Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/04277/2019

THE IMMIGRATION ACTS

Heard at Field House, London	**Determination Promulgated**
On Monday 9 December 2019	**On Tuesday 17 December 2019**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

Q S
[Anonymity direction made]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms M Cohen, Counsel instructed by Duncan Lewis & Co Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Although an anonymity order was not made by the First-tier Tribunal, as this is an appeal on protection grounds, it is appropriate to make 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.

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of the First-tier Tribunal Judge N Lodge promulgated on 15 August 2019 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the Respondent's decision dated 18 April 2019 refusing his protection and human rights claims.

2. The Appellant is a national of Iraq of Kurdish ethnicity. He comes from Sulaymaniyah. He was born a Sunni Muslim. He claims to have converted to Christianity, following an incident at a hospital in Iraq where a nurse apparently healed his daughter. His claim to have converted was not accepted as credible by the Respondent.

3. The Appellant's challenge is in broad terms to the Judge's adverse credibility findings. He appeals on three grounds. First, it is said that the Judge failed to have regard to the evidence of Ms Alison Pargeter, a country expert who provided a report dated 30 May 2019 in support of the Appellant's claim. Second, it is said that most if not all the Judge's adverse credibility findings rely on his view of the implausibility of the claim. The Appellant contends that the Judge has failed to exercise due caution when reaching those findings; in other words, he has imposed his own view of what is likely to have occurred without considering the cultural and other differences which may underlie the claim. It is also said that the Judge's findings ignore the evidence or at least fail to deal with it. Allied to that ground, at ground three, the Appellant argues that the hearing was procedurally unfair because many of the points relied upon by the Judge were not raised by him at the hearing and the Appellant has therefore been unable to comment on them.

4. Permission to appeal was granted by First-tier Tribunal Judge Adio on 7 October 2019 in the following terms so far as relevant:

> "1. …The grounds of application for permission to appeal argue that it was agreed by the parties at the hearing that credibility was the only matter in issue. It is submitted that the judge's assessment of credibility contained material errors of law and was procedurally unfair.
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> 2. The first ground deals with the treatment of expert evidence it is noted that the judge stated as follows, 'I am obliged to observe that for almost self-evident reasons Miss Pargeter's conclusions must inevitably be premised on the truthfulness of the Appellant's account.' It is argued that the approach taken by the judge was erroneous in view of the case of **Mibanga v Secretary of State for the Home Department [2005] EWCA Civ 367.** Counsel argues that the report of the expert should have been considered by the judge as supportive of the Appellant's claim and it was not premised on the truthfulness of the Appellant's account but

> rather commented on the possibility of his claim in light of the country background information.
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> 3. I find that the ground raised by Counsel raises an arguable error of law this finding by the judge appears at paragraph 63 of the decision which indicates that it was not given proper consideration from the outset. The other grounds raised deal with the judge relying a lot on inherent possibility and procedural unfairness in view of alleged matters not being put to the Appellant. I find that the ground relating to the treatment of expert evidence by itself raises an arguable error of law. Permission to appeal is given on all grounds."

5. The matter comes before me to determine whether the Decision contains an error of law and, if I so conclude, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

DISCUSSION AND CONCLUSIONS

Ground One

6. At [26] of the Decision, having indicated at [25] that he found the Appellant not to be credible, the Judge said that "[i]n making that finding, I have throughout my analysis of the evidence had regard to the expert report of Alison Pargeter". As Ms Cohen pointed out, though, it is not until [63] of the Decision that the Judge makes any finding about that report. He there says this:

> "For the avoidance of doubt I emphasise that in reaching my conclusions above I have throughout borne in mind the Expert Report of Alison Pargeter. In the skeleton argument of the appellant's counsel (at paragraph 16) four specific points are made in relation to plausibility of the appellant's account. I have dealt with each above. On the wider point of the duty to make a holistic assessment (para. 17) I am obliged to observe that for almost self-evident reasons Ms Pargeter's conclusions must inevitably be premised on the truthfulness of the appellant's account."

7. Ms Everett makes the point that Ms Pargeter's report is itself premised on plausibility and therefore that report coupled with the way in which the Appellant's case was argued led the Judge to considering the plausibility of the Appellant's account as the Judge has done. She said that there was no error of law in the Judge's approach as plausibility was the thread running through the way in which the Appellant presented the case and the way in which the Judge determined it.

8. I do not accept that the Appellant has demonstrated that there is any error of law in the Judge's treatment of the expert report. Much of the report is devoted to general conditions for Christians and Christian converts in Iraq and the Kurdish area specifically (as one would expect from a country expert). When dealing with the Appellant's situation at section [4] of the report, Ms Pargeter very fairly says that she is unable to comment on the plausibility of the conversion as it is "too personal and

too incident-specific". It is from Ms Pargeter's report that the Judge has obtained some of the evidence on which he relies (see for example that the Mar Josuf church is a Chaldean Catholic one and not Pentecostal: [40] of the Decision). Other parts of the report do not support the Appellant's case (for example, Ms Pargeter says that the KRI authorities would not tolerate a public denunciation of a person for conversion as they are secular: [5.7]; see reference at [49] of the Decision). Overall, Ms Pargeter's conclusion is unhelpful to the Appellant. She says at [6.4] of the report that "[w]hile it is true that the Kurdish authorities do not recognise conversion away from Islam, the authorities would not persecute [QS] on account of his new faith" (although she does conclude that "[w]ere he to practice his faith openly as a convert, he would likely face social stigma, ostracism and potential abuse" and I note that the Respondent had apparently conceded risk if the claimed conversion were accepted). The remainder of the report concerns the CSID issue and internal relocation.

9. In short, therefore, the Judge was entitled not to refer in more detail to Ms Pargeter's report when dealing with the credibility of the Appellant's claim. He has done so briefly in relation to some of the issues, Ms Pargeter herself says that she is unable to comment on the precise detail of the asserted conversion and other aspects of the claim are positively undermined by the report (if the Judge had found the claim of conversion to be true).

Ground Two

10. I have subsumed into this ground what Ms Cohen said was an additional ground which I allowed her to develop but which in my view falls under this heading in any event as the challenge is to the overall adverse credibility findings.

11. Dealing first with the plausibility issue, the Upper Tribunal in KB & AH (credibility-structured approach) Pakistan [2017] UKUT 00491 (IAC) accepted that plausibility is a relevant factor when assessing credibility. However, as Ms Cohen pointed out, it is a factor which must be treated with a degree of caution. The Tribunal in that case cited from HK v Secretary of State for the Home Department [2006] EWCA Civ 1037 as follows:

> "28. Further, in many asylum cases, some, even most, of the appellant's story may seem inherently unlikely but that does not mean that it is untrue. The ingredients of the story, and the story as a whole, have to be considered against the available country evidence and reliable expert evidence, and other familial factors, such as consistency with what the appellant has said before, and with other factual evidence (where there is any).
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> 29. Inherent probability, which may be helpful in many domestic cases, can be a dangerous, even a wholly inappropriate, factor to rely on in some asylum cases. Much of the evidence will be referable to societies

> with customs and circumstances which are very different from those of which the members of the fact-finding tribunal have any (even second-hand) experience. Indeed, it is likely that the country which an asylum-seeker has left will be suffering from the sort of problems and dislocations with which the overwhelming majority of residents of this country will be wholly unfamiliar. The point is well made in *Hathaway on Law of Refugee Status* (1991) at page 81:
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> > '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'
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> 30. Inherent improbability in the context of asylum cases was discussed at some length by Lord Brodie in *Awala v Secretary of State* [2005] CSOH 73. At paragraph 22, he pointed out that it was 'not proper to reject an applicant's account *merely* on the basis that it is not credible or not plausible. To say that an appellant's account is not credible is to state a conclusion' (emphasis added). At paragraph 24, he said that rejection of a story on grounds of implausibility must be done 'on reasonably drawn inferences and not simply on conjecture or speculation'. He went on to emphasise, as did Pill LJ in *Ghaisari,* the entitlement of the fact-finder to rely 'on his common sense and his ability, as a practical and informed person, to identify what is or is not plausible'. However, he accepted that 'there will be cases where actions which may appear implausible if judged by …Scottish standards, might be plausible when considered within the context of the applicant's social and cultural background."

The Tribunal also made the point at [30] that plausibility ought to be considered along with other factors; this is "also illustrative of the need to avoid basing credibility assessment on just one indicator". Plausibility is also "not a concept with clear edges"; there may therefore be varying degrees of implausibility and some aspects of a claim may be plausible even if others are not.

12. With that general starting point, I turn to the individual challenges made to the Decision. First, as I have already noted, Ms Cohen raised an additional point about the finding at [39] of the Decision that the Appellant had said that he attended a Pentecostal church in Iraq whereas the church he named was said by Ms Pargeter to be a "Chaldean Catholic Church". As Ms Cohen points out, the Appellant deals with this point in his witness statement which appears at [AB/5-22]. He says the following about this issue:

> "74. …It was only when I came to the UK that I learnt about different denominations of Christianity. My friend [D] explained this to me when we were talking about Christianity as he was the only person I could understand because we speak the same language and he knew more about Christianity than I did. When I was speaking to [D], he had explained to me that there are different denominations in Christianity like Catholic, Protestant and Orthodox. He said to me that he was a Protestant and he went to a Protestant Church in the UK. [D] said that I

> should come to the Church with him and he said that it would be the same as the one I went in Sulaymaniyah and this why I thought '*only Pentecostal in Sulaymaniyah.'*
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> 75. Also I would like to clarify that I did not say the word 'Pentecostal'. I did not even know that the denomination of that name existed within Christianity. At the time of my interview, I only knew about Catholics, Protestant and Orthodox. I think the interpreter may not have understood me properly. I have a slight speech impediment and I sometimes struggle to say some words. I find it hard to say the word 'Protestant' and that is why I think the Home Office think that I have said 'Pentecostal' and not 'Protestant'. Even later in the interview, when the Home Office were asking me questions, my legal representative tells me that the Home Office say 'Pentecostal' in their questions. I answered their questions thinking that this was the same as Protestant. I only realised that I was not saying 'Protestant' and that the word Home Office were saying is different later in the interview when they asked me about the Church I went to in Leicester…"

13. In my view of that evidence, there is a certain tension between [74] and [75] as to the Appellant's understanding of the different types of religion. Nor am I impressed by the interpretation point. Not only, as Ms Everett points out, is it the case that the Appellant raised no such issue at the interview but, in any event, there is no evidence about the different words in the Appellant's own language which might allow one to assess whether any speech impediment would make the difference which the Appellant asserts. If what he says is that he was saying the words in English and not his own language, it is difficult to see how "Protestant" can sound like "Pentecostal". As I say, there is in any event an inherent inconsistency within those paragraphs as to which word the Appellant used and why.

14. What I do accept however is that the Appellant provided an explanation for why there may be an inconsistency about the church which he says he attended in Iraq on which the Judge has based the finding at [39] and [40] of the Decision and that the Judge has failed to consider that explanation. However, I also note in passing that this undermines the Appellant's central point that the Judge's findings are based on implausibility.

15. Ms Cohen also drew my attention to the asylum interview record ("AIR"). She submitted that the answers to questions [202] to [204] are supportive of what is said by the Appellant. That is true to some extent as, in particular at [204] the Appellant says "[t]he name you mention to me i can't say it as i never heard about it. i heard in Protestant, Catholic and Orthodox. Possible i miss understand you or you misunderstand me." I should say that I reject Ms Cohen's submission that the numerous typographical and spelling errors in the AIR are indicative of interpreting problems. In my view it is likely that those are due to the interviewer typing during the interview or transcribing notes thereafter and failing to make corrections. However, what is said in answer at questions [202] to

[204] does provide some support for the Appellant's position that he did not know about Pentecostal religion at that time and certainly not based on attending such a church in Iraq. That is relevant to what is said at [39] to [40] of the Decision and possibly also to the level of knowledge which the Judge apparently expected of the Appellant in relation to that religion at [41] to [42] of the Decision as well as the expectation that he would attend a Pentecostal church in the UK at [44] of the Decision. I accept that the Judge there has referred to other answers given in the AIR which support the point he there makes but, as Ms Cohen submits, and I accept, the Judge has failed to take into account other answers and in particular those at questions [202] to [204]. Those were relevant to the findings made by the Judge and the inference drawn.

16. Turning then to the examples of error given in the grounds, my attention was drawn to various of the Judge's findings as follows:

> "30. None of the above rings true. If a child of five years of age was losing consciousness, she would not be released from the care of her paediatric consultant (she initially attended a children's hospital) without significant steps being taken to establish the problem. Even if the problem could not be established, she would not be discharged until it was safe to do so. I doubt very much that she would be discharged on the basis that she 'could' have a heart condition. If she continued to lose consciousness, she would be taken back to the children's hospital where she had been treated before and not to a different hospital.
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> 31. The appellant says that Iraqi hospitals do not retain people's medical records but they are given to patients on discharge. This is highly unlikely. Medical records these days, and here I am using common sense, are generally kept on computers. The hospital, even if the appellant had a hard copy of the medical records, would still have copies of her records. In any event, the appellant has made no effort to get the medical records of his daughter. He has contacts in Iraq. He has a sister whom he is in contact with and he could have endeavoured to contact the hospital directly. He has made no effort to get his daughter's medical records sent to the UK.
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> …
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> 34. No matter what stress the appellant was under having an apparently seriously ill daughter, it must have been clear to him that the nurse was not reading from the Quran. It must have been clear to him with a name like Maria as he himself implies that she was a Christian. In the normal course of events, a Christian would make the sign of the cross before praying. Leaving that aside, the appellant apparently didn't pay any attention to the words the nurse was speaking. It is only later that the appellant apparently realises she is a Christian.
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> 35. The appellant's daughter must clearly have been under a doctor at the hospital. She would not be discharged by a nurse simply saying she is now fine. He later says 'The doctors did tests and could not find the symptoms she had before (paragraph 21, witness statement). This does not make sense. The symptoms 'she had before' were fainting episodes.

> Tests would not establish if she had those symptoms. What I think is being suggested is the tests established that there was no underlying causes for her illness. But that was the case prior to the miracle. The doctors could not ascertain what was causing her losses of consciousness."

Other examples are cited in the grounds relating to the Judge's findings about the way in which the Appellant left Iraq, but the above examples suffice to illustrate the point.

17. I begin by noting that when those paragraphs are considered as a whole (rather than the selective quotations from them in the pleaded grounds), they do not necessarily support what is said in the grounds about the reliance on implausibility (or inherent improbability as pleaded). For example, the points made about the Appellant's ability to get the daughter's medical records from Iraq at [31] and the comment about the way in which the Appellant's evidence is framed at [35] are ones which the Judge was entitled to take into account and do not rely on the Judge's view about plausibility.

18. Nor do I consider that it can be said that, overall, the Judge has failed to have regard to the evidence before him. Ms Cohen drew my attention, for example, to the Appellant's witness statement about the incident involving the nurse which reads as follows:

> "17. On 14 February 2018 we took [V] to a different hospital to the one she had been in before. I do not know the name of this hospital but we called it the Emergency hospital. On the following day, on 15 February 2018, a nurse who was working in the hospital came to see us. Her name was Maria and she said that she would do a prayer for [V]. By this time I was really desperate; nothing was working for my daughter, so I did not object to this. At that point I or my wife did not realise that she was a Christian lady, even though she told us that her name was Maria. My wife and I desperately wanted to do everything possible to treat [V], we were not thinking about who the nurse was or what religion she came from.
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> …
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> [19] Before we took [V] home, I wanted to thank Maria and ask her about the prayer that she had done for her. Maria told me that she is Christian and that if I was interested in Christianity I should go to church and they would help me and tell me about the prayers."

Contrary to Ms Cohen's submission that the Judge had ignored the evidence as to the Appellant's evidence about his state of mind when making his finding at [34] of the Decision, the Judge there makes clear that he had in mind the evidence that the Appellant was stressed due to his daughter's condition.

19. Although I am not persuaded that the Judge has relied to the extent asserted on implausibility of the Appellant's claim, there is, as I have

already indicated, a failure to take into account certain of the evidence which is central to the Appellant's case to have converted. Ms Everett accepted that this was the strongest of the grounds. This ground has to be read with the third ground concerning procedural fairness to which I now turn.

Ground Three

20. The Appellant has produced a witness statement from Ms Agata Patyna of Counsel who represented the Appellant before Judge Lodge. In that statement, she records as follows:

> "3. At the hearing, the Appellant was called to give evidence. He was cross-examined by Miss Simbi, the Home Office Presenting Officer. I made a contemporaneous [note] of the hearing ….. In my note, I recorded that the Appellant was not asked any questions by the Judge.
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> 4. At the conclusion of the evidence, the Judge heard submissions from the Presenting Officer and me. I recorded that the only question asked of me was in respect of the feasibility of the Appellant obtaining an Iraqi CSID if his account were not to be found credible. Otherwise, I was not asked to address any specific issues regarding the Appellant's credibility or the plausibility of his account."

21. Ms Patyna has appended the note to her statement. That confirms what she says in her statement. I note that the Home Office's representative asked questions only about the Appellant's involvement in Christianity and attendance at Church. No questions were asked either by her or the Judge about the claimed reasons behind the conversion, namely what occurred when the nurse is said to have healed the Appellant's daughter. That aspect of the account was not therefore challenged. Although as Ms Everett pointed out, the Respondent has challenged the Appellant's credibility, she did not do so in relation to this aspect. The Appellant was not therefore on notice of any challenge in this regard and was not given the opportunity to deal with the Judge's concerns about the credibility of these events.

22. In conclusion, therefore, I am satisfied that there is an error of law based on ground two (in part) when read with ground three. For that reason, I set aside the Decision. As the challenge and the grounds which I consider are made out concern the credibility findings, it is not appropriate to preserve any of those findings and I therefore set the Decision aside in its entirety. I was asked to remit the appeal if I found an error of law. The grounds on which my conclusion that there is an error of law is based concern the credibility findings and, moreover, I have concluded that at least some of those are vitiated by procedural unfairness. For that reason, I am persuaded that it is appropriate to remit the appeal for a full de novo hearing before a different Judge as a matter of procedural fairness.

CONCLUSION

23. I am satisfied that the grounds disclose an error of law as set out above. I therefore set aside the Decision. I remit the appeal to the First-tier Tribunal for re-determination of the appeal. No findings are preserved.

DECISION

I am satisfied that the Decision involves the making of a material error on a point of law. The Decision of First-tier Tribunal Judge N Lodge promulgated on 15 August 2019 is set aside. The appeal is remitted to the First-tier Tribunal for re-hearing before a Judge other than Judge N Lodge.

Signed Dated: 12 December 2019
Upper Tribunal Judge Smith