



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal number: AA/07132/2015**

THE IMMIGRATION ACTS

**Heard at Field House
On 10 November 2015**

**Determination Promulgated
On 23 November 2015**

Before

**MR JUSTICE PHILLIPS
UPPER TRIBUNAL JUDGE REEDS**

Between

**MA
(ANONYMITY DIRECTION MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A. Gilbert of Counsel, instructed by J D Spicer Zeb Solicitors

For the Respondent: Mr S. Whitwell, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal is subject to an anonymity direction that no report or other publication of these proceedings or any part or parts of them shall name or directly or indirectly identify the claimant. Failure by any person, body or institution whether corporate or incorporate (for the avoidance of doubt to include either party to this appeal) to comply with this direction may

lead to a contempt of Court. This direction shall continue in force until the Upper Tribunal (IAC) or an appropriate Court lifts or varies it.

2. The appellant is a national of Iraq. He arrived in the United Kingdom on the 2 October 2006 using a false passport and on the 3 October 2006 he claimed asylum, asserting that his life was in danger in Iraq, as militant groups were killing high ranked members of the Ba'ath party and those who had worked for the government.
3. On the 3 January 2013 the respondent refused the appellant's claim for asylum, determining that there were serious reasons for considering that the appellant's actions and activities as part of the Ba'ath regime would have made him aware of and involved in war crimes and crimes against humanity, namely, the violent suppression of the Shia uprisings in the early 1990s during which time the Iraqi security forces fired indiscriminately into Shia residential areas. The respondent therefore found that Article 1F(a) of the Refugee Convention applied, excluding the appellant from the provisions of that Convention. That provision reads as follows:

“The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

 - (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes ...”
4. That decision was subsequently withdrawn during the appeal process. The appellant was invited for a second asylum interview, conducted on 8 August 2013. In that interview, the appellant :
 - a. asserted that the highest rank he achieved in the Ba'ath Party was Udo Shu'aba, a middle rank, neither the lowest, nor the highest. In 2001 he became responsible for a military base, in command of 25 men.
 - b. gave an account of the change in his rank from 1989 and 1995 and also gave further details as to the level of activity in his role during this period. He stated he was not allowed to take part in any military activity such as combat operations, instead receiving further training. Between November 1991 and 1995, his job consisted of mainly administrative duties due to the no-fly zone in place at that time.
 - c. claimed that he never ordered any officers to attack civilians within Iraq. He never became involved in the military combat, and the invasion of Kuwait. He did not participate in any combat, and never killed anyone.
5. On 8 April 2015 the respondent made a new decision, refusing the appellant's asylum claim. The respondent did not accept the factual basis of the appellant's claim concerning his role in the Ba'ath party or any other role he had. The respondent further stated that, even if the appellant's version of events was accepted, he would not qualify for

asylum, as he would be excluded from the Refugee Convention under Article 1F (a) for crimes against peace, war crimes all crimes against humanity.

6. The appellant's appeal against that decision was heard by the First-tier Tribunal (Judge Upson) on 2 July 2015 and the decision was promulgated on 13 July 2015. The judge recorded that the appellant claimed asylum, alternatively Humanitarian Protection, and also advanced human rights claims, requiring consideration of article 3.
7. In relation to the asylum claim, the judge rejected the appellant's contention, repeated in a witness statement and in oral evidence, that he was only a middle-ranking member of the Ba'ath Party. The judge was satisfied that his initial account given on 3 October 2006, that he was a high ranking member of the Party, was correct, and gave further reasons for reaching this view based on his circumstances and those of his family members. The judge was further satisfied that the appellant had been involved in the suppression of resistance to the Army by firing rockets.
8. The judge therefore concluded that the appellant had committed acts of violence in a military capacity, whilst he was a high-ranking member of the Ba'ath party, amounting to war crimes within Article 1F(a). Even if (which the judge did not accept), the appellant was only ever involved in surveillance, the judge was satisfied that that would be sufficient to bring him within the exclusion under article 1F(a) because he would have had a high rank, standing and influence, and therefore knowledge of the crimes being committed and personal involvement. The judge accordingly found that the appellant was excluded from relying on the Refugee Convention.
9. The judge further found that the appellant was not entitled to Humanitarian Protection under Article 15(c), applying the decision in *HM & others Iraq CG* [2012] UKUT 00409 (IAC) where it is stated that there is nothing to suggest that the conflict is now bad enough to place every civilian in the country at real risk of harm within Article 15(c) of the Qualification Directive. He also rejected the appellant's claim under Article 8 ECHR, but gave no express consideration to the application of Article 3. The appeal was therefore dismissed on all grounds.
10. On 6 August 2015 the First-tier Tribunal granted permission to appeal solely on the ground that Judge Upson's consideration of article 3 had been flawed. On 18 September 2015 the Upper Tribunal gave permission to appeal on the further ground that Judge Upson had not made sufficiently particularised findings as to the Appellant's personal involvement in committing war crimes.
11. Dealing first with the application of Article 1F(a), it is well established that, in considering an individuals' criminal complicity it is necessary to consider to "*concentrate on the actual role played by a particular person, taking all material aspects of that role into account as to decide whether the required degree of participation is established*": *JS (Sri Lanka)* [2010]

UKSC 15 per Lord Kerr at para 55. In the same case Lord Brown identified the determining factors as follows:

Rather, however, than be deflected into first attempting some such subcategorisation of the organisation, it is surely preferable to focus from the outset on what ultimately must prove to be the determining factors in any case, principally (in no particular order) (i) the nature and (potentially of some importance) the size of the organisation and particularly that part of it with which the asylum-seeker was himself most directly concerned, (ii) whether and, if so, by whom the organisation was proscribed, (iii) how the asylum-seeker came to be recruited, (iv) the length of time he remained in the organisation and what, if any, opportunities he had to leave it, (v) his position, rank, standing and influence in the organisation, (vi) his knowledge of the organisation's war crimes activities, and (vii) his own personal involvement and role in the organisation including particularly whatever contribution he made towards the commission of war crimes.

12. Whilst the judge referred to *JS (Sri Lanka)*, we are satisfied that he did not follow the approach advocated by the Supreme Court. In particular, the Judge failed to consider the position and involvement of the appellant in the Ba'ath party at the time of the alleged war crimes. The judge appears to have considered only the appellant's final role and rank in the Ba'ath Party in 2001 to 2003, not the crucial question of his role at the time of the War Crimes in the early 1990s, when he clearly held a significantly more junior position. Mr Whitwell, appearing for the respondent, candidly accepted that the judge had not considered the timeline and that he (Mr Whitwell) could not "square the circle". We consider that it was incumbent on the judge to make clear findings as to his rank and involvement in the context of the country evidence and materials and that this evaluative task was not either undertaken or apparent from his assessment. Consequently, we find that the determination of the First-tier Tribunal discloses an error of law in its approach to the Article 1F issue.
13. As regards Article 3 ECHR, this was a separate and distinct claim and we consider that, having found that the Appellant was a high ranking member of the Ba'ath party who had been involved in war crimes, it was incumbent on the judge to have considered the risk to the appellant of ill-treatment contrary to article 3 on return to Iraq on that specific basis, not merely on the basis of the general risk to returnees, including those with a connection to the Ba'ath Party. Mr Whitwell suggested that the judge's consideration of Article 15(c) was sufficient for these purposes, but we are satisfied that there was an error of law in failing to give specific consideration to article 3, both because it is a separate category of risk and also because it must be considered on the basis of the specific circumstances of the Appellant, and in the light of the findings of fact reached.
14. Thus we have reached the decision that the appropriate course is for the decision of the First-tier Tribunal to be set aside. Due to the nature of the error of law, the Tribunal will be required to hear the oral evidence of the Appellant and for findings of fact to be made on all the factual issues and

matters of credibility in the light of the country materials. In that context, we are satisfied that the appropriate course is for the appeal to be remitted to the First-tier Tribunal for there to be an assessment of the evidence. Whilst it is not the ordinary practice of the Tribunal to remit cases to the First-tier Tribunal, there are reasons why in this case such a course should be adopted, having given particular regard to the overriding objective of the efficient disposal of appeals and that there are issues of fact that are central to this appeal that require determination which have not been assessed when the case was before the First-tier Tribunal.

15. Therefore the decision of the First-tier Tribunal is set aside, none of the findings shall stand and the case is to be remitted to the First-tier Tribunal for a hearing in accordance with Section 12(2)(b) of the Tribunals, Courts and Enforcement Act at paragraph 7.2 of the practice statement of 10th February 2010 (as amended).

Decision:

The decision of the First-tier Tribunal involved the making of an error on a point of law; the decision is set aside and the case is to be remitted to the First-tier Tribunal at Bradford for a hearing in accordance with Section 12(2)(b) of the Tribunals, Courts and Enforcement Act at paragraph 7.2 of the practice statement of 10th February 2010 (as amended).

Direction regarding anonymity - Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005

The appellant is granted anonymity throughout these proceedings, unless and until a Tribunal or court directs otherwise. No report of these proceedings shall directly or indirectly identify him or any member of their 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.

Signed

Mr Justice Phillips

Dated