Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/09950/2013

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 20 May 2014	**On 25 June 2014**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SG
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Ms C Grubb instructed by Hoole & Co Solicitors

DETERMINATION AND REASONS

1. This appeal is subject to an anonymity order made by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind

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the order and I continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

2. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal (Judge Y J Jones) allowing SG's appeal against the Secretary of State's decision taken on 18 October 2013 refusing to grant SG further leave to remain and to make a removal decision under s.47 of the Immigration, Asylum and Nationality Act 2006 on the basis that SG was not entitled to asylum or humanitarian protection. Judge Y J Jones found that SG was entitled to asylum and his removal would breach Articles 2 and 3 of the ECHR as there was a real risk of persecution or serious ill treatment if he returned to Turkey because of his political activities for the BDP and because of his family's association with the PKK.

3. For convenience, I will hereafter refer to the parties as they appeared before the First-tier Tribunal.

Background

4. The appellant is a citizen of Turkey who was born on 18 August 1994. He left Turkey on 17 November 2010 and arrived in the UK on 27 November 2010 when he claimed asylum. On 20 January 2011, the Secretary of State refused the appellant's asylum claim. The appellant appealed. In a determination dated 10 March 2011, Judge Jacobs-Jones dismissed the appellant's appeal on asylum and humanitarian protection ground and under Articles 2 and 3 of the ECHR. Judge Jacobs-Jones did not accept the appellant's account that he had been arrested and detained as a result of campaigning carried out on behalf of the BDP. He did not accept that the appellant would be at risk on the basis of any family connection with the PKK. However, Judge Jacobs-Jones allowed the appeal under Article 8 of the ECHR.

5. As a result, on 14 March 2011, the appellant was granted discretionary leave to remain until 7 April 2012. On 4 April 2012, he applied for further leave to remain. That application was refused on 18 October 2013 and is the subject of this appeal. In her refusal letter of 18 October 2013, the Secretary of State concluded that the appellant's asylum claim had already not been accepted and following the case of Devaseelan [2002] UKIAT 00702, the appellant had not submitted any further evidence that merited a different view of the facts. In addition, the Secretary of State, on the basis that the appellant's claim was not accepted, concluded that he would not be at risk on the basis of his Kurdish ethnicity.

The Appeal to the First-tier Tribunal

6. The appellant appealed again to the First-tier Tribunal. At the hearing before Judge Y J Jones on 13 February 2014, the appellant gave oral evidence and submitted a number of additional documents and evidence which he relied upon to substantiate his claim that he was arrested by the Turkish authorities on 23 April 2010 when he was distributing leaflets on

behalf of the BDP and that during his detention he was questioned for two days and beaten before being released without conditions. Then, on 1 November 2010, whilst he was gathering signatures for a petition asking for Kurdish lessons to be included in the school curriculum, the appellant claims that he was arrested by three officers; taken to the security headquarters where he was held in solitary confinement for three days. During that time he was questioned and beaten and on the last day, he claims that he was taken to the top of the building and officers threatened to throw him off the building unless he became an informer. He says that he was forced to sign a document and was told to report on the first day of every month. The appellant's claim is that he is at risk on return to Turkey primarily because of his links with the BDP and because his family was involved in politics, some having links with the PKK.

7. Before Judge Y J Jones, the appellant relied upon a 'family tree' which set out a number of relatives on the father's side of his family which included a number who had been granted asylum in European countries. The appellant had previously relied on the fact that two of his maternal uncles were recognised as refugees in the UK. The paternal family members included an uncle who had been granted asylum in France in August 2013; a first cousin who was granted asylum in Austria; and two cousins who were granted asylum in Italy in September 2010.

8. The appellant claimed that none of these relatives were members of the PKK although they were sympathetic to Kurdish political parties including the BDP. The appellant claimed that his relatives were, however, suspected to have links with the PKK and that was the basis of their respective grants of asylum in the UK, Italy, Austria and France.

9. In addition, the appellant relied upon an expert medical report prepared by Dr Michael Nelki. That report dealt with a number of scars and lesions on the appellant's body. In addition, having assessed the appellant's symptoms and carried out a CORE-OM questionnaire, concluded that those symptoms were indicative of PTSD and the score was typical of a severe level of psychological distress.

10. Whilst Dr Nelki did not consider that all the scars and lesions were attributable to the claimed ill treatment by the appellant during his two periods of detention, Dr Nelki concluded that the overall pattern of the appellant's physical and mental scars were highly consistent with the history he had given.

11. Having set out the findings of Judge Jacobs-Jones in the appellant's first appeal, Judge Y J Jones concluded, on the basis of the new evidence submitted by the appellant, that she accepted his account to be credible, that he had suffered ill treatment in the past and that, as a consequence, there was a real risk that if he returned to Turkey because of his involvement with the BDP and his family's perceived connections with separatist organisations such as the PKK he would also be at risk.

Consequently, Judge Y J Jones allowed the appellant's appeal on asylum grounds and under Articles 2 and 3 of the ECHR.

Appeal to the Upper Tribunal

12. The Secretary of State sought permission to appeal to the Upper Tribunal. She did so on two grounds. First, Judge Y J Jones had been wrong to reach a positive credibility finding contrary to that of Judge Jacobs-Jones in the appellant's earlier appeal on the basis of the new evidence of the appellant's family tree and Dr Nelki's expert report. Judge Y J Jones had failed properly to follow the guidance in Devaseelan in treating the first Immigration Judge's findings as a starting point and had failed to treat the new evidence with "the greatest circumspection". Secondly, even if the appellant were credible, the Judge had failed to give consideration to the issue of "sufficiency of protection" set out in the refusal letter of 18 October 2013.

13. On 17 March 2014, the First-tier Tribunal (Judge V A Osborne) granted the Secretary of State permission to appeal on both grounds.

14. Thus, the appeal came before me.

The Submissions

15. Mr Richards relied upon the grounds of appeal and placed emphasis upon the Devaseelan point. He submitted that it was not clear why the new documents relating to the appellant's family tree and grant of refugee status to his relatives added anything to the appellant's claim given that Judge Jacobs-Jones was aware that the appellant's maternal uncles had both been granted asylum in the UK. There was no evidence of why the other relatives had been granted asylum in Italy, Austria and France. As regards Dr Nelki's evidence, Mr Richards submitted that that evidence was far from conclusive in its findings and that Judge Y J Jones had failed to approach that evidence in the required circumspection set out in Devaseelan given the clear findings in Judge Jacobs-Jones' determination.

16. Although initially Mr Richards placed reliance upon the second ground, he did so latterly in his submission and with less emphasis given that the refusal letter refers to "sufficiency of protection" at paras 36-45 on the basis that the appellant's account is not credible and whether he could succeed merely on the basis of his Kurdish ethnicity.

17. On behalf of the appellant, Ms Grubb in her skeleton argument and oral submissions argued that Judge Y J Jones was entitled to rely upon Dr Nelki's report which was clear and persuasive. She also relied upon his finding that the appellant suffered from PTSD which was consistent with his claimed ill treatment and also that it was a matter that the Judge was

entitled to take into account in paras 38 and 39 in concluding that an inconsistency in the appellant's evidence was explicable on the basis of his "mental state". She accepted that Dr Nelki's report was not conclusive in relation to the issue of whether the appellant had been subject to torture but the appellant, she submitted, was only required to establish that on a lower standard. The Judge was entitled to accept Dr Nelki's evidence and to therefore, reach a different conclusion from that of Judge Jacobs-Jones in the appellant's first appeal.

18. In relation to the evidence concerning the appellant's family tree and the grant of asylum to his paternal relatives, she submitted that Judge Jacobs-Jones at paras 21-24 of his determination had looked at the evidence concerning the appellant's maternal family members and had not considered whether, although they had connections with the PKK, his father's family members also had a connection which would put the appellant at risk as also being perceived as having connections with the PKK.

Discussion

19. In her determination, Judge Y J Jones correctly directed herself in accordance with Devaseelan that the findings of Judge Jacobs-Jones in the appellant's earlier appeal were the "starting point" (see para 33). That is in accordance with the guideline set out in [34(1)] of Devaseelan. There it is said that:

> "The first Adjudicator's determination should always be the starting–point. It is the authoritative assessment of the appellant's status at the time that it was made. In principle issues such as whether the appellant was properly representative, or whether he gave evidence, are irrelevant to this."

20. At [34(2)], the IAT acknowledged that facts arising since the first determination can always be taken into account at a second hearing.

21. At [40], the IAT dealt with matters that "could have been before the first Adjudicator but were not". The IAT said this:

> "(4) **Facts personal to the Appellant that were not brought to the attention of the first Adjudicator, although they were relevant to the issues before him, should be treated by the second Adjudicator with the greatest circumspection.** An Appellant who seeks, in a later appeal, to add to the available facts in an effort to obtain a more favourable outcome is properly regarded with suspicion from the point of view of credibility. (Although considerations of credibility will not be relevant in cases where the existence of the additional fact is beyond dispute.) It must also be borne in mind that the first Adjudicator's determination was made at a time closer to the events alleged and in terms of both fact-finding and general credibility assessment would tend to have the advantage. For this reason, the adduction of such facts should *not usually* lead to any reconsideration of the conclusions reached by the first Adjudicator."

22. At [40(5)] the IAT noted that:

> (5) Evidence of other facts – for example country evidence – may not suffer from the same concerns as to credibility, but should be treated with caution.

23. Then at [41] the IAT said this:

> (6) **If before the second Adjudicator the Appellant relies on facts that are not materially different from those put to the first Adjudicator**, and proposes to support the claim by what is in essence the same evidence as that available to the Appellant at that time, **the second Adjudicator should regard the issues as settled by the first Adjudicator's determination and** *make his findings in line with that determination* rather than allowing the matter to be re-litigated. We draw attention to the phrase 'the same evidence as that *available to the Appellant'* at the time of the first determination. We have chosen this phrase not only in order to accommodate guidelines (4) and (5) above, but also because, in respect of evidence that was available to the Appellant, he must be taken to have made his choices about how it should be presented. An Appellant cannot be expected to present evidence of which he has no knowledge: but if (for example) he chooses not to give oral evidence in his first appeal, that does not mean that the issues or the available evidence in the second appeal are rendered any different by his proposal to give oral evidence (of the same facts) on this occasion."

24. At [41(7)], the IAT recognised that the force of its reasoning in guidelines (4) and (6) was greatly reduced if there was "some very good reason" why the appellant failed to adduce relevant evidence before the first Judge. However, the IAT offered the view that this would be "rare".

25. As the Devaseelan guidelines recognise, evidence adduced at a second appeal hearing which was potentially available at an earlier hearing but was not produced, should be treated with caution indeed with the "greatest circumspection". Its late production may well lead to suspicions about its credibility. However the IAT recognised that some evidence such as country evidence, may not raise the same concerns about its credibility simply because it was not produced at the earlier hearing.

26. That latter category, in my judgement, contemplates evidence where, because of its source, it is less likely that its late production engages a concern that it is lacking in credibility and, in effect, has now been produced simply to bolster an otherwise weak claim. In my judgement, independent expert evidence falls into this latter category. Like objective background evidence, it is essentially independent of the appellant. That, of course, is based upon the fact that the report is properly prepared, in accordance with the impartiality requirements of a Court or Tribunal by an expert who understands his or her role as an independent expert. The evidence must be assessed in the usual way in the context of all the evidence of the case.

27. There is no doubt, in my view, that Dr Nelki's report met these essential characteristics. It is a balanced report. It is also the case that Dr Nelki's report was not directly challenged by the Presenting Officer at the hearing before Judge Y J Jones. The challenge to its credence made in the grounds of appeal to the Upper Tribunal cannot assist the Secretary of State to establish any error of law by the Judge in relying upon the report. Indeed, in his oral submissions Mr Richards (apart from relying on the grounds of appeal) did not seek to undermine Dr Nelki's conclusions but rather argued that they were far from conclusive and Judge Y J Jones had failed to apply sufficient circumspection, following Devaseelan, in relying upon Dr Nelki's conclusions. Judge Y J Jones dealt with Dr Nelki's report at paragraphs 22-30 of her determination as follows:

> "22. I have been provided with a medical report by Dr Michael Nelki. He produces a CV at Appendix A of his report and states that his main experience has been 35 years in general practice but also eighteen years in refugee health and medico legal report writing. He has completed over 400 medico legal reports for refugees and asylum seekers. He has attended regular and frequent postgraduate training in general practice and study days and periodic clinical meetings at the Medical Foundation and the Helen Bamber Foundation. These have included regular updates on psychiatric matters. He has been appraised and attended peer group meetings locally.
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> 23. Dr Nelki examined the appellant on 20 December 2013 and listed his findings at paragraphs 29 to 31. Dr Nelki found six scars and three lesions. Two lesions found on his face were typical adolescent acne and the third lesion was an area of well demarcated pallor at the back of his neck. Dr Nelki was unable to say whether it was a birth mark or traumatic in origin.
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> 24. His findings in respect of the scars are found at paragraphs 33 to 42. There was a small faint scar to the right side of his head, a small faint area of scarring to the left side of his forehead, a small faint linear scar to the left of his forehead, a two centimetre linear scar to the left of his forehead, a scar to his right knee and a short linear scar in the skin crease of the left side of his neck. Dr Nelki considered that these scars were highly consistent with a hard blow or heavy fall on to a hard surface; however the knee scar might result from any fall, accidental or deliberate.
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> 25. The scars are mainly on the right side of his head but there are also two on the left side of his head and neck. To sustain such scars he would have had to have suffered several different falls on to his head or suffered several blows on to the head. In view of the absence of other scars, except the knee, accidental cause could be regarded as less likely. Dr Nelki considered all the scars as "mature" indicating that he sustained them more than six to twelve months ago.
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> 26. Dr Nelki examined the appellant's soles of his feet which were normal. He added that it is rare to find any clinical (observable) abnormalities after beatings on the soles of the feet (Falaka). Normal findings do not exclude the possibility of Falaka having occurred.

27. Dr Nelki also found symptoms of a severe level of depression as they interfere significantly with his daily life. The appellant also had a cluster of symptoms indicative of post-traumatic stress disorder (PTSD) which results in disturbance in the information processing which becomes apparent in such symptoms of forgetfulness and loss of concentration.

28. Dr Nelki undertook a CORE-OM questionnaire. It is most useful as a measure of progress over time comparing one score with the next. However despite the limitations of its single use the appellant showed a score typical of a severe level of psychological distress. It confirmed Dr Nelki's clinical impression of his mental state.

29. Dr Nelki considered whether the appellant may be feigning or exaggerating his history or symptoms, however, he found nothing to suggest any exaggeration or feigning. In particular he answered openly, promptly and forthrightly, making good eye contact. His demeanour and affect during the interviews fitted his history, giving Dr Nelki no reason to doubt his account or reported symptoms. The pattern of symptoms he described also in many ways fits genuine rather than feigned symptoms.

30. Dr Nelki concluded that the overall pattern of the appellant's physical and mental scars is highly consistent with the history given. Given the total picture of all the scars they constitute reasonable evidence of the trauma as described."

28. Having set out Dr Nelki's evidence, Judge Y L Jones considered that evidence to be relevant in two respects. First, at paras 37-38 she dealt with inconsistencies relied upon by the respondent in the appellant's evidence as follows:

"37. The judge found that the appellant's evidence was undermined because of the discrepancies in his evidence about what he was doing when he was arrested. He also gave different stories in respect of who made the leaflets and at whose behest the appellant was distributing the leaflets.

38. It has been submitted in the skeleton argument on behalf of the appellant that the discrepancies regarding the events on 23 April was confusion over two explanations provided rather than there being a discrepancy in the evidence. There was a misunderstanding of the appellant's evidence rather than a discrepancy in the evidence. On 23 April 2010 he was distributing leaflets and on 1 November 2010 he was collecting signatures for a petition to have lessons in Kurdish in his school. I find that the appellant may have made a mistake in his evidence as given on one occasion but on all the other occasions he has been consistent in relation to his activities and arrests in Turkey. He was 16 when he was interviewed and I find that he may have made a slight error or have been misunderstood because of his mental state in respect of the discrepancy found by Judge Jacobs-Jones.

29. At paragraph 39 Judge Y L Jones continued:

"I am assisted in coming to the conclusion that this was a mistake rather than a discrepancy by the medical evidence given by Dr Nelki who confirms that the appellant's scarring is highly consistent with a hard blow

> or heavy fall on to a hard surface. Dr Nelki found several scars on the appellant's head which indicated several blows to the head which made an accidental cause less likely. Dr Nelki also found that in December 2013 the appellant was suffering from depression and post-traumatic stress disorder and in coming to the latter conclusion he was supported by the information gained from the CORE-OM test."

30. Secondly, at para 40, Judge Y L Jones concluded that Dr Nelki's report supported the appellant's claim as follows:

> "I find that the evidence given by Dr Nelki supports the appellant's claim to have been beaten whilst in custody on two occasions in Turkey. Dr Nelki is an expert witness. His evidence has not been challenged by the Respondent."

31. Then at paragraph 41, Judge Y L Jones concluded:

> "Having considered all the evidence I find that the appellant is credible and has suffered persecution in the past in Turkey.

33. In my judgement, Judge Y L Jones was entitled to take into account Dr Nelki's evidence concerning the appellant's PTSD as new or fresh evidence that cast further light on the appellant's evidence and the claimed discrepancies in that evidence. Further, having set out at some length Dr Nelki's evidence at paras 22-30, which was not challenged by the respondent, that evidence clearly as Judge JY L ones found supported the appellant's account. It was not evidence considered by Judge Jacobs-Jones at the appellant's first appeal hearing. Dr Nelki's expert opinion was, of course, independent of the appellant and was entitled to considerable weight. Judge Y L Jones, as I have already set out, recognised that the findings of Judge Jacobs-Jones were "the starting point" following Devaseelan. There is nothing in Judge Y L Jones' reasons which suggest that she failed to give careful consideration to Dr Nelki's evidence in the light of the fact that it had not been presented at the earlier appeal hearing. Nothing in her determination suggests that she failed to follow the guidance in Devaseelen in taking Dr Nelki's evidence into account in assessing the appellant's credibility including aspects of the appellant's evidence which had troubled Judge Jacobs-Jones but which could be explained in the light of the medical evidence concerning the appellant's mental health.

34. In addition, Judge Y L Jones took into account the evidence concerning the refugee status of a number of the appellant's paternal relations in Austria, Italy and France. The Judge set this evidence out at para 13(h)-(k). At para 35-36 Judge Y L Jones referred to this new evidence as arising subsequent to the earlier appeal hearing as follows:

> "35. Since the findings made by Judge Jacobs-Jones in March 2011 further evidence has been submitted on behalf of the appellant. In particular documents confirming that certain relatives on both his mother's and father's side have been granted asylum in the UK,

> Italy, Austria and France for suspected links with the PKK because of their family background.
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> 36. The appellant was criticised by the Immigration Judge for not producing documents in support of his claim and has now produced family trees and document granting refugee status to the relatives mentioned above."

35. At para 41 Judge Y L Jones returned to this new evidence as follows:

> I find that he would be at real risk on return to Turkey because of his family connections with separatist organisations and having failed to report on 1 December 2011 as requested that he will be known to the authorities in Turkey. He has given clear evidence that he has always supported Kurdish political parties, that he was involved in the BDP, a legal political party in Turkey. I find that his involvement in political activity in Turkey was not low level and he was considered as a separatist because he was arrested on two occasions and beaten. It was not disputed by the respondent that the appellant's mother's side of the family had known links with the PKK and there is now further evidence in relation to the paternal side of the family which supports the appellant's contention that the authorities were interested in him as the result of the political profile of his family. He was also suspected of having direct links with the PKK. He has been detained twice and the medical evidence supports the appellant's claims in respect of his treatment in detention. The appellant has also been active in the Kurdish community in the UK and the medical evidence in respect of the appellant's injuries is unchallenged."

36. Then at para 34 taking into account that Judge Jacobs-Jones' findings had been made in the "absence of medical and corroborative evidence", Judge Y L Jones reached her finding that she accepted the appellant's account of past persecution and that there was a real risk that on return he would suffer persecution as a result of his own activities for the BDP and his family links to the PKK.

37. At the previous appeal hearing, only the evidence concerning the maternal relatives of the appellant was presented to Judge Jacobs-Jones. The family tree and the fact that a number of the appellant's paternal relatives had been granted refugee status in European countries was not a matter before the Judge in that earlier hearing. It is worth noting that Judge Jacobs-Jones based, in part, his finding that the appellant would not be at risk on the basis that he did not accept that any perceived association with the PKK in the case of the appellant's mother's relatives would reflect on the appellant as they had lived separately from the appellant's mother (see summary in Judge Y L Jones' determination at para 34(b)). In this appeal, Judge Y L Jones had more information concerning the appellant's family. It does not appear that that evidence was challenged before the Judge. The Judge was entitled to accept that a number of the appellant's paternal relatives had been granted refugee status. As Judge Y L Jones pointed out in para 41 (set out above), this further evidence supported the appellant's contention that the Turkish authorities were interested in the appellant's family because of their political profile. It was properly open to the Judge to conclude that this

evidence bolstered the appellant's claim (albeit one rejected in the first appeal hearing) that his family's perceived connection with organisations such as the PKK and that there was a real risk that the appellant would likewise be perceived on return.

38. Standing back, this was an appeal where Judge Y L Jones had additional evidence not considered at the appellant's earlier appeal. That evidence was uncontested before the Judge both as to the refugee status of his paternal relatives and the expert opinion of Dr Nelki which was supportive of central aspects of the appellant's claim to have been ill treated whilst in detention.

39. Nothing in Devaseelan prevented Judge Y L Jones on the basis of this evidence reaching factual conclusions which were different from those reached in the first appeal. Judge Y L Jones was well aware of the need to take the earlier findings as her "starting point" and she gave careful consideration to this uncontested new evidence. It was entirely supportive of the appellant's claim and I am satisfied that Judge Y L Jones was entitled, having taken it into account, to reach the positive findings in the appellant's favour that she made.

40. Consequently, for these reasons I reject the principal ground upon which Mr Richards sought to challenge Judge Y L Jones' decision.

41. As regards the second ground, as I have said Mr Richards did not press that before me. He was entirely right not to do so. Given the Judge's factual findings about the appellant's past persecution and real risk of (through his family) being perceived as involved with the PKK, the Judge's finding that the appellant had established a real risk of persecution for a convention reason was entirely consistent with the country guidance in IK (Returnees – Records – ISA) Turkey CG [2004] UKIAT based upon the risk factors set out in the IAT's determination. The grounds' reference to the Judge failing to take into account the issue of "sufficiency of protection" are set out in the refusal letter dated 18 October 2013 is without merit. That can only be a reference to paras 36-45 in which the Secretary of State reached that conclusion on the basis that "it was not accepted that [the appellant] was arrested and tortured as [he] had claimed" and that the only risk factor would therefore be his Kurdish ethnicity which would not place him at real risk of persecution or serious ill treatment. Given Judge Y L Jones' findings, this aspect of the appellant's claim fell away. She found that he would be at risk because of his actual or perceived political associations. Given that this risk was at the hands of the Turkish state itself, no issue of sufficiency of protection could arise.

Decision

42. For these reasons, the First-tier Tribunal's decision to allow the appellant's appeal on asylum grounds and under Articles 2 and 3 of the ECHR did not involve the making of an error of law. The First-tier Tribunal's decision stands.

43. The Secretary of State's appeal to the Upper Tribunal is, accordingly, dismissed.

Signed

A Grubb
Judge of the Upper Tribunal

Date: 16.06.2014