Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/03753/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Sent**
On 19 December 2013	**On 27 January 2014**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

E O
(ANONYMITY DIRECTION MAINTAINED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Lay, instructed by Wilson Solicitors
For the Respondent: Ms A Holmes, a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant, EO, is a citizen of Turkey. The Appellant has appealed against the decision of the Respondent dated 11 May 2004 to refuse to grant him asylum and to make directions for his removal under paragraphs 8-10 of Schedule 2 of the

Immigration Act 1971. His first appeal had been dismissed by Immigration Judge Williams. The dismissal of that asylum appeal had been followed by a fresh human rights claim which had been refused by the Respondent on 23 March 2012. The Appellant had appealed to the First-tier Tribunal (Judge Traynor) but his determination had been set aside and the appeal remitted to the First-tier Tribunal. The appeal was then heard by Judge Herlihy who dismissed the appeal in a determination promulgated on 7 August 2013. Permission was granted to appeal to the Upper Tribunal in August 2013 and, in a decision dated 24 October 2013, Deputy Upper Tribunal Judge Alis set aside Judge Herlihy's determination and directed a resumed hearing in the Upper Tribunal. A transfer order was made on 4 November 2013 by Principal Resident Judge Southern and the matter came before me at Field House on 19 December 2013.

2. The background to the appeal is set out in Judge Alis's decision. I note, in particular, that Judge Alis preserved the finding that the Appellant is of Kurdish ethnicity from the province of Elazig where Zaza is spoken; and that there was an incident in Tunceil on 26 July 2001 during which Turkish Authorities assaulted Kurdish civilians and activists.

3. I did not hear any fresh evidence at the resumed hearing but I am grateful for the oral submissions made by both representatives. Mr Lay, for the Appellant, helpfully summarised the Grounds of Appeal as follows:

   (1) if it is accepted that the Appellant was abused by the police after he was arrested following the incident on 26 July 2001 then, in the light of country guidance as regards the maintenance of records held by the Authorities of such incidents, together with the expert evidence of Dr Laiser, then there is a real risk the Appellant would be identified on return and would suffer harm; and

   (2) the Appellant's opposition to military service motivated by a serious and insurmountable conflict between an obligation to serve in the army and his own conscience and deeply held beliefs (see **Bayatyan v Armenia application 23459/03: European Court of Human Rights**) in consequence, the Appellant's rights under Article 9 ECHR would suffer a flagrant breach upon his return to Turkey.

4. Having considered all the previous evidence very carefully and having proper regard to the determination of Judge Williams and the preserved findings of the determination of Judge Herlihy, I find that the Appellant succeeds in his claim for refugee status under ground (1). My reasons for making that finding are as follows.

5. First, I have considered the medical report of Dr Mason dated 3 October 2012. That report contains an Istanbul Protocol-compliant evaluation in which Dr Mason records that "the Appellant's scars are highly consistent with his account as to the manner in which the wounds that caused them arose." That important evidence (to which I find significant weight should be attached) taken together with the recently established fact that an incident did occur in Tunceli on 26 July 2001 (see Judge Alis's

decision) and the fact that the Appellant is a Kurd from an area of Turkey where severe tensions continue to exist between the local population and the Turkish Authorities provide good reason, in my opinion, for revisiting the adverse credibility findings of Judge Williams. I bear in mind that the facts are to be found in accordance with the so-called lower standard of proof, namely whether there is a real risk that the Appellant would suffer persecution or treatment contrary to the ECHR Article 3 if he were returned to Turkey. There is now no dispute (as there had been before Judge Williams) that the incident in Tunceli did occur and that it is at the very least plausible that the Appellant took part in that incident as he claimed. When that fact is considered in the light of Dr Mason's medical report ("the Appellant's scars are highly consistent with his account …") then I find that it is reasonably likely that the Appellant has given a truthful account of the incident and the aftermath of it in which he claims to have suffered physical harm at the hands of the Turkish Authorities. In reaching that finding I note that Judge Williams did not have the advantage of corroborative evidence regarding the occurrence of the incident nor, of course, did he have sight of Dr Mason's report.

6. Both Judge Williams and Judge Herlihy rejected the credibility of the Appellant's account partly because he had been unable to give details regarding the operation of the PKK. I do not accept the submissions set out in the Grounds of Appeal and reiterated by Mr Lay that the inaccurate answers given at interview by the Appellant regarding the PKK can be explained by reason of the fact that that organisation had declared a ceasefire at around the time the Appellant came to the United Kingdom and first advanced his claim for asylum. The PKK had a long history of armed conflict with the Turkish Authorities and I do not find it credible that a brief hiatus in its violent activities can explain the answers given by the Appellant. I am, however, prepared to accept that the Appellant was only a child when he came to the United Kingdom and that his ignorance of the PKK and its operations may be explained by reason of his youth.

7. Ms Holmes, for the Respondent, submitted that the Turkish Authorities would have no record of the Appellant's involvement in an arrest following the 2001 incident and that they were also aware that false claims for asylum were routinely submitted by its citizens who had travelled abroad. That submission is, in my view, outweighed by the evidence (some of which is set out in the country guidance but also in Ms Laiser's report) that the Turkish Authorities maintain a sophisticated system of criminal records. Ms Laiser notes in her report [page 14] that the Appellant, as a male who has not undertaken military service come to the attention of the Authorities at Ataturk Airport where his details would be checked on the GBT record system. The police database containing particulars of the Appellant's detention, together with his family profile would, in Ms Laiser's opinion, be "very likely" to appear on the TEM-NET database. Ms Laiser concluded that the Appellant would:

> Be likely to face a real risk of ill-treatment at the airport as a Kurdish draft evader and failed asylum seeker from Uzuntarla, linked with the Dersim massacre survivors and

whose family origins can be traced back to Dersim (Tunceli) through NUFUS records in Turkish computer searches.

I am satisfied that an individual who took part in the 2001 incident, was detained thereafter and who still bears the scars of the injuries which he suffered in detention would be likely to attract the interests of the Turkish security Authorities upon arrival at Istanbul. I find also that there was a real risk that the Appellant would thereafter be transferred to the Anti-Terror Branch where all the evidence (including a report of Ms Laiser) indicates that he would face a real risk of torture during interrogation. In the circumstances, I find that the Appellant's appeal on refugee grounds and in respect of Article 3 ECHR should be allowed.

8. As regards the second Ground of Appeal, I shall deal with this briefly. In the light of the Appellant's previous involvement in a Kurdish demonstration following which he suffered injury at the hands of the Turkish Authorities, I consider it reasonably likely that he has subsequently harboured a deep and genuine resentment towards the Turkish Authorities, together with a reluctance to engage in any form of military service in Turkey. I am also prepared to accept that the Appellant has only raised this aspect of his claim late in the day (a fact which troubled both Judges Herlihy and Williams) because the jurisprudence at the time of his earlier appeal before Judge Williams did not indicate that such a claim would lead to a grant of refugee status.

9. I therefore remake the decision by allowing this appeal on Refugee Convention grounds and on Article 3 ECHR grounds. The Appellant is not entitled to a grant of humanitarian protection.

DECISION

10. This appeal is allowed on asylum grounds.

11. This appeal is allowed on human rights grounds (Article 3 ECHR).

Direction Regarding Anonymity – Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005

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 both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 16 January 2014

Upper Tribunal Judge Clive Lane