



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

Appeal Number: PA/11291/2017

THE IMMIGRATION ACTS

Heard at Field House

On 18 April 2018

**Decision & Reasons
Promulgated
On 4 May 2018**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

**FA
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Sandhu of Montague Solicitors LLP

For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order prohibiting the disclosure or publication of any matter likely to lead to members of the public identifying the appellant. A failure to comply with this direction could lead to Contempt of Court proceedings.

Background

2. The appellant is a citizen of Turkey, of Kurdish ethnicity, who was born on [] 1983.
3. The appellant claims to have entered the United Kingdom on 27 January 2013 using a false Bulgarian passport.
4. On 16 December 2013, the appellant was encountered at a residential property owned by his father and was served with notice IS151A that he was subject to removal as an illegal entrant.
5. On 6 January 2014, an application was made in the appellant's name (FLR(O)) for leave outside the Rules. That application was refused on 19 February 2014 with no right of appeal. On 1 April 2014, a judicial review claim was lodged challenging the legality of that decision but permission was refused on 10 December 2014.
6. On 30 January 2015, the appellant lodged an asylum claim. That claim was withdrawn on 11 March 2015.
7. The appellant was in detention and sought voluntary return to Turkey. On 28 April 2015, the appellant was placed on a flight to Turkey.
8. Further representations were made and the appellant's claim reinstated and he was returned to the UK.
9. On 14 October 2017, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and on human rights grounds.

The Appeal

10. The appellant appealed to the First-tier Tribunal. In a determination sent on 15 January 2018, Judge J J Callow dismissed the appellant's appeal on all grounds.
11. Whilst the judge accepted that the appellant was of Turkish ethnicity and a supporter of the HDP Party in Turkey, he found the appellant's account not to be credible. He did not accept that the appellant had been politically active by taking part in demonstrations and distributing leaflets and had been detained and tortured by the Turkish authorities and also that he had been assaulted and ill-treated by political opponents in Turkey. The judge found that the appellant had fabricated his claim and that he was, as a consequence, not at risk on return to Turkey.
12. The appellant sought permission to appeal to the Upper Tribunal. On 6 February 2018, the First-tier Tribunal (Judge Cruthers) granted the appellant permission to appeal.

The Judge's Decision

13. Before Judge Callow, the appellant, his father and partner gave oral evidence.
14. At para 18 of his determination, Judge Callow set out his ultimate finding, namely that he made an “adverse finding of credibility” against the appellant having considered all the evidence in the round.
15. At para 19, Judge Callow relied upon the appellant's immigration history, in particular that he had not claimed asylum until he had been encountered as an illegal entrant in December 2013. Further, Judge Callow also took into account that the appellant had, in March 2015, withdrawn his asylum claim and had voluntarily agreed to return to Turkey – which in fact he did.
16. Judge Callow said this at para 19:

“The appellant's immigration history is not consistent with a genuine fear of persecution in Turkey. In the first instance the appellant did not claim asylum until after he had been encountered as an illegal entrant to the UK. Had he been identified as politically active and had an adverse political opinion been imputed to him, or had he feared such imputation or otherwise entertained a genuine fear of persecution, it is not credible that he would not have brought an asylum claim other than as a last resort and after agreeing to voluntarily return to his home country. Notwithstanding the fact of having made an application for leave to remain essentially founded on grounds of asylum, it defies belief that the appellant would claim that this application was not made and if it was made, despite being countersigned by the appellant's father who met the costs thereof, that it was only after he had voluntarily agreed to return to Turkey that a renewed claim was in fact made in April 2015”.
17. Judge Callow returned to this issue at para 23 as follows:

“The appellant's immigration history is not consistent with a genuine fear of persecution in Turkey. In the first instance the appellant did not claim asylum until after he had been encountered as an illegal entrant to the UK. Had he been identified as politically active and had an adverse political opinion been imputed to him, or had he feared such imputation or otherwise entertained a genuine fear of persecution, it is not credible that he would not have brought an asylum claim other than as a last resort and after agreeing to voluntarily return to his home country”.
18. In his evidence, the appellant claimed to have no knowledge of the application made in January 2014 on his behalf in which he first raised his asylum claim. The judge set this evidence out at para 9 of his determination as follows:

“While he accepted that he had not immediately claimed asylum on arrival in the UK and only did so after he had been arrested as an illegal entrant, this was because of advice that it was best not to do so straight away as there was a high risk of being detained and returned to Turkey”.

19. In other words, he sought to blame his previous legal representatives.
20. The appellant's father, in his oral evidence, stated that he was aware of the application and had indeed paid for it (see para 10 of the determination).
21. At para 20 of his determination, Judge Callow dealt with the appellant's evidence blaming his former representatives as follows:

“As the appeal is based in part on an allegation about the conduct of a former representative, it is noted that contrary to the guidance in *BT (Former solicitors' alleged misconduct) Nepal [2004] UKIAT 00311* there has been no evidence that the former representatives made an application without the appellant's approval and knowledge. The complaint does not appear to have been put to the former representatives. Certainly, no evidence of correspondence addressed to the former representatives has been tendered in evidence. In all the circumstances a finding of fact based on an allegation against former representatives cannot be made in the present appeal”.

22. At para 21, the judge dealt with a rule 35 report prepared by Dr Jabbar whilst the appellant was in detention and dated 25 April 2015 (at pages 12-14 of the appellant's bundle) as follows:

“No weight is attached to Dr Jabbar's very brief medical report. Aside from the fact that it is the function of this tribunal to consider the plausibility of an asylum claim, the details of the scars seen by the doctor are inconsistent with the injuries described by the appellant in making his asylum claim. In making his asylum claim he claimed that he had been sprayed with pressurised cold water and subjected to *falaka*. In a further incident when he was assaulted by nationalists, he felt burning on his sides and was hit on his arms with something sharp. None of the foregoing bears a resemblance to the details of the doctor's physical examination of the appellant - a 2cm scar on the bridge of the nose, a circular mark due to cigarette burns on the right hand, two separate scars on the lower stomach and multiple scars on the lower right leg and two scars on the back of his left arm in the vicinity of the elbow”.

23. Then, at para 22 Judge Callow, whilst accepting that the appellant was a member of HDP, a political party in Turkey, he noted the absence of any supporting evidence from the appellant's mother and friends as follows:

“Whilst it has been accepted that the appellant is a member of HDP, a recognised political party in Turkey, it has not been shown that the events which led to the appellant leaving Turkey have been established. While I am sensitive to the fact that a claim for asylum does not require corroboration, it could reasonably have been expected of the appellant that he would have obtained supporting evidence from his mother and friends. If the incidents had occurred and not least of all had enquiries been made about his whereabouts, he could have obtained statements from his mother and friends confirming such information. This evidence was readily available, but has not been produced. The failure to provide evidence that the appellant is being sought without explanation is a factor of weight

where there are doubts about the appellant's credibility: *TK (Burundi) [2009] EWCA Civ 40; [2009] Imm AR 3 at 488*".

24. Finally, at para 24 the judge stated his ultimate finding, namely that the appellant's account was not credible and that he had fabricated a claim:

"The cumulative effect of these considerations is such that the appellant's account of political activity, and of the consequent adverse interest in him of the authorities and other parties, is not credible. I find that the appellant has fabricated his claim".

Discussion

25. Mr Sandhu, who represented the appellant, relied on a number of points derived from the grounds of appeal which, he submitted, demonstrated that the judge had materially erred in law in reaching his adverse credibility finding and that his decision could not stand.
26. First, he submitted that the judge had placed undue weight upon the appellant's immigration history.
27. Mr Kotas, who represented the Secretary of State, submitted that the appellant's immigration history was clearly relevant in that he had not claimed asylum until he had been encountered and served with notice as an illegal entrant. That was clearly relevant to his credibility under s.8(5) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.
28. I accept Mr Kotas' submission on this point. Plainly, the appellant's failure to claim asylum until after he had been notified of the decision that he was liable to be removed as an illegal entrant, which was in December 2003, fell within s.8(5), namely that:
- "This section also applies to failure by the claimant to make an asylum claim or human rights claim before being notified of the immigration decision, unless the claim relies wholly on matters arising after the notification".
29. The effect of s.8 of the 2004 Act applying is set out in s.8(1) as follows:
- "In determining whether to believe a statement made by or on behalf of a person who makes an asylum claim or a human rights claim, a deciding authority shall take account, as damaging the claimant's credibility, of any behaviour to which this section applies".
30. Providing that the whole of an individual's circumstances, and the evidence, are considered, the appellant's failure to claim asylum earlier was potentially damaging of his credibility (see *JT (Cameroon) v SSHD [2008] EWCA Civ 878*).
31. It is readily evident from the judge's reasoning at paras 18-24, that he did not rely solely upon the appellant's failure to claim asylum earlier.
32. The judge dealt with the appellant's evidence that he had not made the claim in January 2014 and that it was done without his authority by solicitors at para 20. There was no supporting evidence of their

misconduct. Indeed, as I have already pointed out, the appellant's father was aware of the application and paid for it.

33. In any event, even if the appellant had not raised his persecution claim in the context of that application made on 6 January 2014, on his evidence, he would not have raised it until twelve months later when he lodged an asylum claim on 30 January 2015. That would, with even more force, engage the effect of s.8 of the 2004 Act.
34. Mr Kotas also drew my attention to the fact that the appellant had voluntarily sought return to Turkey following refusal of his claim outside the Rules and subsequent unsuccessful judicial review claim. Further, his claim on 30 January 2015 for asylum had been withdrawn on 11 March 2015. He had returned to Turkey in April 2015. Whilst the appellant claimed he had been misadvised, as I have already pointed out, the judge dealt with this perfectly properly in para 20 and, in the absence of any supporting evidence, was entitled to reject the appellant's explanation. This aspect of the appellant's "immigration history" was also relevant to his credibility and, as the judge pointed out in para 23, whether he "entertained a genuine fear of persecution".
35. Consequently, I reject this ground of appeal.
36. Secondly, Mr Sandhu submitted that the judge's treatment of Dr Jabbar's rule 35 report, at para 21 of his determination, was inadequate. He submitted that the appellant's evidence of torture was not, as the judge stated, inconsistent with the identified scars on the appellant's body. He referred me to the evidence at question 139 of the appellant's asylum interview (page C14 of the respondent's bundle) and also question 166 where, in addition to being subjected to pressurised cold-water sprays and falaka by the Turkish authorities, the appellant claimed that he had suffered burning when assaulted by political opponents.
37. The rule 35 report (which is at pages 12-14 of the appellant's bundle) is brief. In section C, Dr Jabbar confirms that:

"I have concerns that this detainee may have been the victim of torture".
38. Then, in section 5 he states:

"[The appellant] states that he was tortured in Turkey in 2012 by the Turkish police as he is Kurdish and was part of a demonstration. He was taken to the police station and he was beaten with hot blunt instruments overnight. He has scars.

Since then he is unable to sleep and gets flashbacks of the events. We have referred him to our inhouse mental health team. He is also getting migraines and tension type headaches which we are treating.

His account is plausible".
39. Then at page 14, on two pictorial depictions of the human body, a number of scars/marks are highlighted. The only one referring to any potential

cause is on the right arm where it is stated: "circular marks due to cig burns".

40. Mr Kotas submitted that the rule 35 report was not the equivalent of a medical report which was Istanbul Protocol compliant. It only stated that the appellant "may" have been the victim of torture.
41. I accept that submission. The report is clearly not Istanbul Protocol compliant. It goes no further than stating that the appellant "may" have been the victim of torture. Together with, of course, stating that his account is "plausible" based upon what the appellant told Dr Jabbar. It is worth noting that as recorded, and as I have set out above, the account given by the appellant does not square with his evidence before the judge, in that the appellant did not claim that he was "beaten with hot blunt instruments" by the police. His account (as set out in para 6 of the determination) was that he had been subject to pressurised cold-water spray and falaka by the police. The reference to him feeling "burning on his sides" was to an incident that he claimed occurred later, on 20 December 2012, when he was accosted and assaulted by political opponents.
42. Whilst it may be that Judge Callow understated the weight to be attached to Dr Jabbar's report, namely that "no weight" should be attached to it - given its brevity and the fact that apart from a mark being attributed to a cigarette burn - the report offers no basis for concluded a causal connection existed between what the appellant claimed ill-treatment on the two occasions he was assaulted and his injuries. It was, self-evidently, not consistent with the approach required under the Istanbul Protocol because, of course, it was not a medical report produced for the purposes of litigation. It was a rule 35 report relevant to whether the appellant could continue to be detained. Its form and substance reflected that underlying purpose. Whilst, therefore, it was capable of being independent evidence of torture, I am not satisfied that the judge's treatment of it in para 21 amounted to an error of law. The report provided no significant weight in favour of the appellant's claim and, in particular, his credibility.
43. Thirdly, Mr Sandhu submitted that the judge had been wrong to take into account, in para 22 of his determination, that there was no supporting evidence from the appellant's mother and friends.
44. That argument is, in my judgment, wholly unsustainable. The judge, correctly, recognised that the appellant did not have to provide "corroboration". Nevertheless, given that part of his claim was that his mother had told him, since his arrival in the UK, that the authorities had been looking for him at his home (see para 9 setting out his oral evidence), it was properly open to the judge to take into account in assessing whether he believed, at least that aspect of his claim, that evidence which could have readily been made available was, in fact, not

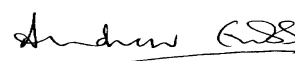
produced (see TK (Burundi) v SSHD [2009] EWCA Civ 40 at [10]). Consequently, I also reject this ground.

45. For these reasons, I reject the grounds of appeal. I am satisfied that the judge did not materially err in law in reaching his adverse credibility finding.
46. Finally, in the grounds of appeal it is contended that the judge failed to properly consider the “risk factors” set out in IK (Returnees - Records - IFA) Turkey CG [2004] UKIAT 00312. The factors are set out in [14] of IK which is set out at para 10 of the grounds. Mr Sandhu, in his oral submissions, did not press this ground of appeal. In my judgment, he was correct not to do so. Having found the appellant not to be credible and having rejected his account as a fabrication, there was no basis for concluding that the appellant would be at risk based upon his support of HDP and that he is a Kurd.
47. In fact, the judge dealt with this issue at para 25 as follows:
- “The issue of treatment of Kurds remains as sensitive today as it was at the time of promulgation of the decision in *IK (Returnees - Records - IFA) Turkey CG* [2004] UKIAT 00312, a decision which was not referred to at the hearing of the appeal. However, as his claim for asylum has not been established he will not be at risk on return to Turkey. In the absence of an adverse profile in Turkey, he will not be of any interest to the authorities on return”.
48. It does not seem that the appellant's legal representatives, then as now Montague Solicitors, relied upon IK before Judge Callow. The judge was certainly not referred to that decision at the hearing. In any event, the appellant's claim to be at risk, given the adverse credibility finding, was simply unsustainable.

Decision

49. For the above reasons, the First-tier Tribunal's decision to dismiss the appellant's appeal did not involve the making of an error of law. The decision stands.
50. Accordingly, the appellant's appeal to the Upper Tribunal is dismissed.

Signed



A Grubb
Judge of the Upper Tribunal

2 May 2018