Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/04842/2018

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 7 January 2020 **On 15 January 2020**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant
and

MA
(ANONYMITY DIRECTION MADE)
Respondent

Representation:
For the Appellant: Ms U Dirie, Counsel
For the Respondent: Ms R Bassi, Goldman Bailey Solicitors

DECISION AND REASONS (given ex tempore)

1. In a decision dated 14 September 2019 the First-tier Tribunal ('FtT') dismissed the respondent's appeal against a decision of the Secretary of State for the Home Department ('SSHD') dated 26 March 2018, in which he treated the respondent's submissions as a fresh claim but refused to revoke an earlier deportation order, having found that the respondent was not entitled to asylum.

Background

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2. The respondent is a citizen of Turkey. In 2004 he raised a protection claim in the United Kingdom ('UK') however he was removed to Germany and eventually returned to Turkey in 2006. Upon return to Turkey the respondent claimed that he was detained for some three days during which time he was questioned regarding the activities and alleged association that he and his family members had with the PKK. Prior to this detention in 2006 the respondent claimed that he had already been questioned, threatened and ill-treated in 2002 and 2004. He therefore claimed to be a person who was held by the Turkish authorities to be of adverse political interest to them because of his perceived association with the PKK. The respondent was ultimately released from his detention in 2006 but claimed that he was told that he was required to become an informer. He was again arrested in 2007 and claims to have been detained and subjected to torture. In 2008 he was again arrested and beaten. He arrived in the UK in January 2009 where he again claimed asylum. In addition, he was convicted of falsely or improperly obtaining another person's identity document and sentenced to twelve months' imprisonment in January 2009. He became the subject of a signed deportation order in January 2013 and his appeal against that decision was dismissed by the panel of the FtT in a decision dated 8 May 2013 ('the 2013 FtT panel'). With the assistance of solicitors, the respondent made a number of further submissions in support of his international protection claim. It is unnecessary to go into the detailed history as to what happened in relation to those submissions save to say that they resulted in the fresh claim decision refusing his asylum claim dated 26 March 2018, which I have already referred to above. This is how the matter came to be before the FtT on 23 August 2019 which resulted in the decision under appeal.

The respondent's vulnerability

3. The FtT treated the respondent as a vulnerable witness - see [12] and [99] of the FtT's decision. There was no opposition to this approach by the respondent's representative before the FtT. In so doing the FtT took into account, in particular a report prepared by a clinical psychologist, Miss Chisholm dated 18 October 2007. That report is a very detailed report running to 61 pages. Miss Chisholm concluded that the respondent was suffering from PTSD with complex features as well as depression. She observed that that diagnosis was consistent with medical records going back a number of years. She set out her diagnostic opinion in this way:

> "202. Post-traumatic stress disorder arises as a result of experience of traumatic experiences. In my opinion Mr [A]'s symptoms of PTSD are highly compatible with his alleged experiences of repeated imprisonment including repeated and severe violence, sexual abuse, and threats of death in these situations.
>
> 203 In keeping with this he reports that the content of his traumatic nightmares and intrusive memories include the situations in

which his life and physical integrity have been threatened (sexual assault, beatings and threats of death).

204 In my opinion the repeated and severe nature of his traumatic experiences which began in childhood has resulted in a set of symptoms more akin to complex PTSD. Complex PTSD is a potential outcome of exposure to repeated or prolonged instances of multiple forms of interpersonal trauma often occurring under circumstances where escape is not possible (Herman, 1992).

205. In my clinical opinion Mr [A]'s depression has arisen out of a very strong sense of being stuck with repeated imprisonments. As he described it – now feeling imprisoned both externally and internally by his post-trauma symptoms.

206. In my opinion Mr [A]'s experience of complex PTSD and depression are in keeping with the experiences he reported of repeated interpersonal trauma and chronic fear.

Psychological opinion

207. In order to understand the likely cause of Mr [A]'s complex post-traumatic stress disorder, depression, feelings of hopelessness I consider below the psychological mechanisms behind these disorders in relation to Mr [A]'s account and experiences."

4. At the hearing before me I made it clear that the respondent should continue to be treated as vulnerable. Both representatives agreed with that approach.

Proceedings before the FtT

5. At the beginning of the hearing before the FtT, the SSHD's representative requested an adjournment in order to carry out verification checks on court documents that had been submitted by the respondent, indicating that he was subject to court proceedings arising out of his alleged PKK associations. That adjournment request was refused and the hearing proceeded. The FtT decision does not outline in any detail what actually happened at the hearing. I therefore asked the representatives to check their own records. Their records were consistent with what I was able to make out from the FtT's own record of proceedings. The respondent and three witnesses were called to give evidence but there was no cross-examination whatsoever and as a result, the hearing proceeded by way of submissions only.

6. The FtT acknowledged that the correct approach was to use the 2013 panel's decision as its starting point in accordance with the Devaseelan [2002] UKIAT 00702 principles. See [100] and [101]. With that in mind the FtT noted the 2013 FtT panel's conclusions at [102]. These included a finding that the respondent had joined the DDP in 2006 but his politics had been at a relatively low level. Although the 2013 FtT panel accepted that he was questioned on

arrival in 2006, they did not accept that this amounted to torture. The 2013 panel's conclusions are set out in more detail at [32] of its decision. The FtT also considered those findings and the summary at [102] of its decision is just that, a summary. The FtT went on to set out the evidence available to it that was unavailable to the 2013 FtT panel. On any view that evidence is detailed and far-reaching. The FtT first of all turned to the report prepared by Dr Chisholm that I have already referred to. The FtT found that it was highly likely that the respondent had been suffering from PTSD at the time of the hearing before the 2013 FtT panel. The FtT also referred to medical evidence to support the respondent's claim that he had scarring as a result of the torture he experienced in Turkey. The FtT then turned to the evidence provided by the witnesses, who referred to close family members who had been the subject of arrest and challenges for reasons relating to political associations in Turkey since the 2013 FtT panel decision. The FtT also noted the court documentation that had been provided in support of the respondent's claim that he had court proceedings against him in Turkey. At [111] the FtT then:

7. At [112] the FtT then said "*I accepted the evidence that the appellant has suffered past serious harm. In this respect I took into account Immigration Rule 339K. I found that the appellant's past ill-treatment was a serious indicator as to future risk*". The FtT then turned to the risk that the respondent would face if he returned to Turkey and said this:

> "113. I took into account the fact that the appellant's case was not that he was at real risk of serious harm solely on the basis of his own political profile. I noted that it was his case that there was a concatenation of circumstances that meant he would be at risk. In particular I noted that he was of Kurdish ethnicity, an active member of the DTP in Turkey. He had grown up in a PKK area and that he had family who were members of the PKK or perceived so by the authorities. I noted that he had come to the attention of the authorities on a number of occasions and had only been released on the proviso that he would report and become an informer. I also noted that he had avoided military service and that he had been politically active in the UK.
>
> 114. In the light of those matters I concluded that it was likely the appellant would be identified on arrival at the airport in Turkey and be subjected to serious harm as he had been previously. In this respect I took into account the country guidance case if IK (returnees – records – IFA) Turkey CG [2004] UKIAT 00312.
>
> 115. I took into account the Secretary of State's Country Policy and Information Note: Turkey. Turkish political parties' version 3.0 August 2018. I noted that this recorded that the BDP had been founded in 2008 and that it was an extension of the DTP. I noted that this was the party that

> the appellant had been a member of and that this party had been bound. I noted that the BDP was the founder member of the HDP and shared most of its political ideology. I found that the appellant would be perceived as being a member of the HDP. I noted that in the policy information note the Secretary of State accepted that a member of the HDP might be at risk. I referred myself to paragraph 2.4 onward in the note in this respect. In addition I took into account the report of the country expert which was to the effect that the appellant would be at risk on return to Turkey due to his political identity and also as being a draft evader."

8. The FtT went on to allow the respondent's appeal on asylum grounds as well as human rights grounds.

The appeal to the Upper Tribunal ('UT')

9. The SSHD has applied with permission, to appeal against the decision of the FtT and relied upon three grounds of appeal.

   (i) Ground 1 submits that the FtT erred in law in failing to apply the country guidance case of IA and Others (risk – guidelines – separatist) [2003] UKIAT 00034 and failed to properly engage with the Country and Policy Information Note on Turkey ('the CIPN').

   (ii) Ground 2 submits that the FtT failed to provide adequate reasons for its finding at [111] in relation to the findings made by the 2013 FtT panel.

   (iii) Ground 3 submits that the FtT failed to address the submission made by the SSHD that the respondent could follow the example of a brother in Turkey by giving up his political activities and starting afresh.

10. Permission to appeal was granted by UT Judge Kebede in a decision dated 8 November 2019. The respondent has relied upon a Rule 24 notice dated 6 December 2019.

11. At the hearing before me Ms Bassi relied upon the three pleaded grounds. She accepted that it was appropriate to deal with ground 2 first and then to move on to grounds 1 and 3 because the latter two dealt with prospective risk whereas the first ground dealt with the FtT's approach to its findings of fact. Ms Bassi made no application to amend the grounds of appeal and her submissions were firmly focussed upon the grounds of appeal as drafted. Ms Dirie responded to those grounds and I deal with both parties' submissions in more detail below when I discuss each ground of appeal.

Discussion

Ground 2

12. Ground 2 is summarised in the grounds of appeal as follows: "*Failure to provide adequate reasons for material findings*". The submissions that then follow are based entirely upon the FtT's approach as set out in [111]. I have set out the relevant parts of that paragraph above.

13. Ms Bassi criticised the FtT's findings at [111] for three reasons. She first of all submitted that the FtT provided inadequate reasons for its decision to approach the respondent's case on the basis that it needed to be "*considered afresh*". She argued that that was not an approach that was open to this FtT but even if it was, it was simply inadequately reasoned. The FtT was clearly aware that it was obliged to use the 2013 FtT panel's findings as a starting point and expressly directed itself to that. The FtT effectively found that although those findings ought to be a starting point, it was appropriate to depart from them because there were very good reasons to do so. That is an approach that was in principle open to the FtT - see Devaseelan itself, as well as AL (Albania) v SSHD [2019] EWCA Civ 950 at [25]. The FtT set out the detail of the evidence available to it, that was not available to the 2013 FtT panel from [103] to [110]. The FtT noted that not only was that evidence not before the panel, but clearly considered that it was cogent and detailed evidence that went to the heart of the reliability of the respondent's evidence that was given before the 2013 FtT panel. The respondent gave evidence then at a time when on this FtT's findings it was likely that he was suffering from complex PTSD. This FtT found that in all the circumstances the respondent's failure to produce the medical evidence that he relied on more recently should not be held against him. That medical evidence was not challenged before the FtT and it has not been the subject of any challenge in the grounds of appeal. In other words, the SSHD accepted the medical evidence and accepted that the FtT was entitled to accept that medical evidence. That evidence alone was sufficient for the FtT to reach the view that the respondent's case needed to be considered on a fresh basis notwithstanding the previous findings being a starting point. The medical evidence in effect constituted very good reasons to depart from the findings of fact made by the 2013 panel. That medical evidence however does not stand in isolation but was accompanied by further evidence as to how family members have been treated in Turkey as provided by a number of witnesses, none of whom were cross-examined.

14. In my judgment the FtT was entitled to adopt the approach to the 2013 FtT panel's findings that it did and has sufficiently reasoned why it took that course by adequately addressing and accepting the new evidence that was available to it. The SSHD has been told why the FtT opted to make fresh findings and there has been no failure to provide reasons for taking this course. The reasoning could have been clearer and more explicit but the reasons for considering matters afresh are tolerably clear: there was overwhelming significant and cogent evidence that had not been challenged which called into

question the reliability of factual findings made in the absence of that evidence.

15. The second limb to Ms Bassi's submission is that the FtT failed to make clear which of the findings made by the 2013 FtT panel, it considered itself bound by. That submission must be viewed in the context of the whole of [111]. Although the first two sentences of that paragraph are clear ("*I noted that all this evidence had not been before the previous Tribunal. I found in the circumstances that the appellant's case needed to be considered afresh.*"), the third sentence is not ("*In the light of this I did not consider that I was not bound by all the findings of the previous decision maker.*"). Indeed, both representatives agreed that the third sentence is impossible to follow. It is so unclear that it seems to me that when the decision is read as a whole, it is appropriate to disregard it. The FtT clearly reached a decision that the respondent's case needed to be considered afresh and it was *not* bound by any of the previous factual findings. In my view that reading of [111] in the context of the decision as a whole, is entirely appropriate bearing in mind the strength of the new evidence and the SSHD's position in response to it.

16. It follows that the FTT was not required to indicate which findings it considered itself bound by, when it is sufficiently clear that it was making findings afresh given the nature and extent of the new evidence.

17. Ms Bassi also submitted that the FtT failed to make any finding on the level of the respondent's political activity in Turkey and the UK. She asked me to note that the 2013 FtT panel considered that activity to be low. The difficulty with that submission is that the respondent has not alleged that his political activities were sophisticated or at a high level. His case is that although his activities were relatively low, the authorities perceived him and close family members to have such an adverse political profile as to justify repeated arrests, ill-treatment and torture. In those circumstances it was not necessary for the FtT to make a specific finding as to the level of political activity. Whatever the level of his activity the FtT accepted that he had been of adverse interest to the Turkish authorities. The FtT clearly accepted the respondent's evidence and accepted that the authorities *imputed to him* a political opinion to justify their past adverse interest in him.

18. Before leaving ground 2 it is important to acknowledge that the FtT's reasoning for accepting this respondent's claim was very brief indeed. It is undoubtedly clear that the FtT accepted the respondent's evidence and said so at [112] in terms. This paragraph must be read together with the remainder of the decision including the second half of [105] where the FtT said this:

> "I found that the appellant had given a clear consistent account which was in keeping with the background evidence. I found that his account was partially corroborated by the evidence of his mental health problems including the diagnosis of PTSD. I noted that both Dr Chisolm and Dr Cohen were of the view that the appellant was not feigning or exaggerating his symptoms. I further noted that the independent physical evidence of scarring was said by Dr Cohen to be highly consistent with the appellant's claimed experiences."

19. I accept that the FtT's structure of his credibility findings is at best odd and the reasons for those findings very brief indeed. There is also a surprising failure to make any clear findings on the important court documents, in relation to which the SSHD sought an adjournment. These are regrettable matters. However as I have already indicated there can be no doubt that the FtT accepted the respondent's evidence. There was no clear challenge to this evidence on the part of the SSHD. There has also been no clear challenge to the FtT's acceptance of the respondent's past ill-treatment in Turkey. Ms Bassi referred me to the manner in which ground 2 itself was worded i.e. "*failure to provide adequate reasons for material finding*". She highlighted that this referred to [111] of the FtT's decision. That paragraph however deals with the FtT's decision to consider the respondent's case afresh. It does not deal with the respondent's acceptance of the respondent's claim to have been ill-treated many times for reasons relating to his perceived political opinion in the past. There has been no attack on [105] or [112] in ground 2. That is not necessarily surprising bearing in mind the SSHD's decision not to cross-examine the respondent or any of his witnesses at the hearing before the FtT. In short, there has been no clear challenge to the FtT's decision to accept this respondent's claim as to what happened to him in Turkey.

20. In any event when the FtT's decision is read as a whole, the SSHD has been provided with adequate reasons to know why it is the FtT accepted the respondent's account. I summarise the FtT's reasons below.

    (i) The 2013 FtT panel did not have the evidence that the respondent was suffering from PTSD and the FtT found that the failure to provide that evidence should not be held against him.

    (ii) Bearing in mind the respondent is vulnerable, he gave a clear and consistent account.

    (iii) That account is consistent with the country background evidence.

    (iv) That account is partially corroborated by the respondent's mental health problems.

    (v) That account is corroborated by the physical evidence of scarring.

(vi) That account is supported by politically active family members who gave evidence postdating the 2013 FtT panel that other close family members have been arrested and charged with offences relating to terrorism.

21. None of those observations by the FtT have been challenged. As pleaded ground 2 is not made out. I now turn to ground 1.

Ground 1

22. I am satisfied that although the FtT did not refer to the country guidance case of IA (supra), it was clearly aware of it and applied the relevant risk factors set out therein.

23. First, the risk factors contained in IA were expressly referred to and endorsed by the subsequent country guidance decision of IK (Returnees - Records – IFA) Turkey CG [2004] UKIAT 00312, which was referred to by the FtT at [114]. Indeed the SSHD's grounds of appeal acknowledge that the factors set out in IA were endorsed in the later country guidance case of IK, which the FtT referred to. It is also clear from the decision of IK itself that the IA risk factors were approved of and set out in full.

24. Second, the IA risk factors are also set out in full in the CPIN at [2.4.13]. That report was expressly taken into account by the FtT - see [115].

25. Third, the FtT clearly took into account all the relevant risk factors and identified those it considered to be most relevant to this particular case at [113]. I have already set that out in full above. This is a case in which the FtT considered all the circumstances cumulatively. It was unnecessary to pinpoint any one factor such as level of political activity because the FtT was satisfied that when all the factors were considered cumulatively this respondent is clearly at prospective risk upon return to Turkey. The FtT did precisely that which was recommended by the country guidance case of IA and considered all the factors in the round. At [47] of IK the Tribunal made it clear that they could not emphasise too strongly the importance of avoiding treating the risk factors as "*some kind of checklist*" and that the assessment of the claim must be carried out in the round.

26. Ground 1 also submits that the FtT simplistically referred to HDP members being at risk without any consideration of the factors identified in the CG case. As I have already noted the FtT took into account all the relevant risk factors at [113] and concluded at [114] that in light of those matters the respondent would be identified on arrival and subjected to serious harm bearing in mind the country guidance case of IK (which as I have noted endorsed and quoted in full the country guidance case of IA). It was only after that that the FtT went on to deal with the respondent's being perceived as a

member of HDP. That membership of HDP must be seen in the context of the FtT's earlier finding as set out a [113] to [114]. The FtT's findings regarding the respondent's HDP activities must also be seen in the context of the CIPN, which as the FtT noted at [2.4.14-2.4.15] makes it plain that a person who otherwise come to the adverse attention of the authorities because of suspected involvement with the PKK or support for autonomy for Kurdish people may be at risk, irrespective of the level of their political activity. This is not a case in which the FtT found that this respondent is at risk solely because of his HDP activities, rather the FtT concluded that when all factors are assessed cumulatively, there is a real risk that the respondent will be subjected to repetition of the past ill-treatment that he has already been party to. That was a finding entirely open to the FtT that was made with full respect being given to the country guidance and background country information available. Ground 1 is therefore not made out.

Ground 3

27. I can take ground 3 more quickly. Ms Bassi relied upon the ground as pleaded and did not make any oral submissions. Ground 3 raises two matters.

28. First, it is said that the FtT did not address the SSHD's submission within the decision letter that the respondent could have given up political activity upon return to Turkey in a manner similar to one of his brothers who was living in Turkey without adverse attention. Second, it is submitted that the FtT should not have accepted the country expert report which was devoid of any reasoning.

29. I entirely accept Ms Dirie's submission that the SSHD's contention that the respondent should give up all political activity in order to avoid persecution runs contrary to the well-established principle in RT (Zimbabwe) and Others v SSHD [2012] UKSC as applied in MSM (Somalia) v SSHD [2016] EWCA Civ 715 at [42]. In any event, even assuming that this respondent gave up all political activity or association, on the FtT's findings he would on any legitimate review remain at risk because he has already been labelled by the Turkish authorities as having come to their adverse attention by reason of perceived political activity and or association.

30. It follows that although it would have been better for the FtT to have dealt with this submission, its failure to do so is not a material error of law because the submission is doomed to failure.

31. Turning to the FtT's approach to the country expert report, the FtT simply noted at [116] that the country expert report was to the effect that the respondent would be at risk on return to Turkey due to its political identity and also being a draft evader. The reference to the country expert report is by way of an aside and does not form any

part of the foundations for the FtT's reasons as to why this respondent is at risk. The FtT is in effect merely commenting that the country expert's report is consistent with the findings that it has reached. Ground 3 is not made out.

Conclusion

32. The FtT's decision has a number of defects and could have contained far clearer and more structured reasoning. However the SSHD accepted and has not challenged the significant cogent medical evidence both in relation to the respondent's psychological symptoms and his physical evidence of serious ill-treatment in Turkey. That evidence entirely supported the FtT's approach to consider the evidence afresh. The FtT acted consistently with the Devaseelan principles. Having accepted the respondent's evidence, the FtT was entitled for the reasons it has provided to conclude that given the past harm that he had suffered there is a real risk that that will be repeated in the future. Indeed, the evidence and the country background information points in one direction in this case and the SSHD has not been able to identify how this case could produce any other result given the stance that was taken in relation to the medical evidence, together with the FtT's acceptance of the past harm that the respondent had come to.

Notice of decision

The FtT's decision does not contain an error of law and shall stand.

Direction regarding anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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: *Melanie Plimmer* Dated: 10 January 2020
Upper Tribunal Judge Plimmer