



**Upper Tribunal  
(Immigration and Asylum Chamber)**  
000197

Appeal Number: UI-2022-  
(PA/03592/2020)

**THE IMMIGRATION ACTS**

**Heard at Birmingham CJC**  
**On 13<sup>th</sup> September 2022**

**Decision & Reasons  
Promulgated**  
**On 21<sup>st</sup> October 2022**

**Before**

**UPPER TRIBUNAL JUDGE MANDALIA**

**Between**

**RK**  
**(Anonymity Direction Made)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr M Hussain, Fountain Solicitors

For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

**DECISION AND REASONS**

***An anonymity direction was not made by the First-tier Tribunal (“FtT”). As this a protection claim, it is appropriate that a direction is made. Unless and until a Tribunal or Court directs otherwise, RK is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of his family. This direction applies amongst others to all parties. Failure to comply with this direction could lead to contempt of court proceedings.***

## **Introduction**

1. The appellant is a national of Iraq. He arrived in the United Kingdom 25<sup>th</sup> March 2019 and made a claim for asylum the following day. His claim for international protection was refused by the respondent for reasons set out in a decision dated 10<sup>th</sup> June 2020. The respondent accepted the appellant is an Iraqi national of Kurdish ethnicity but rejected the core of the appellant's account relating to the events leading to his departure from Iraq. The appellant's appeal against that decision was dismissed by First-tier Tribunal Judge Aziz for reasons set out in a decision promulgated on 22<sup>nd</sup> December 2021.
2. The appellant claim that the decision of Judge Aziz is vitiated by material errors of law. He advances four grounds of appeal. First, the judge applied a higher standard of proof when assessing the international protection claim than the lower standard of proof applicable. Second, the judge erred in assessing the appellant's account as being implausible without considering his account in the context of the appellant's social and cultural background. Third, the judge erred in concluding that there was no objective or country information before the Tribunal to support his claim that the Iranian authorities would cross the border into the IKR to target individuals such as the appellant. Fourth, the judge gave inadequate reasons for attaching little weight to a letter relied upon by the appellant from the 'Freedom & Human Rights Organization in Kurdistan Region of Iraq'.
3. Permission to appeal was granted by First-tier Tribunal Judge Kudhail on 2<sup>nd</sup> March 2022. She said:

"The grounds assert that the Judge erred in applying too high a standard when assessing the appellant's protection claim. The judge does refer to the appellant's account at paragraph 51 as highly implausible and throughout the decision does not refer to the lower standard in his assessment of credibility. Accordingly, there is an arguable error of law."

4. The respondent filed a Rule 24 response dated 28<sup>th</sup> March 2022. The respondent said she does not oppose the appellant's application for permission to appeal on ground one, which asserts that the FTTJ applied a higher standard of proof when assessing the appellant's claim. She went on to say that the respondent accepts there is a material error of law in relation to ground one, and the decision of the FTT should be set aside. The respondent suggested that it would be appropriate to remit the matter back to the FTT.
5. By email sent to the Upper Tribunal and the applicant's representatives at 17:53hrs on 9<sup>th</sup> September 2022, the respondent gave notice that the Rule 24 response previously served conceding a material error of law in the decision of the First-tier Tribunal is withdrawn. The respondent said that the appeal is now opposed. The respondent said:

“... The concession within the attached R24 was not well made in seemingly drawing a distinction between a 'Real Risk' and a 'Reasonable Degree of Likelihood' as regards the low standard of proof. As the SSHD's published policy makes clear the terms are interchangeable and there is no difference- ...”

6. The respondent referred to her published guidance and provided the relevant hyperlink.

#### Preliminary issue

7. At the outset of the hearing before me, Mr Hussain submitted that Rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008 provides for the respondent to provide a response to a notice of appeal within one month after the date on which the respondent was sent notice that permission to appeal had been granted. Here, the respondent had done so under cover of the letter dated 28<sup>th</sup> March 2022. The respondent conceded that there is a material error of law in relation to ground one and accepted that the decision of the FtT should be set aside. Mr Hussain submits there is nothing in Rule 24 that permits the respondent to withdraw the response filed in accordance with the rules. He submits

that up until yesterday, the appellant had understood that his appeal would be remitted to the FtT for hearing afresh, and it is “unfair” for the respondent to withdraw a concession made six months earlier. He submits there had been ample opportunity since 28<sup>th</sup> March 2022 for the respondent to withdraw the concession, but the respondent had not done so. I asked Mr Hussain a number of times what the ‘unfairness’ or ‘prejudice’ to the appellant is, by the respondent’s belated withdrawal of the concession. Mr Hussain submits the prejudice to the appellant is that it is ‘unfair’ to now allow the respondent to withdraw a concession, when the appellant has proceeded since March 2022 on the basis that the respondent accepts the decision of the First-tier Tribunal should be set aside and the appeal should be remitted for hearing afresh.

8. In reply, Mr Bates referred to three decisions of the Court of Appeal that touch upon the test to be applied when considering whether a party should be permitted to withdraw a concession previously made. He referred to the judgments of the Court of Appeal in NR (Jamaica) v SSHD [2009] EWCA Civ 856, Rauf v SSHD [2019] EWCA Civ 1276 and Koori v SSHD [2016] EWCA Civ 552. Mr Bates submits the concession made by the respondent in March 2022 was made on a mistaken premise and contrary to the respondent’s own published guidance; ‘Assessing credibility and refugee status in asylum claims lodged before 28 June 2022 Version 10.0’. The respondent’s published guidance states:

“... ‘Reasonable degree of likelihood’ is a long way below the criminal standard of ‘beyond reasonable doubt’, and it is less than the civil standard of ‘the balance of probabilities’ (i.e. ‘more likely than not’). Other terms may be used: ‘a reasonable likelihood’ or, ‘a real possibility’, or ‘real risk’; they all mean the same...”

9. Mr Bates submits it is ultimately for the Tribunal to determine whether the decision of the First-tier Tribunal is vitiated by a material error of law. There is no suggestion that the respondent has acted in bad faith. The appellant’s appeal has been listed for hearing and the appellant is represented. There is no reason why the appeal cannot be heard in the usual way, and if it is said that the appellant requires an adjournment

because there has been insufficient time to prepare for the hearing in light of the respondent's change in position, the respondent would not oppose that application.

10. In reply, Mr Hussain referred me to paragraph [12] of the judgment of Lord Justice Goldring in NR (Jamaica). He accepts the Tribunal has a discretion, but he submits, the respondent had ample time to withdraw the concession previously made. He urged me to refuse to exercise my discretion in favour of the respondent and submits the respondent should not be permitted to renege on the concession previously made.
11. I acknowledge that the withdrawal of the concession previously made by the respondent has come late in the day. That is unfortunate. I accept as Mr Bates submits, the concession made by the respondent is on the face of it, contrary to her own published guidance regarding the assessment of credibility. I am satisfied that there is, in the exercise of my discretion, good reason in all the circumstances for me to permit the concession to be withdrawn. Mr Hussain has been unable to point to any prejudice to the appellant beyond saying that it is 'unfair' because the appellant has believed for the past six months that his appeal to the Upper Tribunal is conceded and that the appeal will be remitted to the First-tier Tribunal for hearing afresh. Mr Hussain was unable to point me to any steps that have been taken by the appellant in reliance upon the concession made. It would have been open to the appellant's representatives to invite the Tribunal to make a decision without a hearing under Rule 34, but they did not do so. The absence of any prejudice to the appellant is not to say that the application to withdraw the concession should inevitably succeed, but it is a relevant factor that weighs in favour of the respondent. As Mr Bates submits, the appellant and his representatives have attended the hearing to pursue the appeal, and if an application for adjournment is made because of the belated withdrawal of the concession, that will not be opposed. There is here, no allegation of the respondent acting in bad faith and as Lord Justice Goldring said in NR (Jamaica), in the final analysis, what is important is

that as a result of the exercise of its discretion, the Tribunal is enabled to decide the real areas of dispute on their merits so as to reach a result which is just both to the appellant and the Secretary of State. Here, in the exercise of my discretion I am quite satisfied that the respondent should be permitted to revisit her Rule 24 response so that the law is properly applied, and that it would not be unjust to allow this in the absence any reliance upon the rule 24 response to the detriment of the appellant. I therefore permit the respondent to withdraw the concession made in her rule 24 response dated 28<sup>th</sup> March 2022.

### The Appeal before me

12. There was no application for an adjournment. Mr Hussain adopts the grounds of appeal. He submits that at paragraph [51] Judge Aziz considered a core part of the appellant's account regarding his identification by the Iranian Etalaat who then infiltrated the IKR searching for the appellant and raided his family home. Judge Aziz stated; *"...This, in itself, seems highly implausible given the appellant's and his cousin's lack of political profile..."*. Mr Hussain submits the use of the words "highly implausible" demonstrates Judge Aziz applied too high a standard of proof and failed to consider the claim made by the appellant on the 'lower standard' applicable. I referred Mr Hussain to the self-direction regarding the burden and standard of proof set out in paragraph [40] whereby Judge Aziz directs himself that the appellant must show that there is a "real risk of ...". Mr Hussain submits that is incorrect and the standard of proof is the 'lower standard'. He submits it may have been open to the judge to say that the account is "implausible", but the addition of the word "highly", suggests that the judge was looking for something more than even an implausible account, and adopting a particularly high threshold.
13. Mr Hussain submits that in considering the appellant's account, Judge Aziz repeatedly considers whether the account is plausible. He refers to paragraphs [29] and [30] of the judgement of the Court of Appeal in HK

v SSHD [2006] EWCA Civ 1037 in which Neuberger LJ referred, with approval, to the point that was made in 'Hathaway on Law of Refugee Status (1991) at page 81:

“In assessing the general human rights information, decision-makers must constantly be on guard to avoid implicitly recharacterizing the nature of the risk based on their own perceptions of reasonability.”

14. Mr Hussain submits that at paragraph [54] of his decision, Judge Aziz stated there is no objective or country information to support the appellant's assertion that the Iranian authorities would seek to go over the border into the IKR and target individuals who held such a low profile as the appellant. However, in the same paragraph, the judge refers to the 2020 US State Department Report that his attention was drawn to. He submits Judge Aziz erred in finding that there was no objective or country information before the Tribunal to support the appellant's assertion that the Iranian authorities would seek to go over the border into the IKR and target individuals.
15. Finally, Mr Hussain submits Judge Aziz referred, in paragraph [57], to the letter of 16<sup>th</sup> September 2020 from the 'Freedom and Human Rights Organisation in Kurdish Region of Iraq' relied upon by the appellant but gives inadequate reasons for not attaching weight to that letter. Mr Hussain submits that overall, Judge Aziz failed to give adequate reasons for his finding that the appellant is not a credible witness.
16. In reply, Mr Bates submits Judge Aziz properly directed himself to the relevant standard of proof at paragraph [40] of the decision. Judge Aziz noted that it is for the appellant to show that there is a "real risk" of him being persecuted or subjected to serious harm, upon return to Iraq. He submits that as the respondent's published guidance to caseworkers properly records, various terms such as 'a reasonable likelihood' or, 'a real possibility', or 'real risk' are often used but they all mean the same.

17. Mr Bates submits that in considering the claims made by an appellant, it is perfectly possible for a judge to find something to be implausible or highly implausible. He submits that here, Judge Aziz was entitled to say, at [51], that the account relied upon by the appellant is “highly implausible” for the reasons that he set out. Mr Bates submits that contrary to what the appellant claims, the use of the words “highly implausible” suggest that the Judge was careful to ensure that he was not only considering whether the account was plausible, but in fact ensuring that there was something more than just inherent implausibility, before rejecting the appellant’s account.
  
18. Mr Bates submits that Judge Aziz adequately addressed the 2020 US State Department Report in paragraph [54] of his decision and was entitled to conclude that the country information that was drawn to his attention does not assist the appellant. Furthermore, Mr Bates submits that on closer reading, it is not even clear whether that report, which is at page 202 of the appellant’s bundle, relates to the position in the IKR, or the position in Iraq in general. The background material appears to be referring to the position in Iraq. There is no evidence that Iranian proxies are operating in the IKR. There is reference to ‘Iranian backed militia’, but that militia are not the Iranian authorities or evidence that the Etalaat cross the border into Iraq. The Judge wanted to be referred to evidence to confirm the Iranian authorities (i.e. the Etalaat) cross the border into Iraq, but the background material relied upon by the appellant does not support his claim.
  
19. Mr Bates submits the letter from the ‘Freedom and Human Rights Organisation in Kurdish Region of Iraq’ is referred to at paragraph [57]. The Judge was provided with a copy of the letter in the appellant’s bundle, with a translation. The letter contains various assertions that cannot be tested and when considering the weight to be attached to that letter following a holistic view of the evidence, one can understand why the Judge applied Tanveer Ahmed, and it was open to the judge to attach little weight to that evidence. Mr Bates submits reading the



decision as a whole and the findings made, Judge Aziz was entitled to dismiss the appeal for the reasons given.

## Discussion

20. I take the first two grounds of appeal together since they both relate to the standard of proof adopted by the judge and his reliance upon the plausibility of the account relied upon by the appellant. The appellant claims Judge Aziz applied a higher standard of proof when assessing the international protection claim than the lower standard of proof applicable. Furthermore it is said that Judge Aziz erred in assessing the appellant's account as being implausible without considering his account in the context of the appellant's social and cultural background. There is in my judgment no merit to these two grounds.
21. It is uncontroversial that the appellant has the burden of establishing the veracity of his claim and the accuracy of the facts on which the claim is based. The standard of proof is relatively low. In R v SSHD ex p. Sivakumaran (1998)AC 958, it was held that the existence of a well-founded fear of persecution required the establishment of what was described by Lord Keith of Kinkel as "a reasonable degree of likelihood". He derived some assistance from a speech of Lord Diplock in Governor of Pentonville Prison ex p Fernandez [1971] 1 WLR 987 and imported the standard of proof from the law of extradition into that of asylum. He said

"In my opinion the requirement that an applicant's fear of persecution should be well-founded means that there has to be demonstrated a reasonable degree of likelihood that he will be persecuted for a Convention reason if returned to his own country. In *Reg. v. Governor of Pentonville Prison, Ex parte Fernandez* [1971] 1 W.L.R. 987, this House had to construe section 4(1)(c) of the Fugitive Offenders Act 1967, which requires that a person shall not be returned under the Act if it appears

"that he might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions."

Lord Diplock said, at p. 994:

"My Lords, bearing in mind the relative gravity of the consequences of the court's expectation being falsified either in one way or in the other, I do not think that the test of the applicability of paragraph (c) \*995 is that the court must be satisfied that it is more likely than not that the fugitive will be detained or restricted if he is returned. A lesser degree of likelihood is, in my view, sufficient; and I would not quarrel with the way in which the test was stated by the magistrate or with the alternative way in which it was expressed by the Divisional Court. 'A reasonable chance,' 'substantial grounds for thinking,' 'a serious possibility' - I see no significant difference between these various ways of describing the degree of likelihood of the detention or restriction of the fugitive on his return which justifies the court in giving effect to the provisions of section 4(1) (c)."

I consider that this passage appropriately expresses the degree of likelihood to be satisfied in order that a fear of persecution may be well-founded."

22. Lord Tempelman described the standard of proof as "a real and substantial danger"; and Lord Goff as a "real and substantial risk". As Mr Bates submits, various terms are used interchangeably. Here, Judge Aziz correctly directs himself at paragraph [40] that the burden of proof is on the appellant and that the appellant must show that there is "*a real risk of ...*". I am quite satisfied that Judge Aziz correctly directed himself as to the standard of proof applicable. The issue is whether he went on to apply the correct standard of proof.
23. In an appeal such as the present, where the credibility of the appellant is in issue, a Tribunal Judge adopts a variety of different evaluative techniques to assess the evidence. The judge will for instance consider: (i) the consistency (or otherwise) of accounts given by the appellant at different points in time; (ii) the consistency (or otherwise) of an appellant's narrative case for asylum with his actual conduct at earlier stages and periods in time; (iii) whether, on facts found or agreed or which are incontrovertible, the appellant is a person who can be categorised as at risk if returned, and, if so, as to the nature and extent of that risk (taking account of applicable Country Guidance); (iv) the adequacy (or by contrast paucity) of evidence on relevant issues that, logically, the appellant should be able to adduce in order to support his or her case; and (v), the overall plausibility of an appellant's account.

24. At paragraph [42] of the decision Judge Aziz states that looking at the evidence in the round, he did not find the appellant to be a credible witness. He found his account to be implausible and lacking in credibility in a number of key areas. The judge says he found the evidence contained material inconsistencies and there is a real lack of objective evidence to substantiate his key 'subjective fear' that there is a real risk that the Iranian authorities infiltrate the IKR in order to capture individuals like the appellant. Judge Aziz sets out his reasons for finding that the appellant is not credible, in the paragraphs that follow.
25. In HK v SSHD the court considered the very difficult task faced by Immigration Judges when they are called upon to make findings of fact, in circumstances where there is no direct factual evidence other than that given by the appellant. The Court warned against the danger of an assessment of credibility or reasonable likelihood which was over-influenced by cultural differences, and which was then used as the sole basis for rejecting the whole claim. In Y -v- SSHD [2006] EWCA Civ 1223, Keene LJ referred to the authorities and confirmed that a Judge should be cautious before finding an account to be inherently incredible, because there is a considerable risk that they will be over influenced by their own views on what is or is not plausible, and those views will have inevitably been influenced by their own background in this country and by the customs and ways of our own society. However, he went on to say, at [26];

“None of this, however, means that an adjudicator is required to take at face value an account of facts proffered by an appellant, no matter how contrary to common sense and experience of human behaviour the account may be...”

26. Judge Aziz gives a number of reasons for his finding that the appellant is not a credible witness. He carefully refers to the appellant's account at paragraph [51] of his decision and explains why he finds that account to be 'highly implausible'. That does not in my judgement demonstrate that he was applying a higher standard of proof. He was simply considering one facet of the appellant's claim and determining whether

the account relied upon by the appellant can be relied upon. Judge Aziz had directed himself correctly in law about the risk of persecution based on the appellant's account of his experiences in Iraq. I am quite satisfied that he referred to and applied the correct burden and standard of proof in form and in substance. He was entitled to decide whether he was satisfied of the facts asserted by the appellant. In doing so, he did not err in law in describing parts of his account as incredible or implausible. Any distinction between "plausibility" and "credibility" was of little significance. His use of the plausibility of aspects of the claim made by the appellant as a tool for assessing the overall claim for international protection does not show that he had applied the wrong standard of proof or erred in his consideration of the claim advanced by the appellant.

27. Equally, there is in my judgement, no merit to the third ground of appeal advanced by the appellant. The appellant claims Judge Aziz erred in concluding that there was no objective or country information before the Tribunal to support his claim that the Iranian authorities would cross the border into the IKR to target individuals such as the appellant. Paragraph [54] of the decision must be read as a whole. Judge Aziz notes Mr Howard was unable to refer him to any background material to suggest that the Iranian authorities breach international law by entering a neighbouring sovereign state in order to kidnap and kill individuals such as the appellant. Judge Aziz was referred to the 2020 US State Department Report relied upon by the appellant, and he plainly considered the extent to which that report supports the claim made by the appellant. It was in my judgement open to Judge Aziz to conclude as he did at paragraph [54] that the report does not assist the appellant. Putting aside the submission made by Mr Bates that it is not even clear whether the report relates to the position in the IKR, the report refers to reports of Iranian backed militias having deployed snipers and impeded the provision of medical care to wounded demonstrators, during protests that occurred in October 2019. The appellant was unable to draw the Tribunal's attention to any background material to support his

claim that the Iranian authorities (i.e. the Etalaat rather than Iranian backed militia), would seek to go over the border into the IRK and target individuals who held such a low profile as the appellant. This third ground of appeal amounts to nothing more than a disagreement with a finding and conclusion that was open to the judge on the evidence before the Tribunal.

28. Finally, I reject the fourth ground of appeal relied upon by the appellant. He claims Judge Aziz gave inadequate reasons for attaching little weight to the letter relied upon by the appellant from the 'Freedom & Human Rights Organization in Kurdistan Region of Iraq' and finding that the appellant is not a credible witness generally.
29. In Tanveer Ahmed v SSHD [2002] UKIAT 00439, which is referred to by Judge Aziz in paragraph [57], Mr Justice Collins confirmed that in asylum and human rights cases it is for an individual claimant to show that a document on which he or she seeks to rely can be relied on, and the decision maker should consider whether a document is one on which reliance should properly be placed after looking at all the evidence in the round. Beyond the very brief reference in paragraph [2] of the appellant's witness statement dated 18<sup>th</sup> May 2021 to the appellant's father having reported threats to the 'Iraqi Human Right (Report enclosed)', Mr Hussain was unable to draw my attention to any other evidence before the First-tier Tribunal regarding the provenance of that document. The document relied upon by the appellant could not be considered in isolation. Judge Aziz concluded, at [57], that he attached 'little weight' to that document in light of the adverse credibility findings that he had made. It was in my judgement open to him to do so.
30. The appellant's general assertion that Judge Aziz failed to give adequate reasons for concluding the appellant is not a credible witness is misconceived. I have reminded myself what was said in MD (Turkey) v SSHD [2017] EWCA Civ 1958 that adequacy meant no more nor less than that. It was not a counsel of perfection. Still less should it provide

an opportunity to undertake a qualitative assessment of the reasons to see if they are wanting, even surprising, on their merits. The purpose of the duty to give reasons, is in part, to enable the appellant to know why he has lost, and it is also to enable an appellate court or tribunal to see what the reasons for the decision are so that they can be examined in case there has been an error of approach. Paragraphs [42] to [58] of the decision demonstrate Judge Aziz carefully considered the claim being advanced by the appellant and reached conclusions and findings that were open to him on the evidence before the Tribunal. He gives adequate reasons for the findings made.

31. It is now well established that it is necessary to guard against the temptation to characterise as errors of law what are in truth no more than disagreements about the weight to be given to different factors, particularly if the judge who decided the appeal had the advantage of hearing oral evidence. It is in my judgement clear that in reaching his decision, Judge Aziz considered all the evidence before the Tribunal in the round and reached findings and conclusions that were open to him on the evidence. A fact-sensitive analysis of the risk upon return was required. In my judgement, the findings made by Judge Aziz were rooted in the evidence before the Tribunal. It was open to him to conclude that the appellant is not a witness of truth for the reasons set out in his decision. The findings reached cannot be said to be perverse, irrational or findings that were not supported by the evidence.

32. It follows that I dismiss the appeal.

### **Notice of Decision**

33. The appeal is dismissed. The decision of First-tier Tribunal Judge Aziz stands.

**V. Mandalia**

Date 14<sup>th</sup> September 2022

Upper Tribunal Judge Mandalia