Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number:** UI-2022-005045
PA/52235/2020; IA/02017/2021

THE IMMIGRATION ACTS

Heard at Field House
on 9 December 2022

Decision & Reasons Promulgated
on 16 February 2023

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

KO
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant or members of his family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Representation:
For the appellant: Ms K Degirmenci, Counsel, instructed by Montague Solicitors
For the respondent: Ms S Cunha, Senior Home Office Presenting Office

DECISION AND REASONS

Summary

1. For reasons set out below, this decision is relatively brief in content. In summary, I conclude that the First-tier Tribunal materially erred in law, that its decision should be set aside, and that the decision be re-made by allowing the appellant's appeal on Refugee Convention and Article 3 and 8 ECHR grounds.

Background

2. The appellant appeals against the decision of First-tier Tribunal Judge Peer ("the judge"), promulgated on 17 March 2022 following a hearing on 1 March 2022. By that decision, the judge dismissed the appellant's appeal against the respondent's decision, dated 3 November 2020, refusing his protection and human rights claims.

3. The appellant is a citizen of Turkey. He left that country in 2015 and travelled to New Zealand, where he studied for a while. Having been issued with a multi-entry visa valid from September 2017 until March 2018, the appellant came to United Kingdom and was granted leave to remain under the ECAA. He subsequently returned to New Zealand for a very brief time, before returning to this country in July 2018, where he has resided ever since. The appellant has been in a relationship with a Turkish national at all material times. The couple are married. His wife has permanent residence in New Zealand. She is in the United Kingdom on a lawful basis.

4. On 24 October 2018 (prior to his leave to remain expiring), the appellant made a protection claim based on his Kurdish ethnicity, past political and journalistic activities in Turkey, detentions by the Turkish authorities, and legal proceedings against him in that country.

5. Having considered the appellant's claim, the respondent concluded that the appellant was at risk of persecution if returned to Turkey. A number of material facts were accepted, although not the entirety of the claim put forward.

6. However, the respondent also concluded that the appellant had a right of permanent residence in New Zealand. Given that there was no risk to him in that country, he could be returned there and, as a consequence, the protection claim was refused.

7. Humanitarian protection and Article 3 claims were refused for the same reason.

8. In respect of Article 8, it was said that the appellant could return to New Zealand with his wife.

The decision of the First-tier Tribunal

9. The judge produced a lengthy decision, to which he clearly invested a good deal of time and effort. He considered a significant amount of evidence, both documentary and oral. One aspect of the documentary evidence related to claimed ongoing legal proceedings against the appellant in Turkey.

10. Without intending any disrespect to the judge, I only summarise his findings briefly here:

(a) the appellant was at risk of persecution if returned to Turkey; [67];

(b) certain aspects of the documentary evidence relating to ongoing proceedings in Turkey were unreliable: [54]-[66];

(c) the appellant had not attended the Turkish Consulate in order to try and renew an expired passport, as claimed: [58] and [66];

(d) the appellant did not in fact have a right of permanent residence in New Zealand: [73];

(e) the appellant would, however, be able to obtain a residence visa such that he could return to New Zealand (with his wife) and reside there: [76]-[77];

(f) the appellant was not at risk of persecution in New Zealand and so his protection claim failed: [78];

(g) an Article 3 medical claim failed: [80]-[83];

(h) Article 8 did not assist the appellant: [88]-[108];

(i) the appeal was dismissed on all grounds.

The grounds of appeal and grant of permission

11. Lengthy grounds of appeal were drafted, challenging all material aspects of the judge's decision. Of greatest relevance were the grounds criticising the judge's approach to the question of residence in New Zealand and the legal proceedings in Turkey.

12. Permission to appeal was granted by the First-tier Tribunal on all grounds.

13. Subsequent to the grant of permission, the respondent provided a rule 24 response, which opposed the appeal.

The hearing

14. At the outset of the hearing, and having clearly considered the papers with care, Ms Cunha accepted that the judge had materially erred in law when concluding that the appellant could obtain a right of residence in New Zealand and thus could be returned to that country (that being the challenge put forward in ground 1). She also accepted that there was an apparent contradiction in the judge's treatment of the court documentation, with reference to what was said at [66] and in ground 3.

15. Ms Cunha accepted that in light of the errors, the decision should be set aside.

16. Following a discussion as to the appropriate means of disposal, Ms Cunha submitted that the decision should be re-made on the materials before me. There was no objection to me admitting additional documentary evidence (relating to the claimed ongoing proceedings and including a translation of an arrest warrant).

17. She conceded that the appellant's appeal should be allowed on Refugee Convention and Article 3 grounds.

18. Unsurprisingly, Ms Degirmenci was content with that course of action.

19. I announced to the parties that I was setting aside the judge's decision and re-making the decision by allowing the appellant's appeal against the respondent's refusal of his protection and human rights claims.

Discussion

20. In my judgment, Ms Cunha was right to have made the concessions that she did.

21. There has never been any dispute that the appellant was at risk of persecution if returned to Turkey. The judge was plainly entitled to rely on the respondent's original concession on this issue.

22. The judge was entitled to find that the appellant did not have a permanent right of residence in New Zealand. Indeed, on the evidence as a whole, that was the only rational conclusion which could have been reached.

23. Thereafter, the judge went wrong in his analysis of and conclusions on the question of whether the appellant would nonetheless be able to return to reside in New Zealand on some other basis. In light of Ms Cunha's position, I need not set out my reasons in any real detail. In summary form, the judge: (a) erred in considering that the appellant should have approached the New Zealand authorities for assistance and/or obtaining some sort of a travel document; (b) impermissibly relied on the appellant's wife's permanent residence in New Zealand as a means for the appellant

obtaining appropriate residence; (c) erred in appearing to find that the appellant's expired Turkish passport could have been used to assist with obtaining residence in New Zealand.

24. I would add a further observation. On any rational view, it could not be said that the appellant had been habitually resident in New Zealand prior to coming to the United Kingdom.

25. Turning to the court documentation, I acknowledge the detailed analysis undertaken by the judge. However, Ms Cunha was fully justified in conceding an error on this issue. There is a contradiction within [66] of the judge's decision. On the one hand he concluded that the relevant documents were not reliable, whilst on the other seemingly relying on their content and effect when concluding that the appellant would not have approached the Turkish authorities in United Kingdom, as claimed, because of the ongoing proceedings against him.

26. I do not propose to go through the remaining grounds of appeal. Suffice it to say that I see merit in them all. However, one or other of the errors identified above is sufficient for the judge's decision to be set aside.

Re-making the decision

27. In the particular circumstances of this appeal, is appropriate for me to go on and re-make the decision. The position adopted by Ms Cunha at the hearing was entirely appropriate.

28. I have considered the appellant's bundle which was before the judge, running to 184 pages. In addition, and without opposition from the respondent, I admit the further documentary evidence relating to ongoing proceedings in Turkey, including:

(a) a record of a hearing conducted on 11 July 2018, relating to proceedings against the appellant confirming that an arrest warrant has been issued against him and adjourning the case until December 2018;

(b) a witness statement from the appellant's current solicitor, confirming the address of the Turkish Consulate in London and explaining the method by which the appellant's Turkish lawyer could access relevant court documents;

(c) further confirmation of the address of the Turkish Consulate in London;

29. Ms Cunha did not seek to challenge the reliability of the new evidence. Her concession that the appeal should be substantively allowed is demonstrative of an acceptance of central aspects of the appellant's account. Ms Cunha did not seek to make any additional oral submissions.

30. I have considered all of the evidence in the round. I make the following relevant findings of fact-based on that evidence and the parties' respective submissions over the course of time.

31. It is clear to me that the appellant's account of his political and journalistic activities whilst in Turkey is, in all material respects, true. A considerable amount of that account was accepted by the respondent's in the first instance. Beyond that, I find that his evidence of repeated detentions and journalistic activities is plausible and substantially consistent, both internally and when measured against the country evidence.

32. The appellant has not sought to exaggerate his claim at any stage. I acknowledge the plausibility issues taken against the appellant previously in respect of being released from detention and then being able to leave Turkey in 2015. These are not entirely unmeritorious and I have considered them carefully. Whilst I harbour some concerns, having regard to the evidence as a whole I am satisfied that these events took place, as claimed. I find that the appellant was detained in 2011, 2013, and 2015. I find that he did in fact leave the country and that he was able to do so notwithstanding that legal proceedings had been initiated in 2013.

33. I have considered whether any of the judge's findings on the court documents should be preserved. However, at least one aspect of his conclusions on that evidence has been found to be erroneous. It would not be right to preserve any of the findings.

34. It is of some note that the appellant made his protection claim in the United Kingdom whilst having extant leave to remain under the ECAA. This is not a case in which he was here unlawfully and only made a claim when threatened with removal, contrary to what the judge appeared to believe.

35. I have taken account of the letter from the appellant's Turkish lawyer. I regard that as being a reliable document in all respects. Her standing is supported by confirmation from the relevant Bar Association. In addition, I am satisfied that she, like other lawyers, would potentially have access to relevant court documents to a specific administrative system (the UYAP Information System), as described in the witness statement from the appellant's United Kingdom solicitor. What he has said corresponds with information provided in the record of hearing document itself.

36. What the Turkish lawyer says, namely that there are ongoing proceedings against the appellant, is consistent with both the documentary evidence and what the appellant stated over the course of time.

37. I find that the appellant is the subject of ongoing legal proceedings in Turkey. I find these relate to his alleged involvement with the PKK. I find that the record of hearing document refers to an arrest warrant which was issued at some point prior to the hearing in July 2018. The appellant has not been in Turkey since then, and I find that the arrest warrant remains outstanding.

38. In respect of the claimed visit to the Turkish Consulate in 2018, I accept the appellant's evidence that at that particular point in time (September 2018), he was unaware of the hearing which had taken place in July of that year. Whilst his decision to attend the Consulate might be said to be questionable, it was not so implausible as to be simply untrue.

39. The appellant is plainly at risk of persecution and Article 3 ill-treatment if returned to Turkey by virtue of his past record and the ongoing legal proceedings against, when these elements are set against the country information on the Turkish authorities' human rights record.

40. In respect of New Zealand, I, like the judge, find that the appellant never had permanent residence in that country. In addition, he was plainly never habitually resident there. I find that the appellant's wife does have permanent residence in that country, but she is also lawfully resident in this country.

41. There is no question of the appellant being returnable to New Zealand. It may or may not be the case that he could acquire further residency in that country if an application was made, but I am not about to engage in impermissible speculation on that issue.

42. The appellant is a refugee and a person whose removal from the United Kingdom would violate Article 3.

43. In light of the above, the appellant is not entitled to humanitarian protection.

44. I need not address the Article 3 medical claim. That was dealt with by the judge and there has been no challenge thereto.

45. In respect of Article 8, the appellant's removal to Turkey would plainly be disproportionate, given my findings on the protection claim. There is no need to address any theoretical possibility of the appellant and his wife going to New Zealand.

Anonymity

46. The First-tier Tribunal made an anonymity direction. In light of my conclusions in this case, it is appropriate to make a direction at this stage as well.

Notice of Decision

47. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

48. I exercise my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and set aside the decision of the First-tier Tribunal.

49. I re-make the decision by:

(a) <u>allowing</u> the appeal on Refugee Convention and Article 3 ECHR grounds;

(b) <u>dismissing</u> the appeal on humanitarian protection grounds;

(c) <u>allowing</u> the appeal on Article 8 ECHR grounds.

Signed: H Norton-Taylor Date: 12 December 2022

Upper Tribunal Judge Norton-Taylor