



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004623

First-tier Tribunal Nos: PA/55131/2022
LP/01649/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 16th of April 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

SAM
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Hussain, Legal Representative instructed by Fountain Solicitors

For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

Heard at Field House on 15 March 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the Appellant] (and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified) 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 (and/or other person). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Appellant is a national of Iraq who arrived in the UK on 22 October 2015 and made an asylum claim the same day on the basis that he had been involved in a relationship with a young woman whose brothers were involved with ISIS and had threatened to assassinate him as a result. His application was refused and his appeal was dismissed in a decision dated 21 June 2017 by Judge Gurung-Thapa.
2. The Appellant made further submissions in support of a fresh claim on 20 May 2021. This application was refused on the basis of asylum and humanitarian protection, however, the Appellant was granted leave to remain on Article 8 grounds until 1 May 2025. The Appellant appealed against that decision and his appeal came before First tier Tribunal Judge Plowright for hearing on 15 September 2023. In a decision and reasons dated 19 September 2023 the judge dismissed the appeal.
3. The Appellant sought permission to appeal to the Upper Tribunal on 9 January 2024 on the basis that the judge materially erred:
 - (i) by finding at [27] that there was no evidence to suggest that the appellant had referred to himself as an atheist;
 - (ii) in failing to adequately assess the persecutory risk that the Appellant faces on return to Iraq in light of the factual matrix, in light of the accepted risk that atheists face on return to Iraq [21] refers;
 - (iii) in failing to explain why the appellant's claim to have received a letter accusing him of being a faithless person [22] was not considered as further evidence to corroborate his account of being openly an atheist.
4. Permission to appeal was granted on 9 January 2024 by UTJ Norton-Taylor on the basis that the judge may not have dealt properly with the Appellant's assertion that he was an atheist:

"The appellant's challenge is arguable, albeit by a relatively narrow margin. There was evidence before the judge which was supportive of the claim that the appellant not only considered himself to be an atheist, but that he would wish to openly express that if returned to Iraq. Whilst the judge found that the appellant had not adopted atheism as a philosophical belief, it is arguable that this was predicated on the fact that there had been no open expression of this in the United Kingdom. It may be that the judge failed to adequately consider the evidence in relation to how the appellant saw himself, whether he genuinely held a relevant belief, and what he in fact intended/wished to do on return."

5. The Secretary of State served a Rule 24 notice on 31 January 2024 opposing the appeal. On the issue of the Appellant's claimed atheism the notice provides at [5]:

"The FtT when considering the claim to be an atheist at [21] onwards, the FTTJ was entitled to note the absence of such a claim to have lived or be living openly as an atheist. It wasn't a feature of his previous evidence to the Tribunal and there was nothing beyond that bare assertion that he would like to live openly as an atheist [26]. The FTTJ notes the absence of evidence of anything to show his "commitment" to being an atheist or that he advocates in such an open manner.

In the absence of any evidence before the Tribunal beyond a blanket assertion from an appellant who has been found not to be credible, it is unreasonable to expect the FTTJ to make a finding that A would act as an openly expressing atheist on return when there was no evidence to support such a finding. Certainly, the grounds do not point to any such evidence. Rather, as found by the FTTJ the A was a non-practising Muslim.”

6. An Appellant’s bundle was served very late i.e. two days before the hearing, but it comprised all the material documents.

Hearing

7. In his submissions Mr Hussain sought to rely upon his grounds of appeal. He submitted that the main focus of the grounds is that the judge did not consider the Appellant to be an atheist, nor that he would be at risk on return to Iraq. The judge criticised the Appellant for not raising this before, however in the previous refusal decision at page 735 of the bundle at [22] it was noted the Appellant claimed to be an unbeliever and that based on his self-description as a Muslim by name it was considered that he was nominally Sunni Muslim but non-practising, see also [23] to [26] at AB 48. Mr Hussain sought to rely on the decision and reasons of the previous First-tier Tribunal at [32] and [34] page 746 and at page 752 where there is reference to the Appellant being an atheist. He submitted there was no clear finding by Judge Gurung-Thapa on this point.
8. In his submissions, Mr Clarke sought to rely upon the Rule 24 response. He submitted that the way that the first ground of appeal is framed is that the Secretary of State conceded that if the Appellant lived openly as an atheist he would be at risk, however this could not properly be relied upon. The judge took into account the Appellant’s witness statement and assertion that he would live openly as an atheist in the UK but found there was no evidence before him to suggest that the Appellant was an atheist and there was an absence of corroboration of that assertion. Mr Clarke submitted that there was a real inherent difficulty with the grounds of challenge and that is that the first question as set out in HJ (Iran) [2010] UKSC 31 was not met.
9. The key findings by the judge are at [27] of his decision and reasons and it is quite clear he rejects the Appellant’s claim of atheism. The judge accepts the Appellant is not a practising Muslim but this is not quite the same. Mr Clarke submitted that atheism was not relied upon as part of the Appellant’s protection claim in 2016 and what he argued is that his girlfriend’s brother who was a member of ISIS had threatened him on the basis of being faithless. He submitted that the grounds do not take issue with that finding of fact and that he would not be perceived as an atheist. Mr Clarke submitted it was important to look at the context in which the judge’s findings were made. At [10] the judge set out the previous claim in 2016 which makes clear that that was based on the Appellant being a PUK informer and there was a family feud and a risk from his girlfriend’s family.
10. Mr Clarke submitted that the current claim is a brand new ground of risk and it was not pleaded before the First-tier Tribunal previously that the Appellant would be at risk as an atheist *per se*. Mr Clarke submitted there was no new evidence, the judge had been very mindful of the chronology and how the Appellant has presented the claimed risk to him. He notes that the Appellant’s atheism was not specifically considered previously and whilst there might be passing references to atheism in the evidence what was lacking was evidence that the Appellant

positively believed in atheism. The first time this appears is in the Appellant's 2023 statement but there are no details about what this actually means, nor any evidence that the Appellant openly referred to himself as an atheist. Whilst the judge accepted the Appellant was a non-practising Muslim this is not the same as adopting the philosophical belief of atheism. He submitted that the judge had made well-reasoned findings of fact and the decision should be upheld.

11. In his reply, Mr Hussain submitted that the starting point for the judge to consider atheism was at [21] and [23]. He submitted that the Appellant had not been represented at the previous hearing but had still raised the issue of atheism. Mr Hussain submitted that the judge had not made clear findings as to why he rejected the Appellant's claim based on his atheism and submitted that there were material errors of law.

Decision and Reasons

12. I find that there are material errors of law in the decision and reasons of the First tier Tribunal Judge for the reasons set out in the grounds of appeal.
13. I have examined with care the decision of the previous First tier Tribunal Judge Gurung-Thapa, promulgated on 21 June 2017 at AB 746-756. The Appellant was unrepresented at this hearing. At [29] AB 751, the judge noted the Appellant's evidence as including the following: "*The appellant stated that he does not want to kill anyone and he has no religion. He is an atheist.*" And at [34] AB 752: "*When asked how her family would know that he is an atheist, the appellant replied he was stylish and he had tattoos on his body.*" And at [36]: "*The appellant stated that he was also threatened by supporters of ISIS because he was a faithless person.*" Whilst Judge Gurung-Thapa rejected the credibility of the Appellant's account she made no finding with regard to his claim to be an atheist.
14. In light of the fact that the Appellant did put forward atheism as a basis of claim at the previous hearing, when he was unrepresented, I find that First tier Tribunal Judge Plowright erred in law:
 - (i) in finding at [23] that it was implausible that it was not argued at the previous hearing that the Appellant was an atheist, given that the Appellant did give evidence concerning his atheism and also was unrepresented at that hearing, which meant there was no one to make legal representations on his behalf before the judge;
 - (ii) in finding at [25] that the first time the appellant made reference to fearing persecution as a consequence of being an atheist was in the further submissions dated 13 May 2021, when his evidence before Judge Gurung-Thapa in June 2017 went to that issue;
 - (iii) In finding at [27] that there is no reason why he would not have pursued atheism as part of his asylum claim before the previous judge.

15. Whilst the judge may be correct at [27] in finding that there was no evidence the appellant has advocated atheism as a belief or advocated against Islam I do not find that this is a necessary pre-requisite to proving that he is an atheist.

Notice of Decision

16. There are material errors of law in the decision and reasons of First tier Tribunal Judge Plowright for the reasons set out above. I set aside that decision and remit

the appeal for a hearing *de novo* before the First tier Tribunal. None of the findings of fact are preserved.

Rebecca Chapman

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

4 April 2024