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

**Case No: UI-2021-000080**
**First-tier Tribunal No:**
**PA/03256/2020**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**
**On the 31 May 2023**

**Before**

**UPPER TRIBUNAL JUDGE KAMARA**
**DEPUTY UPPER TRIBUNAL JUDGE SKINNER**

**Between**

**AJH**
**(ANONYMITY ORDER MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Ms King, counsel, instructed by JD Spicer Zeb Solicitors
For the Respondent: Mrs Nolan, Senior Home Office Presenting Officer

**Heard at Field House on 22 May 2023**

**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

### Introduction

1. This is an appeal from the decision of First-tier Tribunal Judge M A Hall ("the Judge") promulgated on 26 June 2021 ("the Decision"), by which the Judge dismissed the Appellant's appeal against the Respondent's refusal dated 7 May 2020 of his protection claim. Permission to appeal was granted by Upper Tribunal Judge Lindsley on 24 November 2021.

2. The Appellant is an Iraqi national who claims to be at risk on return by reason of threats from a Shia militia in Baghdad, Asab Al Haq ("AAH"). For that reason, it is in our judgment appropriate, notwithstanding the importance of open justice, to make a direction anonymising his identity in these proceedings (as the First-tier Tribunal also did), as set out above.

3. The hearing before us took place in person. We heard submissions from Ms King for the Appellant and Mrs Nolan for the Respondent, neither of whom appeared before the Judge below. We are grateful to them both for their assistance.

### Background

4. The background to this appeal can be relatively shortly stated at this juncture. As already noted, the Appellant is a citizen of Iraq. He was born in June 1986 and came to the UK in November 2017, claiming asylum on arrival.

5. The basis of the Appellant's claim was, and is, that he is at risk from AAH because, in short, in August 2016 he refused to allow members of AAH to enter his house after one of them was shot and injured in an attack by them on the Appellant's neighbour's house in Baghdad. They have, he says, returned regularly since then to his house to try to find him.

6. By her decision dated 7 May 2020, the Respondent rejected the credibility of the Appellant's account and refused his claim on that basis. Curiously however, in her decision the Respondent accepted that the Appellant had a subjective fear of returning to Iraq. That is self-evidently inconsistent with her conclusion that the events of which he is said to fear did not occur.

7. On appeal, the Judge also rejected the credibility of the Appellant's account of what had happened to him in Iraq. He went on also to conclude that, in the alternative, the Appellant had a reasonable internal relocation possibility. It will be necessary to say more about the Judge's reasoning in relation to each of these aspects of the decision below.

8. The Respondent did not file a response to the appeal under rule 24 of the Tribunal's Procedure Rules.

9. Before turning to the grounds, we note that, at the outset of the hearing, we raised with Ms King the fact that the grounds of appeal only appeared to seek to impugn the Judge's conclusions in relation to credibility and not the alternative finding that, if the Appellant's account were believed, he would nevertheless not be entitled to international protection because there were parts of Iraq in which he would not be at risk from AAH. There was therefore an apparent issue as to whether any of the grounds were material. Ms King submitted that the finding in

relation to internal relocation was also vitiated by the errors identified in the Grounds, but, in the alternative, she sought permission to amend the grounds to challenge that finding. We deal with this issue after having considered each of the grounds on which permission has been granted.

**Discussion**

10. The Grounds of Appeal in this case challenge the Judge's approach to the evidence and his assessment of credibility. In considering those grounds, we accordingly have well in mind the following well-established principles:

    a. We must dismiss an appeal unless satisfied that the Decision contains an error of law: s.12 of the Tribunals, Courts and Enforcement Act 2007;

    b. We must exercise caution before characterising as an error of law what is in reality a disagreement with the assessment of facts: MA (Somalia) [2010] UKSC 49 at [45];

    c. Weight to be given to the evidence is pre-eminently a matter for the trial judge: Volpi v Volpi [2022] EWCA Civ 464 at [2(iv)];

    d. Appellate caution also applies in relation to a trial judge's evaluation of expert evidence. It is for the Judge, not the expert, to decide those facts, and a Judge is not bound to accept expert evidence, even if it is uncontroverted: Volpi at [4]; and

    e. Tribunals are free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense: Volpi at [5].

Ground 1: the Respondent's 'concession'

11. In the Decision, the Judge noted at para. 25 that "It was accepted in the refusal decision that the appellant had demonstrated a subjective fear, although Miss O'Mahoney [who appeared for the Respondent] stated at the hearing that it was unclear why this had been accepted by the respondent, as the refusal letter made it clear that the appellant's account was rejected in its entirety, other than his nationality."

12. Under Ground 1, the Appellant submits that the Judge erred in not "factoring in" this purported concession into his assessment of the Appellant's credibility. Ms King, who did not draft the Grounds, did not pursue this ground with any enthusiasm, and in our judgment rightly so. The acceptance by the Respondent that the Appellant had a subjective fear of return to Iraq was inconsistent with the Respondent's principal case, developed at length in the reasons for refusal letter, that the events which the Appellant said gave rise to a risk on his return were not accepted as having happened. As Ms King accepted, this is not a case in which it was possible to say that the Appellant might genuinely fear return to his country of nationality but the risk feared was not sufficiently grave to get over the 'real risk' threshold required. As such, that purported concession cannot properly be taken into account in assessing the credibility of the Appellant's evidence, and the Judge did not err in law in not doing so.

13. Rather, the Judge evidently saw this passage for what it obviously was, namely a template paragraph mistakenly left in the decision. Given that the Appellant's own skeleton argument before the First-tier Tribunal recognised that he had to show that the events of which he complained had taken place, there was plainly

no prejudice to the Appellant in permitting it to be withdrawn, which is in effect what the Judge did.

14. This Ground is accordingly rejected.

Ground 2: Persistence of raids

15. In para. 51 of the Decision, the Judge recorded the Appellant's evidence on AAH's continued interest in him as follows:

> "The appellant in his witness statements claimed that although the two family properties in Baghdad had been vacant since September 2016, and one of them had been blown up, the properties were raided again in August 2019, and again on 28 March 2020 and 6 April. In his oral evidence the appellant claimed that the properties were still being raided by AAH on a monthly basis, as they were still looking for him. At the hearing on 8 June 2021 the appellant said that the most recent raid was in the previous month."

16. At the end of that paragraph the Judge concluded that "If this were the case I find the monthly raids would have been mentioned in the appellant's witness statements or interview records but they were not." At para. 52, the Judge continued, "I find that no credible evidence has been produced to indicate that AAH would carry on raiding properties which have been vacant since September 2016, one of which had been damaged by an explosion and not repaired."

17. Ms King submitted that this misrecords the Appellant's case and makes an assessment of the credibility of the Appellant's evidence on a misunderstanding of what had been said. More particularly, the Appellant had not, she said, claimed that there had been "raids", but rather that the AAH had visited them. In considering whether the Appellant's evidence was credible, it was necessary to assess the evidence in fact given.

18. In his witness statement dated 12 December 2019, the Appellant describes the August 2019 attendance by AAH at his property as a "raid". Similarly, in para 26 of his 17 September 2020 statement he states that "On 28th March 2020 [AAH] militia came to my house in Dora, they raided the house… On 6th April 2020 the same militia came to my parent's house and raided the house" (emphasis added). It therefore seems to us that the Judge cannot be criticised in relation to what is said in the first half of para 51.

19. The more difficult issue however is in relation to what the Appellant said in his oral evidence. In the grounds, it is said that "The Appellant's account was that the militia returned looking for him and to warn that the properties could not be sold or rented as the owners were wanted by the militia." It is however well established that there is a "bright luminous line" between submissions and evidence, that where a question arises as to what happened in the First-tier Tribunal it is necessary to adduce evidence to that effect, and that will normally be by way of witness statement from the advocate: BW (witness statements by advocates) [2014] UKUT 568 (IAC). If the drafter of the grounds wished to challenge the way the Judge described what the Appellant said in oral evidence, he ought therefore to have put in a statement and/or obtained the Judge's Record of Proceedings. We can place no weight on what is said in the grounds in this respect.

20. Moreover, although we have since the hearing been able to consider the Judge's Record of Proceedings, it is however, at least in any relevant respect, illegible, and so takes the matter no further.

21. However, Mrs Nolan quite properly told us (and had disclosed to Ms King prior to the hearing) that in the note of cross-examination taken by the Presenting Office at the hearing before the Judge, there was no reference to monthly "raids" recorded. Rather, that note recorded that the Appellant said that "Every month or so, they go to check for my presence." Mrs Nolan was careful not to suggest that this was a verbatim record of the hearing, but it is clear that, while it may not be perfect, it would appear to provide a contemporaneous record of the Appellant's evidence and not merely a summary of the hearing. We consider it likely that if the Appellant had used the word "raid" it would have been recorded and we therefore accept that, on the balance of probabilities, the Judge has misrecorded the Appellant's oral evidence in para. 51 of the Decision.

22. The next question is where that then takes matters. Ms King's submission was that, contrary to what the Judge said, there was, on any view, credible evidence that AAH would continue to look for the Appellant, namely the expert report of Dr George. Dr George's evidence was, inter alia, that it was plausible that the AAH militia would return to the relevant property, he gave detailed evidence about the nature of revenge for injury or slights as a feature of Iraqi culture, and stated that he knew of no evidence that the resulting risk of revenge would diminish over time. It was therefore possible, Ms King submitted that, if the Judge had properly appreciated what the Appellant had said and considered this evidence this could have affected the Judge's assessment of the Appellant's credibility on this central issue.

23. In response, Ms Nolan submitted that the key factor in the Judge's rejection of the Appellant's account in this respect was not the implausibility, as the Judge saw it, of monthly raids, but the absence of reference to these monthly attendances on the Appellant's property in his witness statements. Regardless of whether the monthly visits were "raids" or not, the Judge would have inevitably rejected the Appellant's account for this reason in any event.

24. We prefer Ms King's submissions for the Appellant. It is not possible to second guess how the Judge would have responded had he been properly appraised of what the Appellant was saying in his evidence and of what Dr George said in his expert report. While the Judge was correct that there was no evidence that the AAH would continue with "raids", there was evidence that they would continue searching for someone in the Appellant's position and it is not possible to conclude that such evidence would not have factored into the Judge's consideration of the credibility of the Appellant's evidence on this issue.

25. This ground of appeal is accordingly made out.

<u>Ground 3: Letter from Appellant's Iraqi solicitor</u>

26. In para. 54 the Judge stated that he "place[d] little weight upon the very brief statement made by the appellant's father who makes reference to militia attack on his son's house but does not make specific reference to attacks upon his own house which the appellant claims to have occurred. In my view the very brief letter from the appellant's solicitor does not add any substantial weight to his claim, as this simply states that he was assigned to report incidents between 2016-2020."

27. The Grounds submit that the Judge erred in this passage because the letter from the solicitor provides corroborative support of the police reports submitted. This is because he is named in each report and he is the person who sent the 23 April 2020 report, as evidenced by his being named on the FedEx documentation. Therefore, whilst the letter is brief, the Judge, it is said, has failed to view it as part of the whole of the documentary evidence and it supports the reliability of the police reports.

28. We do not accept that submission. The Judge's assessment of the weight to give to the letter is eminently a matter for him and the letter says very little indeed. The broader point made by the Appellant in the grounds as to the corroborative impact of the letter on the weight to be given to the police reports does not depend on the weight to be given to the content of the letter itself in circumstances where the Judge did not find that the letter was not genuine. It would have been wholly consistent for the Judge not to give weight to the letter from the solicitor, but nonetheless rely on the fact that he is named in the police reports to augment the weight to be given to those documents.

29. We therefore reject this ground of appeal.

Ground 4: Police Reports

30. The Judge recorded at paras. 61 and 62 of the Decision that both the Appellant and the police reports themselves note that the process by which those reports came into being is that the police would take the complaint, visit the scene, take statements from relevant witnesses and thereafter prepare a report. The first report is dated the same day as the incident complained of was said to have occurred and the Respondent submitted to the Judge that this was not credible, given the length of the process described, a submission to which the Judge acceded. He accordingly rejected the claimed reliability of the police reports.

31. The Appellant's complaint, as developed by Ms King, was in essence that the inference as to the unreliability of the police reports was not one open to the Judge in circumstances where there was no evidence of Iraqi police procedures, or the length of time that it might normally take for a report to be prepared and given that the process described by the reports themselves could conceivably be completed within a day.

32. In response, Mrs Nolan submitted that the Judge's approach to the evidence was a proper application of the well known Tanveer Ahmed principles expressly stating that he came to his conclusion as to the weight that could be ascribed to the police reports "having considered the totality of the evidence". She further submitted that the Appellant's ground amounted to no more than a disagreement with the Judge's findings and that we were being asked, impermissibly, to "island hop".

33. We agree with the Appellant on this ground. While extrapolation and the drawing of common-sense inferences are entirely legitimate means of finding facts, it is well established that this must not cross over into impermissible speculation (see e.g. KK and RS (*Sur place* activities: risk) Sri Lanka [2021] UKUT 130 (IAC) at [314]). The Judge in this case fell, in our judgment, on the wrong side of this line. He had no evidence as to the speed at which the police in Baghdad normally respond to complaints and while plainly the police would need to act with a degree of alacrity in undertaking the work necessary to be in a position to

compile the report on the same day, it cannot be said to be implausible that they would be able to do so.

34. Ground 4 is therefore made out.

Ground 5 – Expert evidence

35. The expert witness in this case gave evidence that the Appellant's account was plausible. Ground 5 alleges that the Judge failed to take into account the evidence of Dr George in coming to the conclusion that the Appellant's account was, in relevant respect, not credible. We do not accept that. The Judge expressly recorded the Appellant's submission at para. 40 that "Dr George also supported his account, and weight should be attached to that evidence." At para.49 he states that "I accept Dr George's evidence that this organisation exists and is a Shia militia. I note that Dr George indicates in his report that he finds the appellant's evidence plausible taking into account the background evidence in Iraq at the relevant time, but that Dr George correctly points out that credibility is a matter for the Tribunal." At para. 67, the Judge states that "I accept that Dr George is an expert and have read his comprehensive report. At paragraph 137 Dr George states that if the appellant's evidence is accepted he would be at risk if he returned to Baghdad, because AAH will want revenge, and if the appellant could not be found then other family members may be at risk if they are in Baghdad. Dr George notes that the appellant's evidence is that he has uncles remaining in Iraq. There is no evidence that those uncles have been harmed. The appellant has given contradictory evidence as to whether his uncles remained in Baghdad or not. Dr George's report has been prepared on the basis that the appellant's evidence is accepted, but for the reasons given in this decision, I do not accept that the appellant has given a credible account." At para. 50, in introducing the section of the decision dealing with his credibility findings, the Judge states that "Having considered the evidence in the round I do not find the appellant to be a credible witness…" It is clear from these passages that in assessing the credibility of the Appellant's account, the Judge had well in mind Dr George's view that the Appellant's account was plausible and took it into account in a way he was entitled to do. This ground accordingly fails.

Materiality

36. The Appellant has, for the reasons set out above, succeeded in showing that the Judge made two errors of law. For the decision to be set aside, it will normally be necessary to show in addition that the errors could have made a difference to the outcome. We are satisfied that if the Judge had undertaken the credibility assessment without making those two errors he could have reached a different conclusion in relation to credibility. The errors are therefore not immaterial in that regard.

37. The other aspect of materiality in this case however is, as noted above, in relation to the Judge's finding that the Appellant could internally relocate within Iraq so as to avoid any threat from AAH. In this respect, the Judge said at para. 72 that "There is no need for the appellant to relocate but he has a reasonable internal relocation option should he choose to do so. He has experience of living in Karbala which is approximately 100 kilometres south of Baghdad."

38. On the face of it, this finding is dispositive of the Appellant's protection claim. Ms King's primary submission in relation to it however is that the same errors identified in the Grounds affect this finding too, such that the issue might have

been differently decided had the errors not been made. Ms King suggested that because the Judge did not say in relation to internal relocation that he was taking the case at its highest and because it ran on from the statement that he did not need to relocate, that we could not be sure that in some way the Judge predicated the internal relocation finding on the other findings of fact he made, some of which are vitiated by our conclusions above. We reject that submission. Neither the persistence of raids or visits by the AAH nor the police reports (i.e. the facts to which the grounds we have allowed relate) are relevant to the question of relocation, nor is the Appellant's credibility. The only sensible way to read the Judge's finding in our view is that it is as an alternative to his rejection of the Appellant's factual case.

39. Ms King therefore has to fall back on her alternative, which was to seek permission to amend the Grounds to add a challenge the relocation finding. She sought to do so on two bases.

40. First, Ms King submitted that the internal relocation finding was predicated on unsustainable findings of fact. This was not however developed (e.g. no such findings of fact were identified). The finding that the conclusion is based on is that the Appellant has experience of living in Karbala, which is based on the Appellant's own account. In his asylum interview, the Appellant told the Respondent that he lived in Karbala from 2005 until 2009. This was therefore a finding that, so far as we can tell, was not disputed, and for which in any event there was, unarguably, a proper evidential foundation. This proposed ground is accordingly not arguable and we refuse permission to amend so as to include it for that reason.

41. Second, Ms King submitted that the finding in relation to internal relocation failed to take account of material evidence, namely the evidence of Dr George. Dr George addressed the question of internal relocation in detail at paragraphs 161-175 of his report. Nowhere does he specifically address the possibility of relocation to Karbala, however at paragraph 173, Dr George opines that on the basis of the Appellant's account, he would be at risk from AAH in all parts of Iraq, other than the Kurdish region in the north. The Judge, in concluding that the Appellant could relocate to Karbala, bases this finding on the basis of his previously having lived there, but that was prior to his claimed troubles with AAH. The Judge accordingly appears not to have considered whether the claimed risk from AAH that the Appellant faces in Baghdad also applies in Karbala and in doing so has not considered the evidence of Dr George on the point. It is of course well established that a judge does not necessarily have to refer to every piece of evidence considered, but as the Court of Appeal made clear in Simetra Global Assets Ltd v Ikon Finance Ltd [2019] EWCA Civ 1413, [2019] 4 WLR 112, a judge is required to deal with apparently compelling evidence, where it exists, which is contrary to the conclusion he or she proposes to reach and explain why he does not accept it. In those circumstances, we consider this ground to be arguable. Given that the addition of this ground makes the difference between the Appellant's overall success and failure on this appeal, which relates to a protection claim, and notwithstanding the 11th-hour nature of the application to amend, we are satisfied that it is in accordance with the overriding objective of the Tribunal Procedure Rules to allow this amendment.

42. Mrs Nolan's response to this ground was in essence twofold.

43. First, she sought to rely on the fact that Dr George in paragraph 173 said that there was no part of central and southern Iraq where the Appellant could live

"free of risk", which is not the test to be applied in determining questions of internal relocation. That is of course correct, but Dr George is not required to apply the legal test in his report, which is a matter for the Tribunal. Moreover, it does not mean that the Tribunal could simply ignore the evidence.

44. Second, Mrs Nolan also notes that the risk from AAH is not said to extend to the Kurdish controlled northern parts of Iraq, so it is possible that he could relocate to that area instead. This is in reality a submission that the error is immaterial because there is another relocation alternative. That may turn out to be correct, but it is not so obvious a conclusion that we can conclude that it reaches the high threshold of inevitability required before concluding that the Judge's failure can be said to be immaterial.

45. In the circumstances, we consider that the Judge has erred in law in his finding that the Claimant can relocate to Karbala.

46. It follows that the Decision should be set aside in its entirety. Given the nature of the fact finding that will be required when the appeal is redetermined it is appropriate to remit the appeal to the First-tier Tribunal, to be heard by a different judge.

**Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error on a point of law.
The decision of the First-tier Tribunal is set aside.
The case is remitted to the First-tier Tribunal, to be heard de novo by a different Judge.

**Paul Skinner**

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

30 May 2023