Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/00505/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21st March 2018	**On 1st May 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR I O
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Chakmakjian of Counsel, Montague Solicitors
For the Respondent: Mr P Nath, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Turkey born on 15th September 1986. The Appellant entered the UK on 27th April 2013 on a lorry. He was detained on arrival in the UK, served with papers as an illegal entrant and claimed asylum. The Appellant's claim for asylum was based upon a fear that if returned to Turkey, he would face mistreatment due to his ethnicity, namely that he was Kurdish. The Appellant's application for asylum was refused by Notice of Refusal dated 21st March 2016.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Hussain sitting at Hatton Cross on 15th August 2017. In a decision

and reasons promulgated on 30th August 2017 the Appellant's appeal was dismissed on all grounds.

3. On 13th August 2017 Grounds of Appeal were lodged to the Upper Tribunal. Those grounds contended:-

   (i) That the First-tier Tribunal Judge had failed to give due weight to externally consistent/relevant evidence.

   (ii) That the judge had failed to apply a more generous application of the benefit of the doubt given the Applicant's vulnerabilities.

   (iii) That the First-tier Tribunal had failed to consider the risk on return by association with brothers who were accused of involvement with the PKK.

   (iv) That the First-tier Tribunal Judge had drawn conclusions about plausibility without properly considering all of the evidence.

4. On 9th November 2017 First-tier Tribunal Judge Kelly refused permission to appeal. Judge Kelly concluded that the grounds were nothing more than a series of disagreements with conclusions that were properly open to the Tribunal and for which it provided detailed and cogent reasons.

5. Renewed Grounds of Appeal were lodged to the Upper Tribunal on 24th November 2017. Those grounds appear to mirror the original grounds, save that they add an additional ground that the First-tier Tribunal Judge had failed to conduct a proper balancing exercise under Article 8 ECHR.

6. On 21st December 2017 Upper Tribunal Judge Macleman granted permission to appeal. Judge Macleman noted that First-tier Tribunal Judge Kelly had refused permission on the view that the grounds are no more than disagreement disclosing no error of law and that that view may be difficult to displace. He did however note that the grounds in the renewed application appeared to be slightly shorter but broadly similar and although the apparent defect in the decision is not the subject of any ground and the Appellant should not have his hopes raised by the grant of permission, he considered that it was an inconsistency which, once noticed, cannot properly be permitted to pass.

7. On 13th February 2018 the Secretary of State responded to the Grounds of Appeal under Rule 24. In summary the Respondent submits that the Judge of the First-tier Tribunal directed himself appropriately. The Secretary of State assumes that paragraphs 44 to 49 of the decision had been inserted into the determination in error as they bear no relation to the Appellant's case. However, the Respondent submits that the First-tier Tribunal Judge made findings that were open to him and gave adequate reasons for rejecting the Appellant's claim to be at risk on return to Turkey and that the Grounds of Appeal represent mere disagreement with the First-tier Tribunal Judge. The Secretary of State invites the Upper Tribunal to rectify the error in the determination and remake the decision dismissing the appeal for the reasons set out by the First-tier Tribunal Judge.

8. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Secretary of States appears by her Home Office Presenting Officer Mr Nath. The Respondent appears by his Counsel Mr Chakmakjian. Mr Chakmakjian is familiar with this matter. He appeared before the First-tier Tribunal and he is the author of both sets of Grounds of Appeal.

The Wrongly Inserted Paragraphs

9. The paragraphs which it is submitted are wrongly inserted are paragraphs 44 to 49 of the decision. These are entitled Notice of Decision and are clearly wrong because they start by stating in paragraph 44 that the Appellant claims his removal from the country to Eritrea would be a breach of the United Kingdom's obligations. Thereafter the paragraphs are standard paragraphs albeit that in paragraph 49 the judge makes a finding that the Appellant has shown that he is entitled to humanitarian protection and at paragraph 46 that he is entitled to refugee status. It is clear those paragraphs should not be in the decision nor should paragraph 50.

Submissions/Discussion

10. Mr Chakmakjian submits that there is a material error by the insertion of these paragraphs, which undermines the integrity of the decision. This is shown from the judge's analysis of the proceedings generally, namely that the decision was finely balanced. He submits the question of whether or not there has been the discharge of the burden of proof, rather than the making of any positive findings of dishonesty, that there is a danger shown within paragraph 42 that the decision has been promulgated incompletely and that the judge has come to two outcomes when the decision is looked as a whole and then promulgated the matter and therefore the decision does not stand up to anxious scrutiny.

11. Mr Chakmakjian submits that the judge fell into error in failing to consider or properly consider evidence external to Mr O's account, which supported his claim of being at real risk upon return to Turkey and that such evidence takes on particular significance given his obvious difficulties in articulating his account arising from mental health, post traumatic stress disorder and the manner in which the interviews were conducted. He notes that the judge is aware of the psychiatric report but that the judge is obliged to consider the objective evidence and that there is a distinction between the Appellant's learning difficulties and the diagnosis of PTSD. He submits that the Appellant has given an account of his trauma and therefore the PTSD is capable of supporting his account. He submits that this is important because of the Appellant's vulnerability and in such circumstances the objective evidence takes on even greater importance.

12. He refers to the refugee status of the Appellant's brothers and that their evidence is relevant in that the brother O's detention sets out the family difficulties with the PKK and submits that the First-tier Tribunal Judge has not focused on consistencies in the testimony.

13. He submits that there has been a failure by the judge to consider the Appellant's rights on return by association with his brothers who have been accused of involvement with the PKK. He notes that in the Secretary of State's guidance on membership or association with the PKK, that each case must be considered on its individual facts and that the Appellant is a relative of members of the PKK and that that should be a starting point. He submits that the Appellant has an increased risk of being returned as a failed asylum seeker and that the risk has increased that he is now likely to face and this has not been properly considered by the judge and that that constitutes a material error.

14. He contends that the First-tier Judge had failed to consider and apply the benefit of the doubt in the context of the Appellant's vulnerabilities and that they disadvantage him in a way that could be compared and reasonably be expected from a child. He refers me to the principles set out in *AA (unattended children) Afghanistan CG [2012] UKUT 00016 (IAC)*. He submits that the difficulties experienced by the Appellant equate to those to being in a comparable position to a child as is set out in *AA*.

15. He further submits that the First-tier Tribunal Judge has drawn conclusions about plausibility without properly considering the evidence and that the judge has rejected as implausible the Appellant's account that he lived in hiding in the mountains for five years and also questions whether it is plausible that the PKK could find the Appellant. He submits that although the Appellant's account might seem inherently unlikely, the judge had failed to consider this against the fact that as recorded in paragraph 37 Judge Gulbenkian had accepted that the Appellant's brothers were able to interact with the PKK.

16. Finally, Mr Chakmakjian, whilst acknowledging that the judge has briefly dealt with the Appellant's private life at paragraph 43 of the determination, he contends that the judge has effectively dismissed the appeal on the basis it was not demonstrated that the Appellant would not receive treatment for his condition in Turkey and that that is not compliant with the comprehensive balancing exercise that he is obliged to conduct before reaching a conclusion on proportionality.

17. In response Mr Nath starts by taking me to the Notice of Refusal of the grant for permission to appeal by Judge Kelly. He submits that that is well-balanced, as indeed is the main thrust of the grant of permission by Judge Macleman. He submits the grounds amount to no more than disagreement. So far as the Appellant's medical condition is concerned, he takes me to paragraphs 12 and 13 of the decision, indicating that they represent the starting for the judge and that the judge has given full and proper consideration to the Appellant's medical condition.

18. He comments that the Appellant's brothers had the opportunity but neither has attended to give evidence and there is no reference whatsoever as to why this is the case. He submits that the Appellant's reliance on his brother's testimony should therefore be given very limited weight and that the judge has, at paragraphs 38 and 39, given due and

proper consideration to these issues. He acknowledges that every case must be looked at on its own facts but it is mere speculation to say that the brother's cases affect the Appellant's situation.

19. So far as the other issues are concerned he points out that the question of the Appellant's vulnerability and benefit of the doubt has been addressed right at the beginning of the determination. He submits that he does not understand the argument on plausibility, pointing out that the decision is well-balanced and that the judge has considered the evidence, so far as the Article 8 claim is concerned, at paragraph 48 pointing out that what else was the judge to do, particularly bearing in mind that the brothers had not attended to give evidence. He asked me to dismiss the appeal.

The Law

20. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

21. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

22. The principle thrust upon which Upper Tribunal Judge Macleman grants permission to appeal is the insertion of the paragraphs relating to a decision in Eritrea. As indicated earlier in this decision, those paragraphs are clearly inserted erroneously. This is perhaps an opportunity to remind all judges that there is an importance in proofreading their draft to ensure that paragraphs are not wrongly inserted. That clearly is the case here. The question is whether it is material. I am satisfied that it is not. What is important herein are the judge's findings which are set out at paragraphs 12 through to 43. Had the judge thereinafter gone on to clearly set out his decision at paragraph 51, then he would have been perfectly entitled to do

so. I endorsed the view expressed by First-tier Tribunal Judge Kelly in refusing permission to appeal and re-urged upon me both in the Rule 24 response and by Mr Nath that the grounds constitute no more than disagreement and they therefore disclose no material errors of law.

23. The starting point in arguing against the submissions, made on the Appellant's behalf that there is a material error of law, is to consider paragraphs 13 to 15 of the decision. This shows clearly that the Tribunal had proper regard to the support to the Appellant's claim provided by medical evidence and as Judge Kelly has noted it was in any event, open to the Tribunal to conclude that the evidence, taken as a whole, did not substantiate the Appellant's claim that the "unusual stress", causing him to be in a state of anxiety, was the result of being tortured in Turkey.

24. So far as the weight to be given to the Appellant's evidence is concerned the judge has given full and proper consideration to this matter within his findings and the judge was perfectly entitled to note that the Appellant's brothers had failed to attend to give evidence on his behalf. As again stipulated by Judge Kelly, the bald assertion that the Appellant was likely to attract the adverse attention of the Turkish authorities, by reason of his association with his brothers, is a mere restatement of the Appellant's argument and did not identify any error of law in the reasoning of the Tribunal.

25. Further, it is clear that as a matter of law the First-tier Tribunal Judge was not bound by the assessment made by a different Tribunal concerning the plausibility of claims made by the Appellant's brother and that the Tribunal was entitled to have regard to the discrepancies between the account by his brother in his asylum appeal and that of the Appellant and the failure of the Appellant's brothers either to provide a statement or give oral testimony in support of the Appellant's appeal.

26. Overall the findings of the judge at paragraphs 12 to 43 are logical and well-reasoned and disclose no error of law. Further, the judge has properly addressed himself on the burden of proof and has given due and proper reasoning with regard to his findings under the European Convention of Human Rights.

27. This is a well-constructed decision (save for the insertion of the wrong paragraphs thereinafter) and the judge's conclusions on plausibility are quite properly made. In such circumstances the submissions of the Appellant's legal representatives amount to no more than mere disagreement with the findings of the First-tier Tribunal Judge. In such circumstances the decision shows no material error of law and is sustainable even though there is an insertion of paragraphs that should not be there. They do not taint the whole decision. The decision is therefore upheld and the Appellant's appeal is dismissed.

Notice of Decision

The decision of the First-tier Tribunal Judge discloses no material error of law and is dismissed and the decision of the First-tier Tribunal Judge is maintained. It is recorded that paragraphs 44 to 49 of the decision are struck out.

The First-tier Tribunal Judge granted the Appellant anonymity. No application is made to vary that order and the anonymity direction will remain in place.

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 D N Harris

TO THE RESPONDENT
FEE AWARD

No application is made for a fee award and none is made.

Signed Date

Deputy Upper Tribunal Judge D N Harris