing that if Mr Devani succeeded in showing that FTTJ Sullivan intended to allow the appeal she would argue that that intended decision was wrong. That notice would most appropriately have been given by providing a rule 24 response sooner than the deadline under paragraph (2) (a), but it would have been acceptable for the point to be made in correspondence or, as the Judge said, in a skeleton argument"* [34].

26. The procedure rules have been amended since Devani. Rule 24 of the procedure rules now provides at (1B) *"In the case of an appeal against the decision of another tribunal, a respondent must provide a response to a notice of appeal if the respondent – (a) wishes the Upper Tribunal to uphold the decision for reasons other than those given by the Tribunal; or (b) relies on any grounds on which the respondent was unsuccessful in the proceedings which are the subject of the appeal."*

27. A challenge to the judge's conclusions on the issue of discretion to issue a residence card clearly falls within the purview of rule 24 of the procedure rules (as well as the principles in Devani). The respondent wishes to argue that even if the judge was wrong to dismiss the EEA appeal on the passport issue, the judge should have dismissed it anyway.

28. I refused to allow Mr Tufan to raise the argument that the judge had erred in law in his findings on the exercise of discretion. If the respondent had wished to raise it that should have been by way of rule 24 response. Raising it now would be more than a month out of time and there was no explanation at all for the lateness. There had been no advance notice to the appellant's representatives and the issue the respondent wished to raise was not even now either put in writing or fully particularised. Considering all the circumstances of the case, I considered there was force in Mr Chakmakjian's submission that the respondent had not challenged in the protection appeal the judge's findings that the appellant had rebutted the presumption that he was a danger to the community

and that he was now a law-abiding family man, so that although the appellant had committed a serious offence, this was not a case where someone who was a danger to the community and therefore had a wholly unmeritorious case, could be successful.

Submissions on the document issue

29. Mr Chakmakjian submitted that he had clearly raised in his skeleton argument before the First-Tier Tribunal that particularly after the 2023 decision he considered that there was no issue about the production of the passport. He acknowledged the terms of the review, but he said the issue had changed by the protection decision of October 2023. There had been no response to his skeleton argument and so given paragraph 27 of his skeleton argument he was not expecting any issue to be raised. The issue had simply not been canvassed at the hearing. He submitted the discussion was academic because the respondent had accepted by the decision of October 2023 that the appellant could not obtain a passport. However, in any event as set out in his grounds of appeal, he submitted that the judge should have considered regulation 42 of the EEA regulations which permitted the respondent to accept alternative evidence of identity and nationality where the person was unable to produce the required document due to circumstances beyond the person's control. He submitted that given what the respondent had said in the October 2023 decision, this was a determinative answer. Not only should Judge Hussain's decision on the EEA appeal be set aside for error of law, he said the appeal should be allowed as there was only one answer to the only outstanding point.

30. Mr Tufan accepted that it would be difficult to argue against the point that the judge should have considered regulation 42. He also drew to my attention the case of Rehman (EEA Regulations 2016 – specified evidence) [2019] UKUT 195. However he said that the document it was accepted that the appellant could not produce in October 2023 must have been a CSID. There was a factual point to be argued about whether the appellant could produce a passport. It was not inevitable that the appeal would have to be allowed on that point.

Analysis and conclusions

31. I do not consider it is right to say that the respondent never advanced the lack of documentation as a reason to refuse on EEA grounds. As I have set out in the background, it was clearly raised in the decision letter and in the review. I appreciate there was no response to Mr Chakmakjian's subsequent skeleton argument, and in particular paragraph 27 which I note had featured in his earlier skeleton argument, but I do not consider that he can make a ground of procedural unfairness from the respondent's silence, particularly given the confusion which was apparent from the respondent's earlier review. Nevertheless, by contrast to the clear and explicit consideration with the parties of the section 72 issue [25] – [30] and the consideration of the protection decision, Judge Hussain did not raise with the parties that documentation was or might be an issue on the EEA appeal.

32. There was no suggestion made to me that the provisions of the EEA Regulations on which reliance was placed were not still preserved by the transitional regulations for those who were appealing applications made before the specified date.

33. The regulation on which Judge Hussain relied was regulation 18 (4) *"the Secretary of State may issue a residence card to an extended family member… who is not an EEA national on application if- (a) the application is accompanied or joined by a valid passport…"*.

34. Regulation 36 (3) is also relevant *"If a person claims to be in a durable relationship with an EEA national, that person may not appeal under these Regulations without producing …. (a) a valid passport…."*

35. Regulation 42, which Judge Hussain did not refer to provides:

42.— (1) Subject to paragraph (2), where a provision of these Regulations requires a person
to hold or produce a valid national identity card issued by an EEA State or a valid passport, the Secretary of State may accept alternative evidence of identity and nationality where the person is unable to obtain or produce the required document due
to circumstances beyond the person's control.

(2) This regulation does not apply to regulation 11.

36. Judge Hussain considered that he could not allow the appellant's appeal because the production of a valid passport was mandatory under paragraph 4 (a) of regulation 18. He was simply wrong. He should have considered regulation 42.

37. Even ignoring the concerns that Judge Hussain did not raise the issue with the parties, there is a clear error of law in the failure by the judge to consider regulation 42. The error of law means that the decision must be set aside. Judge Hussain's findings on discretion are preserved; as explained above I have not permitted the respondent to raise out of time a point which should have been raised in a rule 24 response.

38. The question is whether, as Mr Chakmakjian contends, on the unchallenged material before me, the appeal has to be allowed.

39. The case of Rahman explains that the provisions contained in regulation 42 must be interpreted in the light of European Union law and that in some cases, this might involve ignoring the requirement for specified evidence altogether if a document is not in fact required to establish a right of residence. However, the requirement for production of a valid passport comes from the Directive itself as is noted in Rahman, Article 10 of the Directive stating that Member States shall require a valid passport (amongst other documentation) for a residence card to be issued to a family member of a Union citizen who is not himself a national of a Member State. The decision in Rahman refers to the permissibility and desirability of a structured process for administering applications to ensure consistent decision making but also to ensure that there are no undue obstacles to the exercise of rights by Union citizens and their family members.

40. Of course, the Directive itself includes procedural safeguards in Articles 15 and 31 which provide for access to judicial redress procedures which must allow for an examination of the legality of the decision as well as the facts and circumstances on which the proposed measure is based and which shall ensure that the decision is not disproportionate. The case of Banger [2018] EUECJ C-89/17 confirms that extended family members (so not just family members) must

have available to them a redress procedure in which the national court is able to ascertain whether the refusal decision is based on a sufficiently solid factual basis and whether the procedural safeguards were complied with.

41. No doubt the requirement of proportionality explains the inclusion of regulation 42 in the EEA regulations and it must be read in that light.

42. I appreciate that regulation 36 also requires a valid passport for there to be a right of appeal but I do not consider that by issuing a decision with a right of appeal the respondent necessarily accepted for all purposes that the appellant was unable to obtain the document due to circumstances beyond his control. I consider the respondent is likely to have taken that course to prevent the appellant being in a position where he could not appeal and of course submit on appeal that he was unable to obtain a passport.

43. However, it is significant to look at the material before the respondent at the time of decision in the light of the concession subsequently made in the decision relating to the protection appeal. That material can be seen in the respondent's bundle relating to the EEA appeal. The letter of 21 December 2020 accompanying the EEA residence card application appears at p 702 of the appellant's bundle for this appeal. The appellant pointed out (amongst other submissions):

(i) He had previously been issued with a UK Travel Document in 2015 on the basis that the respondent had accepted that he was unable to obtain a passport from the Iraqi government;
(ii) He had attempted to apply for an Iraqi passport by attending the embassy in September 2020 but had been handed a letter personally dated 22 September 2020 (at p 725 of the appellant's bundle for this appeal) which explained that he needed an Iraqi civil card and an Iraqi Nationality Card to apply for a passport and without those requirements an application for an Iraqi passport could not be made.

44. The respondent has now accepted by the letter of October 2023 "*in light of the country guidance case of SMO2, it is accepted that the lack of documentation and male family members in Iraq who can assist you to obtain documentation, in addition to your inability to travel to Baghdad, Suleymania or any other region of the IKR to obtain documentation, and length of absence from Iraq increase your risk on return".*

45. I understand Mr Tufan's point that the respondent had not specifically accepted that the appellant could not produce a passport, but rather a CSID. However, whatever the position may have been in the past, the respondent by October 2023 accepted not only the lack of documentation, but also the lack of male family members who could assist the appellant to obtain documentation. Putting together the evidence, the appellant had produced evidence from the embassy that he needed an Iraqi civil card ((a CSID) which on Mr Tufan's submissions the respondent must have accepted he lacked)) and a nationality certificate to obtain a passport. The respondent had not challenged that evidence. The respondent accepted that the appellant not only lacked documentation but also lacked male family members to assist him so that, following *SMO2,* he did not have a way of obtaining documentation (and returning to Iraq himself would have resulted in a breach of Article 3 ECHR). From the perspective of October 2023, it followed that the appellant was unable to produce a passport due to circumstances beyond his

control. Of course, the EEA decision was made in June 2021 and *SMO2* was heard in October 2021, but there is nothing in *SMO2* to indicate that the position had changed between June and October 2021.

46. The appellant had always said that he could not obtain documentation and had no male family members to assist him, so the evidence had not changed, but rather the respondent's perspective on that evidence. Whether the appellant's inability to obtain a passport is considered at the date of the hearing before Judge Hussain or at the date of the decision in June 2021, taking into account the perspective the respondent has now of the appellant's evidence, the only rational conclusion the respondent could have come to in June 2021 was that the appellant could not obtain a passport due to circumstances beyond his control. Clearly there was no issue as to the appellant's identity (the purpose of requiring a passport) as the respondent had issued him with a travel document in the past and he had a current biometric residence card. The only decision Judge Hussain could rationally have come to if he had considered regulation 42 would have been that the requirements of regulation 42 were met at the date of decision and at the date of hearing.

47. On setting aside the decision I therefore remake it allowing the appeal on EEA grounds.

The protection appeals

The appellant's protection appeal (UI-2024-004447)

The respondent's protection appeal (UI-2024-004461)

Humanitarian protection – grounds and submissions

48. The appellant appealed, with permission granted by Judge Seelhoff in the First-Tier Tribunal the dismissal of the appeal on humanitarian protection grounds on the basis that the dismissal was contrary to the judge's reasoning. The judge had accepted that the appellant prima facie qualified for that status [60] but said at [61] "*I am not going to proceed to an assessment as to whether the appellant falls for exclusion from humanitarian protection simply because a person cannot receive both refugee status and humanitarian protection. In light of the fact that I have found the appellant to be a refugee, not liable for exclusion, I cannot also go on to find that the appellant should be given humanitarian protection. However, in the event that my decision to find that the appellant is a refugee is an error, I should say that if I had to make an assessment as to whether the appellant should be excluded from humanitarian protection, I would have found in his favour for the same reasons as I found Article 33(2) of the Refugee Convention not to apply to the appellant.*" The grounds aver therefore that the judge has made an error by finding that the appellant is not entitled to humanitarian protection.

49. As part of the respondent's cross-appeal, the respondent noted that the judge said he would have allowed the appeal in the alterative on humanitarian protection grounds, but it was averred that the judge had failed to consider that the appellant was excluded from humanitarian protection due to his criminal conviction and that there was no avenue to rebut the presumption that the appellant was a danger to the community.

50. There was no rule 24 response to either the appeal or the cross-appeal.

51. At the hearing, Mr Chakmakjian said that he appreciated that a person could not be granted both asylum and humanitarian protection. However the determination did not bestow status. The determination was simply whether the appellant had made out their challenge and given the judge had concluded favourably to the appellant, he submitted his appeal should have been allowed on that basis. Mr Chakmakjian pointed out, as he had in his skeleton argument before the First-Tier Tribunal, that the immigration rules on humanitarian protection had changed and were not those quoted in the decision, but rather there was now a rebuttable presumption of the same type as in asylum cases, so it had been open to the judge to conclude that the appellant was not excluded from humanitarian protection.

52. Mr Tufan submitted that the appeal could not be allowed on humanitarian protection grounds as there would be no basis for finding that the appellant would be in need of international protection as there were no check points in Sulaymaniyah. I reminded him that such a point had not been raised in the cross-appeal or by way of rule 24 response and clearly the decision maker had considered that the appellant would be at risk; the decision said quite clearly as much. Mr Tufan said that there did appear to be a change of wording in the rules relating to humanitarian protection.

53. I told Mr Chakmakjian that I was with him on the point about the change to immigration rules.

Discussion and conclusions – humanitarian protection

54. Before analysing the points on humanitarian protection, I briefly consider Judge Seelhoff's point when granting permission to the respondent, that because the appeal was only uploaded to the EA file on myHMCTS there was a preliminary issue of whether the challenge could be argued. I consider that by raising the issue and then granting permission Judge Seelhoff granted permission unconditionally. It is not possible to grant conditional permission in this way; Judge Seelhoff could have found the application to be invalid and refused to consider it, but having considered it and granted permission, permission has been granted for all purposes. In any event the issue was not taken on behalf of SAH at the hearing before me and I do not consider there to be any jurisdictional issue. The decision and reasons told the parties that to apply for permission, they must sign into the online service and follow the instructions in the overview tab. The two appeals were linked, although they were separate files there was only one decision on both appeals, and it is understandable that a party wishing to appeal would upload to the first reference on the appeal. In any event, rule 33 (3) of the Tribunal Procedure (First-Tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 provides that an application for permission to appeal must be sent to the Tribunal so that it is received no later than 14 days after the date on which the party making the application was sent the written reasons for the decision. The application was so received on the online service. I consider that to be sufficient.

55. Although, the appellant's further submissions of June 2023 were not the clearest, I agree with Judge Hussain that the appellant was making, by those submissions, a claim for international protection including asylum, and by explaining at paragraph 42 of the decision letter that the appellant had a right to appeal against the decision to refuse his protection claim, and heading the

decision letter "*decision to exclude from protection",* the respondent clearly accepted that he had made such a claim.

56. The appellant had claimed asylum in 2001 when he entered the UK, but these further submissions of June 2023 were on a different basis and raised further matters such as "Westernisation". That the respondent treated these matters as a fresh claim, can be seen by their acknowledgment of the right of appeal. The submissions therefore fell to be considered under the regime in force from 28 June 2022 with the changes made by the Nationality and Borders Act of 2022 and the associated changes made to immigration rules.

57. The changes made to the immigration rules relating to humanitarian protection came into effect from 28 June 2022. The previous rules only remained in effect in relation to the decision of applications made before 28 June 2022. Under paragraph 327EA (as amended with effect from 28 June 2022), a claim for humanitarian protection is a request by a person for international protection due to a claim that if they are removed from or required to leave the UK, they would face a real risk of suffering serious harm in their country of origin and they are unable or owing to such risk unwilling to avail themselves of the protection of that country.

58. Paragraph 327EC provides *"If someone makes a claim for humanitarian protection, they will be deemed to be an asylum applicant and to have made an application for asylum for the purposes of these Rules. The claim will be recorded, subject to meeting the requirements of Rule 327AB(i) to (iv), as an application for asylum and will be assessed under paragraph 334 for refugee status in the first instance. If the application for refugee status is refused, then the Secretary of State will go on to consider the claim as a claim for humanitarian protection."*

59. Paragraph 327AB (i) to (iv) provide for various formal requirements, necessary for there to be a valid claim, but whether or not those were complied with, the claim must have been treated as valid to be considered.

60. Paragraph 339C which refers to a grant of humanitarian protection provides (I have emboldened the relevant part):

> *339C. An asylum applicant will be granted humanitarian protection in the United Kingdom if the Secretary of State is satisfied that:*
> *(i) they are in the United Kingdom or have arrived at a port of entry in the United Kingdom;*
> ***(ii) they are not a refugee within the meaning of Article 1 of the 1951 Refugee Convention****;*
> *(iii) substantial grounds have been shown for believing that the asylum applicant concerned, if returned to the country of origin, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail themselves of the protection of that country; and*
> *(iv) they are not excluded from a grant of humanitarian protection.*

61. I should add that the former version of rule 339C (which is the version referred to by the judge in his decision at [66] – he does not explain why he referred to the earlier version) refers to a person being granted humanitarian protection if the Secretary of State is satisfied that they do not qualify as a refugee as defined in

regulation 2 of the Refugee or Person in need of International Protection Regulations.

62. Not qualifying as a refugee is therefore integral to the determination of whether a person qualifies for humanitarian protection.

63. The definition of serious harm in rule 339CA is unchanged from the version quoted by Judge Hussain at [67].

64. I understand Mr Chakmakjian's point that the decision is whether an appellant has made out his challenge. He is right in the sense that as the Upper Tribunal explained in Essa (revocation of protection status appeals) [2018] UKUT 244 there is nothing in the 2002 Act now requiring the tribunal to allow or dismiss an appeal: the only requirement is, under section 86 (2) (a) to determine any matter raised as a ground of appeal. However, the ground of appeal under section 84 (1) (b) of the 2002 Act in relation to humanitarian protection is that removal of the appellant from the UK would breach the UK's obligations in relation to persons eligible for a grant of humanitarian protection. The definition is constructed as set out above so that the only people who can be granted humanitarian protection are those who are not refugees. This is part of the definition no doubt so that primacy can be granted to refugee status. It means that the ground under section 84 (1) (b) cannot be made out if the ground under section 84 (1) (a) is made out, as the judge found.

65. Accordingly, the judge correctly explained at [61] why he could not find that the appellant was both entitled to refugee status and to humanitarian protection. However, he did make binding unchallenged findings which assist the appellant. He positively found that despite a slight contradiction on the face of the letter, the respondent had in fact decided (ignoring for a moment the question of refugee status) that the appellant would qualify for humanitarian protection were he not excluded. This must be right. It must be right firstly because the respondent has accepted that there is a real risk of serious harm to the appellant on return ([27] of decision letter), and secondly because the respondent accepts in their CPIN on Iraq (internal relocation, civil documentation and returns) of October 2023 that a person who is undocumented and cannot access family support (whether because it is not available or they cannot travel to obtain it) is entitled to humanitarian protection unless they are excluded (para 3.2.3) and a person who needs documentation for onward travel through checkpoints but cannot obtain it before or shortly after arrival and before passing through a checkpoint is also entitled to humanitarian protection unless they are excluded (para 3.6.7).

66. The respondent argues at paragraph 4 of the grounds that the appellant is simply excluded from humanitarian protection due to his criminal conviction. Mr Chakmakjian explained in his original skeleton argument that such argument relies on the old version of the rules quoted in the decision letter (pre 28 June 2022). In fact, the rule in force at the relevant time provides (the highlighting in bold is mine):

339D. An asylum applicant is excluded from a grant of humanitarian protection for the
purposes of paragraph 339C(iv) where the Secretary of State is satisfied that there are
serious reasons for considering that the asylum applicant:

(i) has committed, instigated or otherwise participated in the commission of a crime
against peace, a war crime, a crime against humanity, as defined in the international
instruments drawn up to make provision in respect of such crimes; or
(ii) has committed, instigated or otherwise participated in the commission of a serious
non-political crime outside the UK prior to their admission to the UK as a person granted humanitarian protection; or
(iii) has been guilty of acts contrary to the purposes and principles of the United Nations; or
(iv) having been convicted by a final judgement of a particularly serious crime
(as defined in Section 72 of the Nationality, Immigration and Asylum Act 2002), constitutes a danger to the community of the UK; or
(v) is a danger to the security of the UK.

67. I observe that the exclusion wording is not entirely (although almost) identical to the wording in paragraph 339AC of the immigration rules relating to exclusion from asylum *"having been convicted by a final judgment of a particularly serious crime, the person constitutes a danger to the community of the United Kingdom (see section 72 of the Nationality Immigration and Asylum Act 2002)."*

68. It is clear that the respondent considers that in effect the tests for exclusion for committing a serious crime in the UK are the same for asylum and humanitarian protection under the rules currently in force. The respondent's guidance on humanitarian protection for claims lodged on or after 28 June 2022 (31 July 2023 guidance) says (at p 14) "*claimants may present evidence to rebut the presumption that they constitute a danger to the community as a result of their offending, meaning they would not fall for exclusion"* and "*this provision follows Article 33 (2) of the Refugee Convention."*

69. The judge was right therefore and the respondent's grounds have no merit in this respect. The judge having found that the appellant had, for section 72 purposes, rebutted the presumption that he constituted a danger to the community [56], the appellant would also, for the same reasons, not fall to be excluded from humanitarian protection, if he were eligible and not a refugee [61]. The respondent did not suggest in the grounds or a rule 24 response that the judge's conclusion under section 72 of the 2002 Act was vitiated for error of law; accordingly the judge's conclusion that the appellant would not be excluded from humanitarian protection stands.

Asylum – grounds and submissions

70. The respondent's grounds aver that the judge failed to make a finding in respect of which Convention Reason applied to the appellant, and although the judge said at [45] *"my view remains that the respondent did resolve the appellant's refugee status application in his favour",* accepting that Article 3 rights would be breached on return is not the same as accepting an asylum claim. Mr Tufan submitted that the judge had simply made no substantive decision on the appellant's asylum claim.

71. Mr Chakmakjian submitted that it was the respondent's position at the hearing that the only issue with respect to asylum was whether the section 72

presumption had been rebutted and that was the only issue to be determined. He said if the respondent was arguing there was a material error of law how could the respondent explain the phrase at [48] *"together with the presenting officer not objecting to my reading of the letter as deciding the appellant's refugee status application"*.

72. I raised with Mr Chakmakjian the question of a rule 24 response and Mr Chakmakjian quite rightly reminded me that he was relying on what the judge had found, and he did not need to serve a rule 24 response. Nevertheless, it would have been helpful to raise the point at least by way of a skeleton argument given that it was evident from the grounds that the respondent did not accept that a concession had been made.

Discussion and conclusions - asylum

73. There may well have been some misunderstanding at the hearing before Judge Hussain. The decision is not written as if Judge Hussain considered that the respondent had made a positive concession; if he had he would not have explained so carefully why he considered the respondent had made a decision that the appellant would be entitled to refugee status were he not excluded.

74. It appears from the decision that the interpretation of the decision letter as having decided that the appellant would have been entitled to refugee status were he not excluded was raised by Judge Hussain. In those circumstances, I consider that even if the presenting officer had made a positive concession before Judge Hussain based on that interpretation (and as I have explained, I consider he did not) it would not restrict the respondent from arguing that Judge Hussain's interpretation was wrong – compare Secretary of State for the Home Department v Ullah [2017] EWCA Civ 1069 at [65].

75. I consider that Judge Hussain was wrong to interpret the decision in the way he did for the reasons in the grounds as I explain in the following paragraphs.

76. Section 32 of the Nationality and Borders Act 2022 which came into force on 28 June 2022 (with a saving for claims made before that date) says that to determine for the purposes 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*."

77. The decision letter simply does not consider whether the appellant has such a characteristic or whether he fears persecution as a result of that characteristic. That the word persecution is mentioned does not therefore mean that the respondent accepted that the Refugee Convention was engaged. Whilst it is right that the respondent accepted in the review that "westernisation" could engage the Refugee Convention, the respondent does not consider the protection

claim on this basis or on the basis it is put in the skeleton argument. The respondent considered the principles in *SMO2* and decided it on those principles which as explained above, relate to humanitarian protection (absence of documentation, lack of male family members to assist). It is right that [25] of the decision letter also refers to length of absence from Iraq but this is not in the context of westernisation but rather in the context of the *SMO2* principles which are relevant to the ability to obtain documentation or otherwise to be able to pass through checkpoints and to support oneself or to be at heightened risk of indiscriminate violence.

78. It is also significant to note in this context that as set out above, the definition of humanitarian protection means that a person is only granted humanitarian protection if they are not a refugee within the meaning of Article 1 of the 1951 Refugee Protection. That the respondent considered that the appellant was "excluded from the protection of the Refugee Convention" presumably on the basis he had committed a serious crime and was a danger to the community, is not relevant. It is not relevant because as explained in SM (Article 33(2); Section 72; Essa post-EU exit) [2024] UKUT 323, applying Essa, a person in that situation is not excluded from the Refugee Convention, rather they are a refugee, but simply one who can be refouled. The respondent can only have considered humanitarian protection on the basis the appellant was not a refugee, therefore. This highlights further that the respondent was not accepting that the appellant was a refugee, or would have been a refugee but for the commission of the index offences and the consequent presumptions.

79. Judge Hussain therefore did fall into error. The error is a material one, because the respondent had not accepted the facts on which the appellant's "westernisation" claim was based. It is not inevitable therefore that the appellant is a refugee within the meaning of Article 1 of the Refugee Convention. That remains outstanding for determination on the basis Judge Hussain's decision allowing the appeal on asylum grounds is set aside. The finding as to the appellant having rebutted the section 72 presumption is preserved, it not having been challenged by way of rule 24 response. The remaking of the appellant's protection claim will remain in the Upper Tribunal, as the point is a fairly narrow one namely whether the appellant is entitled to asylum as opposed to humanitarian protection.

Notice of Decision

EA/51953/2021 UI-2024-004446

The judge's decision contains a material error of law and is set aside. On remaking, the appeal is allowed.

PA/59530/2023 UI-2024-004447 UI-2024-004461

The judge's decision allowing the appeal on asylum grounds and dismissing the appeal on humanitarian protection grounds is set aside.

The judge's factual findings that:

(i) The appellant has rebutted the presumption that he constitutes a danger to the community;

(ii) If the appellant is not a refugee then he would qualify for humanitarian protection and he would not be excluded from such protection,

are preserved.

The appeal on protection grounds will be remade in the Upper Tribunal.

Directions Notice

The appeal on protection grounds will be listed for hearing on the first available date with a time estimate of 2 hours (listing are please to consult with Counsel's clerk before listing); a Kurdish Sorani interpreter will be provided.

Liberty to apply for any further directions a party considers necessary.

A-R Landes

Judge of the Upper Tribunal
Immigration and Asylum Chamber

28 January 2025