Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/14143/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 March 2020	**On 18 March 2020**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

CKT
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms F Shaw, Counsel instructed by London Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. On 6 January 2020 I set aside part of the First-tier Tribunal's decision dismissing the appeal of this young man from Turkey. In this determination I remake that part of the decision.

2. The appellant is a Turkish national and an Alevi Kurd born on 6 April 1994. He entered the UK as a visitor in October 2017 and claimed asylum on 3 April 2018. His claim is that his brother had been expelled from a

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school of Specialised Gendarmerie in 2002, a month prior to his graduation, without being given any reasons and had appealed the decision to the European Court of Human Rights on the basis that he had been unjustly denied access to the evidence of the investigation undertaken of him and his family which led to the exclusion order. The Ministry of the Interior also sought to be reimbursed for tuition and pension fees that had been paid out, to be reclaimed through the father's salary. The appellant was 7 years old at that time. He claims that due to the court proceedings, the family became known to the Turkish authorities. His brother was subsequently called up for military service in February 2005 and died on 8 September 2005 whilst still in service. The authorities attempted to pass it off as suicide, but the family had disputed this. Despite the opposition of the Turkish government, the family were given permission by the ECHR to continue the proceedings following the death and eventually, on 21 April 2009, the Strasbourg court found that there had been a violation of article 6 of the Convention in that the appellant's brother had not had a fair trial in respect of his challenge to the decision to expel him from military school because he had not been given access to documents classed as confidential before the military court. He, or rather his family, was awarded 2000 euros in costs and 6,500 euros non-pecuniary damage. This is said to have caused further problems with the authorities.

3. The appellant also claimed that after his brother's death, he became involved with EMEP and had been arrested as a result. He further claimed that he would be treated as a draft evader if returned to Turkey and that his political activities in the UK would place him at risk.

4. The appeal was heard at Taylor House on 21 June 2019 by First-tier Tribunal Judge Blake and dismissed in a determination promulgated on 24 July 2019. The judge found that the appellant was not a credible witness, that there was little evidence of his support for EMEP, which was a legally operating party, and that his activities had been low level and for a short period. The judge found that there was little evidence to support the claim of the appellant's brother's action against the state for his dismissal from the army, that there was no evidence that he had been murdered by the state as a result of having taken the authorities to court and that in fact his father still worked for the government. There was untranslated documentary evidence and no evidence of the appellant's sur place activities other than a receipt for £100 from DAY-MER, a Turkish and Kurdish community organisation in London. The judge found that the articles in the bundle had been written many years ago and that the appellant had not had any trouble as a result of them. The judge found that the appellant's claim that he would be at risk of ill treatment as a draft evader was unsustainable because he had no

political profile, his activities in the UK would not bring him to the adverse attention of the authorities and his brother's death would not be an issue either.

5. Permission to appeal was granted by First-tier Tribunal Judge Lever on 27 August 2019 and the matter came before me.

6. Having heard submissions from the parties, I found that on the appellant's own evidence, his military service had been deferred until the 31 December 2019 and he has not been called up to serve. He had not raised any issue of draft evasion in his initial lengthy witness statement or his asylum interview. I found that the judge was entitled to find that there was no basis for any suggestion of mistreatment on that score and preserved that finding.

7. It was argued for the appellant that the judge erred in finding that *"there was little evidence to support the claim"* that the appellant's bother and family had taken action against the Turkish state. It was maintained that the judgment of the European Court of Human Rights was contained in the respondent's bundle and had not been acknowledged by the judge. Given that the judgment of the court had indeed been before the judge, I concluded that there had been a clear error in the judge's finding that the appellant's claim of the court proceedings had not been supported by evidence and on that issue, the determination was found to be flawed.

8. There was no challenge to the findings on the appellant's political activities both in Turkey and in the UK and I therefore preserved the finding that the appellant had been involved in some low level activities with EMEP in Turkey, that he had some activities with DAY-MER in the UK but that his political profile, such as it was, would not cause him any problems on return.

The Hearing

9. The appeal hearing then resumed before me on 2 March 2020. The appellant was in attendance and gave oral evidence through an interpreter he confirmed he understood.

10. He confirmed his name, address and the contents of his witness statement. He was asked to explain his reference to a G3 gun in his statement. He said that it was a shotgun which was longer than a metre in size. He stated that his brother had been shot at the back of his skull. He was aware of that from the autopsy report. He said that an F type prison was a high security prison for political prisoners. His brother had

been held there for about five months without any charge. He had not been told why he was being held there; it had been during the period of his conscription.

11. The appellant was asked to explain how his second brother had been exempted from military service. He said that according to the regulations in Turkey, the death of a conscript meant the exemption of his brothers; all if the death was martyrdom and one if it was not. as his brother was said to have committed suicide only one brother was exempted from service and that was his second brother. He said that the family had been told by the army that his brother had not been martyred/killed in action.

12. The appellant was then tendered for cross examination. He was asked whether the autopsy report he had referred to had been adduced as evidence. The appellant said he had not submitted it. He confirmed that he did not have the report although he had read it when he was 11 years old. He thought his family would have a copy. He said he had also seen his brother's body prior to burial and had seen the head. His parents were aware that he had read the report. It had been prepared by the army. He thought they should still have a copy, but he could not remember if it had been adduced as evidence before the European Court. The appellant accepted that the case before the court had been in respect of his brother's suspension from officer training school and not his unlawful killing.

13. The appellant was asked about the imprisonment of the lawyer who had represented his brother. He said that he had heard about his imprisonment about a year ago when it had happened. He said that he had told his representatives about it before and he thought there was evidence relating to it in the bundle.

14. The appellant was then asked about a document in the bundle relating to his brother S's application for employment. There was reference to "unfavourable conditions", which the interpreter said should have been translated as negative factors, leading to the rejection of his application. The appellant was asked if he knew what those were. He said that it was that they were Kurds, that they had gone to the ECHR and that the appellant's oldest brother had been discharged from officer training school. There was no other letter to clarify what was meant but the appellant maintained it could be nothing other than their history. S had not made any complaint or followed up the refusal. He was asked why S had applied for a public sector job given the family history. The appellant replied that it was more comfortable work.

15. The appellant confirmed that he had not had any problems obtaining his passport.

16. In re-examination, the appellant was asked why he had not asked his parents for a copy of the autopsy report. He said he did not know. He was asked whether his solicitors had asked him for a copy and he said they had not. he confirmed he had told them about it.

17. The appellant stated that his father used to work as a driver for the local authority but that he had now retired. He said his parents, his brother and his brother's family and all the relatives lived in Turkey.

18. I then asked the appellant about his family's circumstances since the ECHR proceedings. He said they had lived *"a normal life"* with no difficulties but that *"we saw the government was building walls against us"*. I asked whether there was any evidence of that other than the letter regarding S's employment. He said there were not because no other applications for employment had been made. He said his brother worked; he ran a shop. I asked why the appellant would have problems on return. He said it was because he was the political one. Other than that, he repeated that his brother could not get a job. He was working just to survive.

19. There were no questions arising from mine and that completed the oral evidence.

20. I then heard submissions. Mr Whitwell pointed out that the live issue was very limited given the preserved findings. He submitted that the evidence about the family lawyer's arrest had been before the First-tier Tribunal. It was not fresh evidence. The letter regarding S's job application did not assist one way or the other. It was not known what the negative factors were and S had not received any feedback. He submitted that one had to look at the appellant's circumstances. He had obtained a passport to come here and had not encountered any adverse questioning. His father had been a driver for the local authority until retirement, that was a public sector role. There was nothing to show that the family were having problems. The appellant claimed that he would be at risk due to his political activities but findings had been preserved on that. The appellant had delayed making an asylum claim for some five months. Whilst it was accepted that he was an Alevi Kurds and that they were subject to discrimination, this was insufficient to show a risk of persecution. The only adverse factors were his faith, that he would be

returning as a failed asylum seeker with an expired passport. He had no criminal record and had never been arrested or detained. There was no clear correlation between the appellant's brother's case and any risk to him. The court judgment only addressed the issue of the brother's expulsion from training school and not with his death. The appeal should be dismissed.

21. Ms Shaw relied on her skeleton argument. She pointed out that the court judgment had listed the appellant by name along with his family and they had al been the subject of security investigations. She submitted that the evidence showed that there were negative or unfavourable factors in respect of S which meant that he could not get a job so there could be similar negative factors in respect of the appellant. There was a distinction between S and the appellant in that the appellant was not exempt from military service unlike S. She referred me to the Home Office Country Report on exemption and to the document from the military deferring the appellant's military service whilst he was studying until 31 December 2019. The appellant had given evidence on how his brother had died. He would now have to return and undertake military service. His dead brother had been held in a F type prison and was never given a fair trial. He had been killed whilst serving. His lawyer had been arrested on allegations of terrorism. The appeal should be allowed.

22. That concluded the hearing. I then reserved my determination which I now give with reasons.

Discussion and Conclusions

23. In reaching my decision, I have considered all the evidence and the submissions made. I have had regard to the lower standard of proof and the fact that the burden is on the appellant to make out his case.

24. I would state at the outset that this has been a very difficult case to decide as it is brought on a very unusual premise and the evidence both for and against the appellant makes it a borderline case to determine. However, bearing in mind that the threshold is a low one and that much of the evidence I have to consider is undisputed, I conclude for the reasons set out below (in no order of priority) that the appellant has just made out his case.

25. References to RB are to the respondent's bundle, to AB to the appellant's bundle and to ASB to the appellant's supplementary bundle.

26. The appellant sought and obtained a visit visa for the UK on 4 October 2017. He left just two days later on 6 October 2017 arriving here the same

day as shown in the passport endorsement. I find, therefore, he left Turkey at the first available opportunity having obtained his visa.

27. The appellant claimed asylum on 3 April 2018. He was asked about this delay at his asylum interview and there as well as in his witness statements he explained that he had been depressed and psychologically unwell on arrival and that it took him time to pull himself together and to feel ready to make the application (RB:C20:219-222 and AB:12, paragraph 29). I note that in the discussion with the interviewing officer about his health, it transpired that he had not realised he was entitled to seek medical help here and had not done so. I note that he later confirms that he had sought help and was on medication (AB:12, paragraph 30). I also note that the psychiatric report, adduced for the First-tier Tribunal hearing, confirms that the appellant suffers from chronic PTSD (RB:Annex E). I find, therefore, that the delay in making the claim is satisfactorily explained and does not adversely impact upon the credibility of the appellant. In any event, I note that it is unclear as to when the appellant first contacted the Home Office in order to make his application; at his asylum interview he refers to the 3 April 2018 as being the date he had been given for his screening appointment (RB:C30:221). Some contact was plainly made before this date.

28. It is accepted that the appellant is an Alevi Kurd. I note that he was born in Altindag which is in the Ankara district (this is confirmed by the appellant's passport, the letter from the military and at RB:B2:1.9 and D1:2). His parents, however, were both born in Sivas (RB:D1:5) and I find that is why the appellant views himself as emanating from that region (RB:C11:28, C29:206). The notice from the Ministry of Defence also refers to the appellant's place of registry as Sivas, despite his place of birth being elsewhere (AB:22) and the family are registered as being from Imranli district in Sivas (ASB:26-27).

29. I note that the appellant's father used to work in the mines in Konya and that his brothers were both born there but that the family eventually settled in Ankara in 1988 (RB:D2:10-11, D1:3) when Kurds were moved from their villages by the Turkish authorities in an attempt to encourage assimilation. The appellant's father then found work as a driver for the local authority of Cankaya municipality in Ankara (RB:D1:4) and remained in employment until his retirement.

30. The appellant is the youngest of three brothers and I refer to the others as M and S. It is accepted that M entered the Beytepe School of Specialised Gendarmerie in 2001 and that shortly before his graduation in 2002 he was dismissed without being given any reasons. I have had careful regard to the judgment from the ECHR which found in his

favour and awarded damages to be paid to his family. Whilst this aspect of the claim was noted by the respondent in her summary of the appellant's claim (decision letter: paragraphs 14-15), there was no consideration of it at all when the claim was assessed.

31. The omission was highlighted by the appellant's representatives on 21 December 2018 when they filed notice of appeal. However, it was not suggested by Mr Whitwell that the appellant's claim that the family was known to the authorities because of this litigation was unfounded. Nor is there any challenge to the finding of the court and the appellant's claim that M's expulsion from the school occurred after the collation of findings of a secret investigation into him and his family (RB:F3: paragraph 7). Mr Whitwell also did not challenge the appellant's evidence that their neighbours had been questioned about the appellant's family's political views by Turkish secret service agents prior to M's expulsion (RB:D3:22 and C15:65). The ECHR judgment refers to the confidential investigation conducted by the secret intelligence service, the Directorate of Security and the Gendarmerie Command (RB:F3:7).

32. It is accepted that whilst the proceedings were ongoing, M was conscripted in February 2005. the appellant's unchallenged evidence is that the family heard regularly from him and all seemed well. M told his family that he would speak to Kurdish activists and prisoners in the F-type high security prisons (RB:D4:26-28). The last contact with M was on 31 August 2005. On 8 September 2005, the appellant's father was called to the local Mukhtar's office and informed of his son's death (RB:D4). M was 23 years old.

33. Other than the appellant's evidence, there is no supporting evidence as to the cause of M's death. The appellant's family were told by officials that M had committed suicide by shooting himself with his G3 rifle. The appellant states that this was disputed by the family for several reasons: M was shot in the back of the head; a G3 (Gewehr 3) rifle is just over a metre long and it would be hard to use it to shoot oneself; M had been well during his service and his contact with his family had revealed nothing untoward as to his mental state; M was not permitted ammunition due to his past history and concern that he might harbour a grudge (RB:D4:35); it was said that he had stolen one bullet from the armoury but the armoury was heavily guarded; the death was said to have occurred inside a high security prison but was reportedly out of reach of any of the surveillance cameras (RB:C15;62); the autopsy report confirmed the shot was to the back of the skull, and lastly the appellant and his family saw M's body at the burial and saw the extensive damage to his head.

34. The appellant stated that the autopsy report had been seen by him and his family. He was not questioned as to when he, himself, had read it as he had been a child of 11 at the time of his brother's death and would probably have not understood much of such a report. However, he said that his family had been in possession of it and it is possible that he read it later on. Unfortunately, this report was not made available for the hearing. The appellant thought his family should still have it and it is unclear why his representatives did not ask him to obtain it, if of course such a document was safe to send. It was not, however, suggested or put to him that he did not see injuries to his brother's skull, as described. The appellant stated that this was something that he would never forget and that would always remain with him and I accept that the experience has had long lasting impact on him. I note that the psychiatrist in his report noted that the appellant's "*voice became choked and there were tears in his eyes*" when he spoke of this (RB:E4:20) and he was visibly distressed at the hearing before me when questioned about this event.

35. I accept that due to the military's conclusion as to the cause of M's death, M was not declared to be a martyr and his family did not benefit from any state benefits that would have been payable had he died in other circumstances. I also accept that only S was exempted from military service due to M's death and not both S and the appellant as would have been the case had the official line not been suicide. Although the extract Ms Shaw cited from the CPIN (AB:at 4.1.1 is rather unclear as to who would be exempted in such circumstances), it is plain from the notice about the appellant from the Ministry of Defence in Ankara dated 13 February 2018, that his conscription has been deferred because of his studies until 31 December 2019 (AB:22). The ability of students to defer national service until completion of their university studies (as long as they are not older than 35) is confirmed in the respondent's evidence (AB:CPIN: 3.3.3 and 2.1.1).

36. It follows that I accept, and there has been no challenge to this, that the appellant enrolled at university in 2012 to study geology but "froze" his studies in February 2017 in the aftermath of the attempted coup on September 2016 when a state of emergency was declared and when the Kurds came under close scrutiny (RB:D9). I accept that the appellant's mother was diagnosed with cancer around this time.

37. I accept that M's death motivated the appellant to become involved in Kurdish politics and that he had some bad experiences such as when he was shot by rubber bullets in September 2013 when attending protests in Ankara and was held in police van for 1 - 1.5 hours, beaten, threatened and abused and suffered damage to his teeth (RB: C23-24, C23:157, C24:160, D6:51). There was also the time in September 2015 when he was present at a rally where bombs killed many people including some of his

friends (RB:D8). Following the attempted coup and the general crackdown, I accept that he began to have problems at university where he was labelled a communist and a terrorist (RB:D9).

38. By February 2017 the appellant was fearful enough that he had stopped attending university, deferred his studies and remained at home until May 2017 when he fled to his uncle's hotel in the extreme west of Turkey hoping to escape the political unrest (RB:D10). Although the respondent questioned this conduct in the decision letter, I accept that Gökçeada island (in the Gallipoli Peninsula), a popular tourist destination with its Greek origins is seen as a "laid back" part of Turkey and I accept that the appellant thought he might be able to lose himself there amongst the guests in his uncle's hotel business. I also accept that due to the military presence following the coup and the state of emergency, he still felt nervous and that he was worried about how his presence might impact on his uncle if he was noticed (RB:D10). I accept that on his return home, he three out all his political literature so as not to arouse any suspicion and that he felt he had to leave Turkey.

39. I have no evidence that the appellant has been in touch with the military authorities since his service was deferred. Nor is there any evidence as to what has happened about his university studies. The appellant's evidence was that the authorities had been to his home and questioned his father about his whereabouts (RB:C31:227-229). No challenge to this has been raised.

40. According to the CPIN (September 2018), records are kept of those liable to military service and anyone who seeks to evade it is registered on the GBTS national information system and is likely to come to the attention of the authorities during routine police checks and border checks. They are also likely to be searched for at their home address (2.4.16). It is reported that the national database of military service is sophisticated, making evasion almost impossible (7.3.1). Branches of the military are located in every district and every male citizen is registered there at birth (7.3.2). The bar code on a passport is linked to the person's entry on the GBTS which includes information about military (ibid). the imprisonment terms for draft evasion are set out at 7.5.2. They vary in length depending on the period of evasion. Given that the appellant has not reported to the military office as required to do after 31 December 2019, he is now reaching the three month point which carries a sentence of 4-18 months or 6-36 months for anything over 3 months.

41. It is accepted that the appellant had been involved in low level politics with EMEP and DAY-MER. The First-tier Tribunal Judge found that his political activities would not raise any adverse interest in him and that finding is preserved. However, I find that there is a likelihood that when

combined with the other risk factors they would bring the appellant to the attention of the authorities particularly as he will already be in their sights being of conscription age and just having completed the deferment period.

42. I accept that the lawyer who acted for M and the family in the ECHR proceedings was imprisoned in 2019 however although raised by Ms Shaw at the start of the hearing, this is not a new fact and was mentioned by appellant in his earlier evidence. Indeed it does not appear to be the first arrest as the appellant referred to "*consistent arrests*" in the past (RB:D3:24). There is no direct connection between the lawyer's problems and any risk to the appellant.

43. I accept that S applied for employment with the General Directorate of Machinery and Chemistry Industry Institution. The letter submitted to confirm this is dated 2 July 2019 and also confirms that S passed the examination and interview stage of the employment process on 18 July 2018 (ASB:23 and 25). The appellant gave evidence that the employer was in the public sector and that was not challenged. The letter then maintains that following a security investigation and archive research results, the offer of employment was withdrawn due to "*unfavourable conditions*". The interpreter at the hearing suggested this should be read as "negative factors" but the meaning is more or less the same. It is the appellant's belief, and of course there can be no certainty given the absence of any further information about the matter, that these negative/unfavourable factors must be their Alevi background, the previous security investigation conducted on the family and M's history.

44. Mr Whitwell submitted that there was no evidence to confirm the appellant's assumption and that it was only speculation that the negative factors were as he surmised however he made no reference to the police check report on S which is also before me (ASB:28). That confirms that a police check on S conducted on 18 December 2019 disclosed no criminal history. The negative conditions cannot relate to S's work experience of qualifications as those would have been known to the employer at the time of the application for work and certainly during the course of the interview and examination process. Whilst I too can only speculate on what is meant by the phrase, it is, in my view, and given all the circumstances and evidence, fair to draw the inference that it relates to the family's known background which the authorities view adversely.

45. Mr Whitwell submitted that the appellant's father was able to hold down his job with the local authority notwithstanding this adverse history however the appellant's father is an elderly man and was close to retirement. It may be that he was not viewed as a threat.

46. It was submitted for the respondent that the appellant had been able to obtain a passport through the normal channels and to leave Turkey using his passport. At the time of his departure, however, the appellant had obtained deferral of his service due to his studies (as he was entitled to) and so there would have been no reason to deny him a passport. It may be seen, however, that the passport was valid for only a two year period (until April 2019) and has now expired.

47. It was also submitted that the appellant's brother S was able to remain in Turkey and work without problems. That work is said to be in a shop and previously as a labourer. His attempt to obtain more skilled work has failed. I accept, nevertheless, that the family has not been directly harassed or persecuted and indeed notwithstanding the discrimination they faced over the years, as detailed in the appellant's statement (RB:D2-3) and interview, he did not seek to exaggerate their circumstances and admitted they were living a normal life.

48. The major difference, however, between the appellant, his parents and S is that the appellant has been away from Turkey, he has allowed his passport and the postponement period of his conscription to expire and he has failed to report to the military office as he was required to do. As it has now been three years since he "froze" his studies, he may well be perceived as having abandoned them and so he would be required to serve in the military on his return. Whilst there have been recent changes to the exemption provisions and an option to pay one's way out of military service has been introduced, I was not addressed on this and neither party submitted any evidence on the current position or how it might impact upon the appellant. I have, therefore, reached my decision on the evidence that was made available.

49. I accept completely that the appellant has a valid subjective fear given what happened to his brother when he undertook military service. That is hardly surprising. The more difficult issue to determine is whether the fear was well founded objectively.

50. I have sought to analyse above all the evidence both for and against the appellant. I accept that the appellant's father remained in employment until his retirement, that no active attempts have been made to harass the family and that the appellant's parents and older brother are living a relatively normal life. I find, nevertheless, that given the low threshold the appellant has just made out his case. This is because his circumstances are significantly different from those of his father and brother, because he is now of an age where he is required to serve in the army, because his brother's history will be known to the military, because he is now under their radar given the expiry of his deferral period, because enquiries have been made of his whereabouts at the

family home and because there is an adverse record of the appellant and his family on state records. S may have escaped a troublesome fate by being exempt from national service but the appellant has not been so lucky. His own political past, which appears to have been known at university and thus may be known to the authorities, is a further factor which distinguishes him from S as does his departure from Turkey and the making of an asylum claim. Whilst these factors may not individually place him at risk, when taken cumulatively they are sufficient to discharge the burden on the appellant to the lower standard. I would also add that there has been little, if any challenge to the appellant's account and that I have accepted him as a credible witness.

51. The First-tier Tribunal dismissed the appeal on humanitarian protection grounds and no challenge to that was made. That decision is upheld.

52. No article 8 claim has been put forward.

Decision

53. The appeal is allowed on asylum grounds.

54. The appeal is allowed on article 3 grounds.

Anonymity

55. I continue the anonymity order made by the First-tier Tribunal.

Signed

Upper Tribunal Judge

Date: 9 March 2020