Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2022-001535
PA/51368/2021; IA/03700/2021

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On 4 October 2022	**On 27 November 2022**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

ZJM
[ANONYMITY DIRECTION MADE]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity order was made by the First-tier Tribunal. This is an appeal on protection grounds. It is therefore appropriate to continue that order. 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, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:
For the Appellant: Mr O Sobowale, Counsel instructed by D&A Solicitors Ltd
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer.

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DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge Seelhoff promulgated on 15 March 2022 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the Respondent's decision dated 3 March 2021 refusing his protection and human rights claims for a second time.

2. The Appellant is a national of Iraq coming from the Kurdish region (IKR). He came to the UK on 2 June 2008 and claimed asylum on 12 August 2008. His claim at that time was that he had been threatened by relatives of his former wife. That claim was refused, and an appeal dismissed in 2010. The Appellant's claim was found not to be credible.

3. The Appellant made further submissions on protection grounds in September 2012 which were refused in November 2015. He applied for indefinite leave to remain on 11 January 2018 which application was rejected in February 2018. A further application made in April 2018 was voided on 2 October 2018.

4. The Appellant made further submissions on protection grounds on 14 September 2018. He now asserts that he is an atheist and will be at risk on that account on return to Iraq. He says that his brother is an active member of an organisation called Asaib Al-Haq ("AAH") and has threatened the Appellant having found out that he is an atheist. The Appellant also claims that he would be at risk more generally including from the Iraqi authorities were they to discover that he is an atheist.

5. The Appellant's claim was rejected by the Respondent as not credible. She also pointed out that atheism is not illegal in Iraq although may be equated with blasphemy which is a criminal offence.

6. Judge Seelhoff also rejected the claim as not credible. He found that the protection grounds were not made out. However, he accepted the Appellant's case that he could not be forcibly removed to the IKR, would not return there voluntarily and could not be returned via Baghdad. Accordingly, he allowed the appeal on Article 3 ECHR grounds following this Tribunal's decision in SA (Removal destination; Iraq; undertakings) Iraq [2022] UKUT 37 (IAC) ("SA"). As Mr Clarke accepted, the Respondent has not challenged that decision either by way of a cross-appeal or in a rule 24 statement (as none has been filed). That part of the decision therefore stands as unchallenged.

7. The Appellant appealed the Decision on five grounds as follows:

   Ground one: The Judge failed properly to determine the protection claim. Although he allowed the appeal on Article 3 ECHR grounds and made adverse findings in relation to the asylum claim, he did not in terms say that he was dismissing the appeal in that regard.

Ground two: The Judge failed properly to consider the report of Dr Rebwar Fatah dated 26 August 2021 ("the Expert Report").

Ground three: The Judge failed to consider material matters when finding that the Appellant would have raised the issue of atheism earlier if he were genuinely an atheist ([45] of the Decision).

Ground four: The Judge had impermissibly looked for "independent corroboration" of the claim which is said to be contrary to the UNHCR Handbook.

Ground five: The Judge has made inadequate findings on the issue whether the Appellant is able to obtain an identity document for return to Iraq (a "CSID") and has failed to have regard to the Respondent's country information and policy note ("the CPIN") in this regard.

8. Permission to appeal was refused by First-tier Tribunal Judge CJT Lester on 19 April 2022 in the following terms:

> "... 3. In a well reasoned and extensive decision the judge gave adequate reasons for their findings. The grounds amount to little more than a disagreement with the findings of the judge. Findings which were properly open to the judge on the evidence before them. They disclose no arguable error of law and permission is refused."

9. On renewal of the application to this Tribunal on the same grounds, permission to appeal was granted by Upper Tribunal Judge O'Callaghan on 9 August 2022 in the following terms:

> "... 2. The Judge expressly allowed the appeal on human rights (article 3) grounds but made no formal decision upon the Refugee Convention appeal before him. The original grounds of appeal reference reliance upon the Refugee Convention, as confirmed at §13 of the decision. The appellant's continued reliance is identified in counsel's skeleton argument, dated 14 September 2021. It may ultimately be that there is sufficient consideration within the body of the decision to establish that the Refugee Convention appeal was dismissed, but I am satisfied that ground 1 is arguable.
>
> 3. I am satisfied that the remaining four grounds of appeal are arguable, particularly in respect to the engagement, or otherwise, with the expert's evidence."

10. The matter comes before me to decide whether there is an error of law in the Decision and, if I conclude that there is, whether to set aside the Decision for re-making. If the Decision is set aside, I may either retain the appeal in this Tribunal for redetermination or remit it to the First-tier Tribunal to re-hear the appeal.

11. I had before me a bundle of the core documents in the appeal, as well as the Appellant's and Respondent's bundles as before the First-tier Tribunal. I refer to documents in the Respondent's bundle as [RB/xx] and the Appellant's bundle as [AB/xx].

12. Having heard submissions from Mr Sobowale and Mr Clarke, I indicated that I would reserve my error of law decision and issue that in writing. I therefore turn to that consideration.

DISCUSSION AND CONCLUSIONS

13. Mr Sobowale made submissions on ground one, followed by grounds three, two and four in that order. He said that those grounds overlap. He then made submissions on ground five. I therefore take the grounds in that order.

Ground one

14. The first ground relates to the Judge's failure to indicate in the Notice of Decision whether the Appellant's protection claim was allowed or dismissed. As Mr Clarke accepted there is no express mention of the protection or asylum claim in that part of the Decision. However, as Mr Clarke pointed out, the Judge at [13] to [16] of the Decision refers to the law applicable to asylum/protection claims. The Judge refers at [28] to [33] of the Decision to the submissions made including the Appellant's claim to be an atheist. At [33] the Judge notes in particular the submission of the Appellant's Counsel that "were [he] not to find the Appellant credible [he] would need to allow the appeal on article 3 grounds in light of SA because the Appellant is Kurdish and can only be forcibly removed to Baghdad which would not be safe for him".

15. The bulk of the Judge's findings are thereafter directed at the Appellant's claim to be an atheist. However, the Judge finds at [41] of the Decision that he "is not satisfied that [the Appellant] has proved that he is likely to be an atheist as claimed, and if he is an atheist it is highly unlikely that he is militant as claimed". The Judge did not accept that the Appellant's posts on Facebook were likely to have come to the attention of any of those persons who the Appellant said wished him harm ([43]). He did not accept that the Appellant had been threatened by his brother as he claimed ([42]). He rejected any risk arising from "sur place" activities ([44]). As I come to below, he also found that the Appellant would have mentioned that he was an atheist in his earlier appeal ([45]). He then reached the following finding:

> "46. Applying the Lower Standard of proof and considering all the factors in the case I am not satisfied that the Appellant has given a truthful account. It follows from these findings that I do not accept that there is any specific risk to the Appellant on return to Iraq."

16. The finding at [46] is as clear as it could be that the Judge was rejecting the asylum claim as not credible. Whilst the Judge has failed to repeat that rejection in the formal Notice of Decision section at the end of the Decision, I am satisfied that any error in that regard is not material, provided of course that his rejection of the asylum claim itself contains no errors. I therefore turn to that aspect of the Appellant's remaining grounds.

Ground three

17. At [45] of the Decision, the Judge said this:

> "I do consider that if the Appellant were genuinely an atheist it would have been reasonable to mention that in the earlier appeal especially as by that stage the Appellant had spent two years in the UK."

18. In the pleaded ground, Counsel then instructed drew attention to the Appellant's account of why he had not raised the claimed risk from atheism until 2018. Reference is made to the Appellant's account that he had been threatened by his brother in 2017 and that is when he raised the risk (in 2018) (statement at [AB/3]).

19. Mr Sobowale however referred to a different witness statement at [RB/185-188]. At §9-14 of that statement, the Appellant recounts how he was not sure about expressing his atheist views when he first came to the UK for fear that his views would be disapproved by others of Iraqi origin. He goes on to say as in his witness statement for the appeal how he told his sister about his views and that his family including his brother then found out. Mr Sobowale also referred to the following paragraph at [AB/2] which repeats that earlier part of the Appellant's account as follows:

> "I accept that when I claimed asylum, I did not declare that I had rejected Islam. I have already explained that at that point in my life, I was not sure how my position would be viewed by the UK authorities. Although I had heard about religious tolerance in the United Kingdom. I had not tested this for myself. I did not have the confidence to openly declare my views because since my youth I had been conditioned to think that I could never speak openly about my views. During the time I have spent in the United Kingdom, I have realized that I could be fearless and that I would be safe even if I spoke openly about my rejection of Islam."

20. Mr Sobowale submitted that it was not clear that the Judge had considered any of this explanation and had fallen into error by finding as he had in relation to the delay in making this claim. Mr Sobowale submitted that the logic of the Appellant's experience was informed by his experience in Iraq.

21. As Mr Clarke pointed out, however, the Appellant's claim in this regard does not relate to his experiences in Iraq. He does not claim to have suffered any ill-treatment in Iraq due to expression of atheism. He claims that he has expressed his views since coming to the UK and the risk arises from that time.

22. As Mr Clarke also pointed out, the Judge's finding in relation to the delay in bringing this claim is very narrow. It appears to be a response to the Respondent's submission recorded at [28] of the Decision that "if the Appellant were an atheist he would have mentioned it at the time of the

previous appeal especially as the Appellant had been here for two years by the time of the appeal."

23. Although I accept that the Judge does not refer to the Appellant's reasons for not raising his asylum claim earlier, there is no error in this regard. The Judge is referring only to the Appellant's failure to mention this in an appeal in 2010. It follows that the threats which the Appellant says occurred in 2017 could have no relevance to that point. Although the Appellant provides a very limited explanation for not making a claim when he came to the UK in terms of lacking the confidence to express his views in case they were disapproved, the Judge was entitled to find that the Appellant would have mentioned that he was an atheist in the earlier appeal if that claim were true.

24. The Judge's starting point was of course the previous appeal findings (per Devaseelan guidance). Those were of limited relevance in this case, beyond the general adverse credibility finding, given the very different nature of the asylum claim. However, as the Judge recorded, the Respondent had also pointed out that, when making the earlier asylum claim, the Appellant had claimed to be a Shia Muslim (see [14] of the Decision).

25. Even if the Judge's finding in this regard had failed to have regard to relevant evidence, such error could only be material if his findings in relation to the evidence were in error. As I pointed out to Mr Sobowale, prior to the finding at [45] of the Decision, the Judge had already rejected the Appellant's account based on his own oral evidence and the documentary evidence he provided. That then brings me to the findings in relation to the documentary evidence as challenged by grounds two and four.

Ground two

26. The Appellant provided in support of his case an Expert Report ([AB/5-35]. The expert, Dr Rebwah Fatah, is an expert "focussing on issues across the Middle East". He was asked to address the issues of "(i) Atheists in Iraq (ii) Potential risk (iii) Internal relocation".

27. Mr Sobowale referred me to paragraphs [81] to [97] of the Expert Report in particular and to section 7 more generally. He submitted that the Expert Report shows that the Appellant's claim to be at risk on account of his atheism is "plausible". He said that the Expert Report was also relevant to the reach of AAH of which the Appellant claims his brother is a member. Mr Sobowale also said that there was some overlap of this ground with ground two as it supports the Appellant's reasons for not disclosing his atheism at an earlier stage and supports his claim to be at risk from his brother who would be concerned about the impact of the Appellant's claim on his prospects.

28. Mr Clarke accepted that the Expert Report was not referred to by the Judge. However, he submitted that at its core this appeal concerns the credibility of the claim and not its plausibility. The Expert Report could only be relevant to the objective risk on return. The expert was not asked to and did not address credibility. He also pointed out that the Appellant did not claim to have expressed atheist beliefs in Iraq nor to have suffered any ill-treatment on that account before he came to the UK. The expert was asked to and addressed risk in Iraq but could not comment on any claimed risk to the Appellant based on what had happened to him whilst in Iraq as he did not claim to have been at risk at that stage.

29. Mr Clarke also made the point that the expert had referred to there being areas of Iraq where atheism would not be an issue and so, even if the Appellant's credibility had been accepted, the issue of internal relocation would have arisen. He accepted however that this was not the basis of the Judge's decision and could only be relevant to materiality of any error.

30. Mr Clarke also made reference to QC (verification of documents; Mibanga duty) (China) [2021] UKUT 00033 (IAC) ("QC") and to the guidance at [3] of the headnote that "[t]he greater the apparent cogency and relevance of a particular piece of evidence, the greater is the need for the judicial fact-finder to show that they have had due regard to that evidence". I note also the guidance at [2] of the headnote that "[t]he significance of a piece of evidence that emanates from a third party source may well depend upon what is at stake in terms of the individual's credibility".

31. I recognise that the facts of QC and the issues there considered are different to the ones in this appeal. However, as the Tribunal observed at [53] of its decision "[i]t is often the case that a person's claim to be in need of international protection turns on whether or not that person is adjudged to be credible". As is evident from what is there said and in the following paragraphs, the relevance of third-party or in this case expert evidence depends on the part that evidence has to play.

32. I have carefully considered the parts of the Expert Report to which my attention was directed. The Expert Report there considers the background evidence reporting incidents involving atheists in Iraq (although observing more generally that many in the IKR "are only religious by name"). As Mr Clarke points out, the expert does differentiate between certain regions which are less religious than others. The expert notes that "the quiet renunciation of one's faith…does not necessarily result in any consequences for the individual". He does however draw attention to the possible criminalisation of atheist beliefs as blasphemy (as the grounds of appeal note). He also says that those who oppose or are perceived to oppose religion on social media are "often met with a volley of abusive responses and threats". At section 7, the expert confirms the existence of AAH which he describes as "one of the largest insurgent groups in Iraq". He notes that the group has

declared that it is joining the political process in Iraq. However, he notes that "its main goals of increasing Iranian influence in Iraq and striving for Shia governance remained". The expert also observes that AAH "is more powerful than the local police" and gives examples of the influence of the group.

33. I accept that the Judge did not refer to the Expert Report. However, I also accept Mr Clarke's characterisation of the Expert Report as directed only at the background evidence of risk based on atheism more generally. The expert was not asked to and nor did he comment on the Appellant's credibility which was in any event a matter for the Judge.

34. The Judge found at [41] of the Decision, having reviewed the oral evidence of the Appellant and the other documentary evidence (as to which see ground four below), that the Appellant's claim was not credible. He did not accept that the Appellant was an atheist as he claimed. Even if he held those beliefs, the Judge did not accept that he expressed them as he claimed. He did not accept that the Facebook records represented "genuine engagement online" ([39]). He there described that evidence as "brief, incoherent and inadequately labelled". He therefore attached "very little weight" to it. No issue is taken with the Judge's conclusions in that regard. Nor is issue taken with the Judge's rejection of the evidence said to come from the Appellant's brother at [42] of the Decision. The Judge there said that "there was no reliable way to identify the source of these posts". I have already set out the Judge's conclusion at [46] of the Decision at [15] above.

35. Having roundly rejected the credibility of the Appellant's account based on his oral evidence and the documentary evidence said to support it, there was no need for the Judge to refer to the Expert Report. The acceptance by the expert that the claim was plausible could not have any impact on the outcome in circumstances where that claim was found for good reason not to be credible.

Ground four

36. The Appellant's ground four concerns what is said to be "the Judge's search for corroboration" of the claim. Reference is made to what is said at [36] of the Decision as follows:

> "I have considered whether any of the evidence before me provides independent corroboration of the Appellant's claim to be an atheist. I consider that the handwritten letter from his friends is of limited value as it is short and lacking in detail and none of the three friends who had signed it attended court…."

The Judge then went on to deal with the Facebook evidence before reaching his findings and conclusions.

37. The Appellant contends that the reference to "independent corroboration" contravenes [196] of the UNHCR Handbook. That reads as follows:

> "It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt."

38. Mr Sobowale prayed this extract in aid of his submission that the reference to "independent corroboration" in the first line of [36] of the Decision showed an impermissible approach. He said that, at best, the lack of independent evidence should be seen as neutral.

39. Mr Clarke pointed out that the paragraph from the UNHCR handbook relied upon did no more than point out that it might not be possible for an asylum-seeker to obtain documents to substantiate a claim. He also pointed out that, since this Appellant's claim is focussed entirely on what is said to have happened in the UK, there could be no issue about documents emanating from abroad.

40. Mr Clarke also drew my attention to ST (Corroboration – Kasolo) Ethiopia [2004] UKIAT 00119 and in particular [15] of the decision which reads as follows:

> "15. The fact that corroboration is not required does not mean that an Adjudicator is required to leave out of account the absence of documentary evidence which might reasonably be expected. An appeal must be determined on the basis of the evidence produced but the weight to be attached to oral evidence may be affected by a failure to produce other evidence in support. The Adjudicator was entitled to comment that it would not have been difficult for the Appellant to provide a death certificate concerning his brother or some evidence to support his contention that he had received hospital treatment. These were issues of fact for the Adjudicator to assess. When the Adjudicator says in paragraph 35 that there is no evidence to support his assertions, it is clear, and both representatives accept, that the Adjudicator is referring to evidence which supports or corroborates the oral evidence of the Appellant."

41. Mr Clarke submitted, and I accept, that there was nothing wrong with the Judge's approach to the other evidence in the Appellant's case. What is

said at [36] of the Decision has to be read in context. Having started with the findings in the earlier appeal which was and is accepted to be the correct starting point and before reaching his findings, the Judge looked at the documentary evidence said to support the Appellant's case. It is in that context that the reference to "independent corroboration" is made. The documents relied upon included not only the statements of friends which are dealt with at [36] of the Decision but thereafter at [37] to [39] of the Decision the Facebook evidence to which I have already referred. The Judge considered that evidence alongside the Appellant's oral evidence as he was required to do.

42. There is nothing legally impermissible about the approach which the Judge took. It was a structured one which looked at all evidence in the round before reaching the conclusion he did at [46] of the Decision. The Judge reached credibility findings which were open to him on the evidence. He rejected the appeal on asylum grounds and was entitled to do so. No error is disclosed by the Appellant's grounds one to four.

Ground five

43. At [47] of the Decision, the Judge said this:

> "I have considered the issue of whether or not the Appellant holds Iraqi documents. I note that Judge Warner did not consider the issue of identity documents in any great detail as that issue was not understood to be so relevant 12 years ago. There is a reference in the papers to the Appellant having a copy of some sort of citizenship document on the basis of which his identity had been accepted. I do not feel able to rely on the Appellant's claim that he has no contact with his family nor do I feel able to rely on his assertion that he has no identity documents available from Iraq. It seems to me likely that the Appellant either has more documents than he has disclosed or more contact with his family that would enable him to obtain the necessary documentation to return. The burden of proof is on the Appellant to demonstrate the fact that he asserts are at least likely to be true and I find that he has not discharged this burden in respect of the CSID card or identity documents from Iraq."

44. The Appellant asserts that the Judge has "failed to make adequate findings on the CSID issue and has not engaged with that material from the Respondent's CPIN" which it is said demonstrates that it is "highly unlikely that the Appellant would get the documentation at the embassy in the United Kingdom nor would he be able to get it in Baghdad upon return". It is said that the Judge has found that the Appellant has family in Iraq who would be able to assist him to obtain documentation on return.

45. Although Mr Clarke accepted that the Judge had failed to grapple with the CSID issue and had not made reference to the CPIN, he said that the Judge had made a more significant error in allowing the appeal based on the Respondent's inability to return the Appellant to IKR. Mr Sobowale accepted, given the outcome of the appeal which was allowed on Article

3 grounds based on inability to return, any error in relation to ground five could not be material.

46. Dealing first with ground five, although I accept as Mr Clarke submitted that the Judge has not referred to the CPIN, it must be recognised that the Judge's findings were based not simply on the Appellant having continued contact with his family in Iraq but also, based on facts at the time of his earlier appeal, having "some sort of citizenship document". As such, the Judge was entitled to find that the Appellant might well either have sufficient documentation or be able to get it based on the documentation he has.

47. In any event, as Mr Sobowale recognised, any error in this regard cannot be material because the Judge accepted that the Appellant could not be returned to IKR. Mr Clarke submitted that it was difficult to see how the Judge had allowed the appeal based on SA. However, that was the Judge's decision, and that decision was not challenged by the Respondent either by way of an application for permission to appeal nor by way of cross-appeal in a rule 24 reply (since none was filed). Mr Clarke did not ask for permission to appeal out of time the Decision allowing the appeal on Article 3 grounds. Accordingly, the Decision in that regard stands unchallenged. The Judge's finding regarding documentation is therefore immaterial even if it were in error which I do not accept that it was when the full findings are read together.

48. Ground five is for those reasons not made out.

CONCLUSION

49. For the foregoing reasons, I conclude that the grounds do not disclose any error of law in the decision of First-tier Tribunal Judge Seelhoff. I therefore uphold the Decision with the consequence that the Appellant's appeal is dismissed on Refugee Convention grounds but remains allowed on Article 3 grounds, the Respondent having failed to challenge the outcome on that basis.

DECISION

I am satisfied that the Decision does not involve the making of a material error on a point of law. I therefore uphold the Decision of First-tier Tribunal Judge Seelhoff promulgated on 15 March 2022 with the consequence that the Appellant's appeal remains dismissed.

Signed L K Smith Dated: 18 October 2022

Upper Tribunal Judge Smith