IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/11237/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 October 2015	**On 14 December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE L J MURRAY

Between

E A
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Panagiotopaulou, Counsel, instructed by The Migrant Law Partnership
For the Respondent: Mr P Nath, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Turkey of Kurdish ethnicity, born on 24 September 1992. He entered the UK illegally in October 2012 and claimed asylum in November 2012 on the basis of imputed political opinion by reason of ethnicity and support for the PKK, as a consequence of which he claims to have been arrested, detained and tortured on several occasions between 2009 and 2012. The Respondent refused to recognise him as a refugee for the reasons set out in a refusal letter dated 28 November 2014 and made a decision to remove him as an illegal

entrant by way of directions under paragraphs 8-10 of schedule 2 to the Immigration Act 1971.

2. The First-tier Tribunal dismissed his appeal and concluded that he was not a refugee and not in need of international protection on the grounds that his case was not a credible one. He sought permission to appeal against that decision. Permission was initially refused by First-tier Tribunal Judge Heynes on 22 April 2015. He renewed his application to the Upper Tribunal. Permission was granted by Deputy Upper Tribunal Judge Chapman on 8 July 2015 on the basis that the credibility findings made by the judge were mixed in that he accepted some aspects of the claim but rejected others and it was arguable that the ultimate negative credibility findings at paragraph 90 did not necessarily flow from the positive credibility findings at paragraphs 71, 74, 83 and 88. Further, it was arguable that in coming to the negative credibility findings the Judge failed to take account of the fact that in interview at question 157 the Appellant described the authorities visiting his home after he fled and arresting his father.

The Grounds

4. Ms Panagiotopaulou relied on both sets of grounds for permission to appeal and so I summarise them here.

5. The grounds for permission to appeal to the First-tier Tribunal assert the following:

   (i) Material weight should have been placed on the Appellant's brother's evidence notwithstanding that it was hearsay;

   (ii) Corroborative evidence from the Appellant's parents who continued to reside in Turkey should not be required;

   (iii) One of the main reasons why credibility was not accepted was that the Appellant did not mention in his witness statement that the authorities were raiding the family house following his flight from Turkey. The Immigration Judge failed to note or place weight on the fact that at question 157 the Appellant had described the authorities visiting his parental home after he had fled and arresting his father which was corroborative of his oral evidence that the authorities maintained an adverse interest in him.

6. The renewed grounds for permission to appeal to the Upper Tribunal repeat the previous grounds and assert that the Judge's credibility findings were mixed but the final conclusion at paragraph 90 was that credibility was severely damaged. The negative credibility findings were that the Appellant had lied in a previous entry clearance application; was inconsistent as to whether there was an arrest warrant and if so what happened to it; did not mention that his family home had been raided in his witness statement and that his parents had not made statements in support of his allegation that he was wanted in Turkey. The renewed

grounds accept that the First-tier Tribunal set out the correct standard of proof.

The Rule 24 Response

7. The Respondent submits that the Judge correctly identified the risk factors and factored them into a consideration of the risk to the Appellant and to the Appellant's credibility. The Judge noted that the consistency of the Appellant's account with the background evidence was not determinative of the claim. The Judge noted the lack of corroborative evidenced from the Appellant's mother and father and that they had not provided evidence to support the account of the Appellant which clearly included the assertion at question 157 that the Appellant's father was arrested. It was open to the Judge to expect such corroboration to be available. The Judge was not obliged to particularise every part of the Appellant's claim. It was open to the Judge to conclude that the inconsistencies and omissions identified at paragraphs 84 to 86 were such as to render his account not credible. It is argued that it was further open to the Judge to consider that the Appellant was seeking to come to the UK and that there was no intention on the part of the Appellant other than to come to the UK and therefore arguably no opportunity to claim elsewhere.

The Hearing

8. I heard submissions from both representatives which I summarise here. Ms Panagiotopaulou submitted that the Appellant had been detained on four occasions and claimed that there were also *sur place* activities. She submitted that the First-tier Tribunal made mixed findings but also failed to make crucial findings and at paragraph 47 rejected the Respondent's argument that he did not recognise the flag. There was no reference as to whether the First-tier Tribunal accepted the Appellant's claim in relation to findings regarding the BDP which were identified as risk factors in the case law.

9. The First-tier Tribunal rejected the Appellant's claim that he was detained but did not give cogent reasons, and looking at paragraphs 76 to 88 it appeared that the Tribunal found that there was no corroborative evidence. There was no requirement for such evidence and in any event the Respondent would have said it was self-serving.

10. The second point was that the matter in relation to the raid on the family home was in fact raised in the interview. Counsel said that there were in fact no inconsistencies and the decision contained material errors.

11. Looking at paragraph 19, having made his findings the First-tier Judge failed to move on to identify risks on return on the basis of the case of **IK (Returnees - Records – IFA) Turkey** CG [2004] UKIAT 00312. Whilst he had mentioned **IK** in paragraphs 50 and 68 of his findings he did not apply

it to the Appellant. He had accepted the Appellant's Kurdish ethnicity but had not made findings in terms of his membership of the BDP or his *sur place* activities in the UK which would be a risk factor, and the type of questions which would be asked of a young man of Kurdish ethnicity and these were factors that enhanced risk.

12. The Article 8 findings were open to him. However he failed to take account of relevant facts and took into account irrelevant facts and placed undue weight on certain factors and factual errors.

13. Mr Nath relied on his Rule 24 response. With regard to the assertion that there were inconsistent findings, corroboration was a relevant factor and the findings were open to the Judge. At paragraph 83 he made positive findings and as he did at paragraph 47 and at paragraph 74 he found what level the Appellant would be and he addressed *sur place* activities. He could not see where the First-tier had erred. The Judge had systematically considered the Appellant's case. There was no error of law.

14. Counsel for the Appellant said in reply that there was a failure to apply the risk factors. Paragraph 47 did not apply to *sur place* activities and the relevance of them was that they were on Facebook and there was a risk that this would become known to the Turkish authorities upon return.

15. In terms of his findings, having accepted that he was a low level supporter the Judge gave no reasons for why he would not be targeted when he accepted that the area the Appellant came from was a problematic area. The reasons he gave for rejecting the account were not good reasons.

16. Both parties agreed that were I to find that there was an error of law it should be a case that was remitted and reheard before the First-tier Tribunal *de novo*.

17. The First-tier Tribunal Judge made a number of positive findings in relation to the Appellant’s evidence. He accepted that he was a frank witness, did not find that his inability to answer questions about the Kurdish flag adversely affected his credibility and found that his account of arrests, detention and ill treatment was consistent with the background evidence. He also found that section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 was not engaged as the Appellant had claimed asylum shortly after arrival.

18. He also made a number of negative findings, namely that the Appellant had used false document when making a visa application in 2011. He correctly directed himself in relation to this finding at paragraphs 72 and 73, reminding himself that the visa application was of peripheral importance to the asylum claim and that the employment of deception was not fatal to his asylum claim but a factor to be taken into account when assessing his credibility. He addressed his level of support for the PKK and found he was a low level supporter and sympathiser (paragraph 76) and addressed risk in this context. He made specific findings as to

where his evidence was either inconsistent or unsatisfactory at paragraph 84. He found at paragraph 89 that notwithstanding the fact that the background evidence was consistent with his account the adverse credibility findings went to the core of his account and consequently found that his credibility was severely damaged. At paragraph 90 he applied the correct standard of proof and found he was not at risk.

19. I find that the Judge's general approach to the evidence was in accordance **Karanakaran v Secretary of State for the Home Department** [2000] 3 All ER 449, assessing each piece of evidence and the weight to be attached to it before coming to a conclusion on future risk.

20. I do not consider that the Judge erred in concluding that the Appellant's parents could have provided evidence to support his case that there were repeated visits by the authorities. In **ST (Corroboration - Kasolo) Ethiopia** [2004] UKIAT 00119 the Tribunal found that it was a misdirection to imply that corroboration was necessary for a positive credibility finding. In **TK (Burundi) v SSHD** [2009] EWCA Civ 40 the Court of Appeal held that where there were circumstances in which evidence corroborating the appellant's evidence was easily obtainable, the lack of such evidence must affect the assessment of the appellant's credibility. It followed that where a judge in assessing credibility relied on the fact that there was no independent supporting evidence where there should be and there was no credible account for its absence, he committed no error of law when he relied on that fact for rejecting the account of the appellant. In **Gedow, Abdulkadir and Mohammed v SSHD [**2006] EWCA 1342 a Somali appellant claimed that an uncle had funded his journey and the Immigration Judge referred to "the absence of any corroborative evidence by letter or any other means from his paternal uncle". The Court of Appeal did not consider he was erroneously requiring corroboration but found that he was drawing a conclusion from the absence of corroboration; and he was entitled to do so so long as he bore in mind the difficulties faced by asylum seekers in producing corroborative evidence.

21. I find that the Appellant could reasonably have produced as statement from his father with whom he remained in contact and who, according to his evidence, had been detained on three occasions. The fact that he did not do so was a factor the Judge was entitled to take into account in the assessment of credibility.

22. However, permission to appeal was granted in part because it was arguable that the Judge erred in failing to take into account the Appellant's answer in interview that the authorities visited his family home and arrested his father after he had fled. At paragraph 84 of the decision the Judge found that the Appellant's evidence was either inconsistent or unsatisfactory in a number of respects and it is clear that these findings led to overall adverse credibility findings. In examination in chief the Appellant said that the authorities had come back to his family home on three occasions since he left. This was not in his witness statement drafted for the appeal and the explanation given for this by the Appellant in oral

evidence was that he had not been asked and did not think it was important. The First-tier Tribunal considered that this explanation did not bear examination as the Appellant had had ample time in which to give a statement to his solicitors.

23. The Appellant was asked at question 157 of his interview whether the authorities visited his parent's house after he left. He said that a week later they detained his father and told him that the Appellant had joined the guerrillas in the mountains and his father was kept for 2-3 days. This does not appear to have been drawn to the Judge's attention in closing submissions.

24. In **ML (Nigeria) v SSHD** [2013] EWCA Civ 844 Moses LJ held at paragraph [10]

> "A series of material factual errors can constitute an error of law. It is trite in not only the field of judicial review but also statutory appeals and appeals by way of case stated that factual errors, if they are significant to the conclusion, can constitute errors of law."

25. At paragraph [18] Sir Stanley Burton added:

> "A material error of fact is an error as to a fact which is material to the conclusion. If there is any doubt as to whether or not the incorrect fact in question was material to the conclusion, that doubt is to be resolved in favour of the individual who complains of the error."

26. It is clear from the answer to question 157 of the interview that the Appellant had said that the authorities had returned to his family home after his departure. In concluding that the Appellant had not previously mentioned that the authorities had returned the First-tier Tribunal made an error of fact. The adverse finding flowing from what was found to be an inconsistency led to the rejection of the Appellant's account and it cannot be said that it was not material to the outcome of the appeal. In the circumstances in the light of the case law cited above I find that there was material error of law in the determination of the First-tier Tribunal.

Notice of Decision

In those circumstances I conclude that there was a material error of law in the determination. All the findings in relation to credibility are vitiated by that error and the extent of judicial fact finding is such that this matter should be remitted to the First-tier Tribunal for complete rehearing.

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 Date

Deputy Upper Tribunal Judge L J Murray