Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/02083/2015

THE IMMIGRATION ACTS

Heard at Field House **Decision and Reasons Promulgated**

On 26 October 2015 **On 9 November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

HG
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A. Gilbert, Counsel, instructed by Montague Solicitors
For the Respondent: Ms N. Willocks-Briscoe, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing the appeal of Mr H.G., a citizen of Turkey against the respondent's decision to refuse his application for asylum and to remove him from the UK.

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2. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order.

Background

3. The appellant is a citizen of Turkey born on 17 August 1990. He entered the United Kingdom clandestinely, he states on 17 May 2012 (having been refused a Tier 4 (General) Student visa). On 30 May 2012 Mr G claimed asylum.

4. The respondent refused the appellant's asylum claim on 4 December 2014 and decided to remove the appellant by way of directions under section 10 of the Immigration and Asylum Act 1999.

5. The appeal against that decision came before First-tier Tribunal Judge Bennett on 5 June 2015. The judge, in a decision promulgated on 3 August 2015, dismissed the appellant's appeal on all grounds.

6. Permission to appeal to the Upper Tribunal was sought on the following grounds: firstly the judge in deciding not to follow the Country Guidance decision of IK (Turkey) [2004] UKIAT 00312, on the basis of the most recent background material was misguided and perverse. The grounds of appeal are discursive but in essence the second ground was that the judge failed to give adequate reasons and resorted to speculation and the third ground was that the judge failed to analyse the IK risk factors.

7. The hearing came before me.

8. Mr Gilbert submitted that there was a new ground that was *Robinson* obvious in that the judge had referred at paragraph 17(c) to a piece of evidence not before the Tribunal from the Netherlands Immigration Service. Ms Willocks-Briscoe submitted that she was not in a position to comment and submitted that the material may have been in the material and that the ground should not be permitted.

New Ground – Procedural Fairness

9. This ground was not in the original grounds of appeal and I am not satisfied that this was a *Robinson* obvious point. Although Mr Gilbert argued that the information quoted by the judge at [17c], which indicated that those undertaking military service were unlikely to be posted to their own region, was not before the judge, the judge refers to an extract from the Netherlands Ministry of Foreign Affairs report on Turkey and Military Service (1 July 2001). The respondent did not have an opportunity to consider all the material to verify where this reference appeared and I accept Ms Willocks-Briscoe's submission that it may have been a reference in one of the Country Guidance cases before the judge (I note that there is a reference to a different part of the same report at paragraph 3.13.2 of the Turkey OGN which suggests that this report is one that is quoted from in the papers

before me). I have not therefore considered this ground (and even if I was in a position to do so I am not satisfied that it has been shown to have merit – the alternative argument that the judge having discounted the Country Guidance because of its age was incorrect to consider an old report is also without merit as the judge specifically indicates that there was no evidence placed before him to support the proposition that the appellant would be sent to fight in a Kurdish area. The appellant cannot now seek to rely on a new report which it purports provides contrary evidence). The appellant cannot therefore succeed on this ground.

Ground 1

10. Although the respondent's refusal letter made no reference to the relevant country guidance case law as the respondent refused the appellant's claim as it was not considered credible, the judge embarked on a detailed assessment of the current country guidance case law for Turkey. The judge at paragraph [15] (page 21) of the determination, having set out at considerable length from paragraphs [10] onwards a discussion as to the current country conditions prevailing in Turkey, reached the conclusion that:

> 'I am not satisfied that the circumstances in Turkey are *now* as they were at the time when **A (Turkey)** and **IK** were determined, I do not consider the factual conclusions in those determinations to be binding. Crucially, I am not satisfied that there is now or was in either 2010 or 2012 the risk of torture which there was in 2003/4 or that torture and other forms of physical abuse *in places of detention* occurred in either the numbers or with the frequency which they did in and before 2003/4'.

11. However although the judge stated that he did not consider 'the factual conclusions' binding, the judge went on to follow the country guidance including at paragraph [18 (4)(e)], [21], [22], [23], [25], [26] and [28]. It is clear therefore that the judge's findings related only to the narrower issue of the risk of torture and physical abuse of persons in places of detention.

12. SG (Iraq) v SSHD [2012] EWCA Civ 940 endorsed the country guidance system and reminded that Tribunals must take Country Guidance determinations into account:

> '... decision makers and tribunal judges are required to take Country Guidance determinations into account, and to follow them unless very strong grounds supported by cogent evidence, are adduced justifying their not doing so.'

13. The Tribunal in NM and others (Lone women – Ashraf) Somalia CG [2005] UKIAT 00076 discussed the country guidance system and at paragraph 140:

> '… they should be applied except where they do not apply to the particular facts which an Adjudicator or the Tribunal faces and can

> properly be held inapplicable for legally adequate reasons; there may be evidence that circumstances have changed in a material way which requires a different decision, again on the basis that proper reasons for that view are given; there may be significant new evidence which shows that the views originally expressed require consideration for revision or refinement, even without any material change in circumstances. It may be that the passage of time itself or substantial new evidence itself warrants a re-examination of the position, even though the outcome may be unchanged.
>
> ….
>
> The system does not have the rigidity of the legally binding precedent but has instead the flexibility to accommodate individual cases, changes fresh evidence and the other circumstances which we have set out'.

14. The Tribunal Guidance Note 2011 No 2 states at paragraph 11 that:

> '... if there is credible fresh evidence relevant to the issue that has not been considered in the Country Guidance case or, if a subsequent case includes further issues that have not been considered in the CG case, the judge will reach the appropriate conclusion on the evidence, taking into account the conclusion in the CG case so far as it remains relevant.'

At paragraph 12:

> '... Where Country Guidance has become outdated by reason of developments in the country in question, it is anticipated that a judge of the First-tier Tribunal will have such credible fresh evidence as envisaged in paragraph 11 above'.

15. The judge made a detailed consideration of the background evidence before him and contrasted the evidence referred to in IK and A (Turkey) [2003] UKIAT. It is not correct, as the grounds state, that the judge's justification was that the Country Guidance was too old. I am satisfied that the judge's approach was in line with the case law and Presidential Tribunal Guidance Note referred to above, in that the judge looked at the current evidence and came to a reasoned view that there had been a 'reeling back' of the evidence in relation to torture. For example the judge contrasted the recording in the country guidance that the background evidence was that 'torture continues to be endemic in Turkey' and that it 'might well deserve the categorisation of systematic'. The judge contrasted this with the current background country information including the 2013 US State Department Report which the judge states at [12]:

> '... recorded the existence of *reports* of arbitrary or unlawful killings by the government or its agents'.

16. The judge went on to record and discuss the current evidence including (in the 2013 US State Department Report) in relation to torture:

> 'The constitution and law prohibit such practices, but there were reports that some government officials employed them. Human rights organizations continued to report allegations of torture and abuse, especially of persons who were in police custody *but not in a place of detention*, during demonstrations, and during transfers to prison, where such practices were more difficult to document.'

17. The judge went on at [13] and [14] to discuss in some detail the evidence that there were still reports and allegations of torture but not in places of detention. He also relied on background country information in the same report that 297 digital audio and video systems had been installed 'in provincial anti-terror directorates' between 2007 and 2012. Although paragraph 11 of the appellant's grounds of appeal referred to their being no evidence of audio and video recording being installed, that is clearly incorrect and has no merit. The judge also considered, in the round, the government campaign of 'zero tolerance' for torture.

18. The skeleton argument before me purported to expand the appellant's argument in relation to the judge's consideration of the Country Guidance. Although it was argued that the judge misdirected himself by requiring systemic/systematic breaches of Human Rights as a condition precedent to found a real risk of a breach, that it not what the judge did; the judge was not considering conditions precedent for a real risk, but rather was contrasting the evidence at the time of the Country Guidance which showed that torture was systematic and pervasive, and the evidence before the judge which he found showed that the situation had improved. That is entirely different from a consideration of whether there was a real risk and the relevant standard of proof, which the judge correctly directed himself on at [7].

19. It was argued that the judge also departed from the country guidance as the 2013 US State Department Report indicated that there were no reports of politically motivated disappearances. It was argued that the absence of politically motivated disappearances did not automatically lead to the inference that there was not widespread torture. Although the judge considered this issue and was of the view that if torture was still endemic there would have been at the very least reports of politically motivated disappearances, that is not the same as equating torture with disappearance. Instead the judge was evaluating the background evidence, including of no reports of political disappearances, in the round.

20. It was argued that the judge failed to give adequate reasons why evidence of 950 reports of torture in the 2013 US State Department Report and cited by the judge at [13] was irrelevant to the real risk that it was stated the appellant faced. That is a misunderstanding of the judge's findings. The judge did not find that there was no evidence of torture but that (again at [13]) there was nothing to

indicate that the 'practice of torture in *places of detention* was *systematic'*. The judge was of the view that the evidence indicated that there were reports of torture in police custody, during demonstrations and during transfers to prison but not in places of detention. In relation to the report of 950 reports of torture the judge noted that this extract supported the proposition that unlawful violence was practised in the course of disrupting protests and rallies, rather than in detention. The judge also relied on the evidence that those arrested for ordinary crimes were as likely to suffer torture and mistreatment in detention as those arrested for political offences, as not supporting the proposition that torture/maltreatment were inflicted on account of political opinions.

21. In relation to evidence of torture it was argued that the judge failed to consider, I was pointed to page 17 of the 2013 US State Department Report which referred to assertions that there were several thousand political prisoners from across the political spectrum. However Mr Gilbert was unable to say how reports of political prisoners represented evidence of torture that the judge had not considered. I am satisfied that the judge considered all of the reports, including through his detailed consideration of it and his reference at footnote 7 on page 16 of his determination to having been provided with a 'copy of the relevant parts of the report'. The appellant's bundle, which was before me and the First-tier Tribunal indicates that the judge was provided with the entire report. Although I was also referred to page 5 of the same report in relation to allegations of torture, the judge recorded, including at [12], the references in the 2013 US State Department Report to torture. As already noted, it was the judge's finding that the current evidence did not support a finding that the risk of torture specifically in places of detention were at the levels found in the Country Guidance.

22. It was argued that the judge made an unsupported finding that CCTV would deter abuse. However as noted above, the original grounds of appeal, as well as the skeleton argument, referred to evidence of proposed installation of CCTV whereas the judge clearly considered evidence in [13] that 297 digital audio and video systems had been installed. The judge made a number of other findings properly open to him as to why this would be of relevance. Mr Gilbert's argument that the judge had failed to consider all the relevant background information has no force. Although he pointed to the extract of the Turkey Operational Guidance Note that was before the judge including 3.9.5 which refers to police 'routinely detaining demonstrators for a few hours at a time' and 3.9.12 which refers to numerous allegations in a 2010 report about the use of torture particularly in unofficial places of detention, this was a general overview. In addition I am satisfied that it is clear that the judge did consider this information; I note that at paragraph [14d] the judge indicated that he was not directed to:

> '... any part of the Operational Guidance Note or to any new evidence in it post-dating the determinations in A(Turkey) and IK indicating that torture remained at the level at which, consistently with the evidence before the Tribunal in those appeals, it was found to be.'

The fact that the judge did not specifically list each and every item before him does not detract from the judge's overall rounded assessment and finding in relation to the evidence that there no reports of systematic torture in official places of detention, including as the judge considered the installation of CCTV systems of importance in reducing such practices in places of detention. That was a finding open to the judge.

23. Although it was also argued that the judge had speculated that the Rule of Law in the UK was comparable to Turkey, that is a misreading of the findings. The judge in his discussion of the use of CCTV systems used the analogy of the introduction of recording systems in the United Kingdom as an example that the installation of such systems did not mean that torture and maltreatment remained endemic, but rather that such systems would deter such practices. Even if the judge was mistaken in using this analogy, it is not material as the judge gives clear reasons, aside from this example, for considering the installation of these systems would prevent abuse.

24. It was also argued that the judge speculated at [14a] that there would be a continuing improvement from 2003. I note that the judge's first finding in [14a] was that his findings at [11] to [13] in relation to the differences in evidence from the time of the Country Guidance cases and 2013 applied. The judge also relied on the comments made by the Tribunal in IK that it recognised that conditions were improving and that there had been a significant decrease in the number of complaints of torture. The judge went on to state that there was nothing before him to indicate that he should not have assumed that there would not have been a continuing improvement. That comment must be seen in light of the judge's determination in its entirety including the evidence which the judge considered and set out at [13] and [14] and his conclusions in relation to this issue at [15]. Those were findings which were open to him.

25. Although reference was also made to the judge allegedly misdirecting himself at paragraphs [14b] to [14e] as to the nature of Country Guidance determinations there is no merit in those arguments. Even if the judge was in error in his discussion as to the passage of time in itself (although in doing so he echoed the presidential guidance referred to above that credible fresh evidence that has not been considered in the Country Guidance case should be considered) any error was not material as the judge identified elsewhere the material evidence which led to his conclusions (as set out at [15]).

26. Although reference was made to the judge's reference at the end of [14] to his own experiences as a judge, again any error in doing so was not material, including as the judge confirmed that it was not a foundation for his conclusions.

27. In conclusion therefore, the judge's findings were detailed and carefully reasoned including that at [12] the Country Guidance tribunal expressly indicated (at paragraph 110) that these 'questions will require review as further evidence becomes available.' The judge gave adequate reasons for what was a limited departure from IK.

28. In any event, even if the judge had not given adequate reasons for that departure, the argument on the Country Guidance is something of a red herring. The judge at paragraphs 16 to 18 gave very detailed reasons why the appellant was not found to be credible. Even if it were considered that the judge erred in not considering IK binding, the judge made a detailed assessment of the appellant's evidence in the round including of his claim that he had been detained and tortured at police stations which the judge said did not accord with the extract from 2013 US State Department Report (that there were allegations of torture/abuse of persons who were in police custody 'but not in a place of detention'). I am satisfied that such a finding, which the judge considered in the round in light of a number of other negative credibility findings, is not inconsistent with following IK. Therefore, in the alternative, any error made by the judge in his assessment of IK was not material.

29. In conclusion there is no merit in Ground 1.

Ground 2

30. The second ground in the appellant's grounds of appeal was in relation to the adequacy of the judge's reasoning and that he resorted to speculation. These grounds were set out at paragraphs 12 to 14 of the grounds of appeal on which permission was granted. Although the judge is criticised for his findings at [16] in relation to medical treatment, this is no more than a disagreement with the judge's findings that there was no documentary evidence to support the proposition (which underpinned one of the appellant's claims) that medical practitioners would have not treated him or provided him with a report/ or that they would have reported him to the authorities. The judge was entitled to find that there was no independent documentary evidence supportive of these issues. I note that this was not pursued by Mr Gilbert and I find it to be without merit.

31. Paragraph 13 of the grounds argues that the judge made findings that the authorities would not have asked the appellant to become an informer. The grounds argue that this is based on the judge's personal assumptions and was not supported by the evidence. The grounds refer to the fact that one of the risk factors in IK is if an

individual has been asked to become an informer, which it was stated suggests that this was common practice. However the judge gave detailed reasons for not accepting that it was the practice at the relevant time in Turkey to ask someone in the appellant's situation to be an informer. The judge's reasoning included an indication that he was aware that 'whether the appellant became an informer or was asked to become one' was included as a potential risk factor in IK, but gave adequate reasons, including the lack of up to date evidence, for not accepting that it was the practice at the relevant time. This was a finding open to the judge.

32. Although Mr Gilbert made a number of submissions in relation to the judge's credibility findings at [18] which were not in the grounds of appeal; in any event these arguments were no more than a disagreement with the judge's reasoned findings. The judge drew together the various strands of the appellant's account and the evidence that was before the judge and considering the entirety of the judge's findings, he came to conclusions that were reasonably open to him.

Failure to analyse IK risk factors

33. It was argued (at paragraph 19 of the grounds of appeal) that:

> 'the immigration judge's 'in the alternative' analysis of the Determination 'in the event' he is wrong about IK is equally flawed'.

However this ground is misconceived. The judge did not indicate that he was analysing the risk factors in the event that he was wrong about IK. The judge had set out in conclusion at [19] that he did not accept the appellant to be a reliable, credible or truthful witness and set out specifically that he did not accept any of his account of any interest in him by the Turkish authorities, other than in relation to his requirement to perform military service (and the judge did not accept that the appellant had a genuine conscientious or moral objection to military service).

34. It was in this context that the judge then considered the appellant's risk on return as someone who has not performed military service and who is a failed asylum seeker.

35. Therefore Mr Gilbert is incorrect in his submission that the judge should have considered the risk factors not at the airport but in the appellant's home area. In addition, the assessment at paragraph 25 was only made in the alternative that the judge was wrong in relation to the judge's very specific finding at [24] that there would be no suspicion or belief that Mr Gilbert was or might be assisting the PKK in the mountains.

36. Although Mr Gilbert argued that the approach to IK was wrong, any error was therefore immaterial. The judge did not accept the appellant as credible so there was no requirement to assess risk in his home area. In any event the factors which the Tribunal in IK adopted from A (Turkey) are not to be treated as 'some kind of checklist'.

37. In relation to the judge's assessment of the appellant's risk at the airport although it was argued that the judge ought to have considered IK in light of RT (Zimbabwe) [2012] UKSC 38 and whether the appellant would be required to lie about his asylum application to avoid a risk of harm. Although the judge did not specifically cite RT (Zimbabwe) the judge implicitly considered the rationale, as he indicated at [27] that the appellant 'can truthfully state that his account was disbelieved'. Mr Gilbert's argument that the appellant would have to lie about being a Kurdish supporter ignores the judge's credibility findings including at [19] that it is not accepted that the appellant was 'a reliable, credible or truthful witness' nor was it accepted that after 2009 that he took part in rallies and or demonstrations or that he was involved in the BDP or the DTP.

38. Mr Gilbert's arguments on this ground were again therefore no more than a disagreement with the judge's findings.

Decision:

39. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law and shall stand.

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 their 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: Dated: 2 November 2015

Deputy Upper Tribunal Judge Hutchinson