Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07370/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24th January 2018	**On 20th April 2018**

Before

UPPER TRIBUNAL JUDGE PERKINS
DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR E S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms M Sirikanda (Solicitor from Ahmed Rahman Carr, Solicitors)
For the Respondent: Ms A Everett (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge R Cooper, promulgated on 21st June 2017 following a hearing at Taylor House on 23rd May 2017. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before us.

The Appellant

2. The Appellant is a male, a citizen of Turkey, who was born on [ ] 1986. He appealed against the Respondent's decision dated 5th July 2017, refusing his application for refugee status and humanitarian protection under paragraph 339C of HC 395. The essence of his claim is that he is a Kurd, who supports the Kurdish nationalist parties in Turkey, and as such that he would be at risk from the Turkish authorities if he were to be removed, on account of his political opinion.

The Appellant's Claim

3. The Appellant claims that he has supported the Kurdish Workers' Party "and other pro-Kurdish political parties". At school he was discriminated against, because Kurdish was not spoken, and since the age of 15 he has been actively involved in politics, after leaving school. He was arrested at a demonstration outside the People's Democratic Party (HADEP) building in around April 2001. On this occasion he was detained for 24 hours at Gaziantep Security Headquarters. He was beaten and he was accused of supporting the PKK. As a result of this arrest, he was expelled from his school (paragraph 7). Since then, he has continued to be politically active in HADEP youth politics. He has attended meetings, demonstrations, leafleting, campaigning during elections.

4. He joined the HADEP Party itself in 2004 and in 2006 he joined the Democratic Society Party (DTP). Thereafter he undertook military service for fifteen months from 2006 until 2008, when he claimed he was given "dirty jobs" to do because he was a Kurd and because of his political opinion (see paragraph 9). In January 2008 he was arrested and detained for two days when the DTP headquarters were raided. He was accused of working for the PKK, was beaten, and subject to *falaka*, but released because of insufficient evidence against him (paragraph 10).

5. From Gaziantep he moved to Izmir because he feared further difficulties, and whilst continuing to be involved in DTP activities, he subsequently aligned himself with the Peace Democratic Party (BDP) when the DTP was banned in December 2009. He was arrested on 1st June 2010 following a demonstration, detained for four days, interrogated, and ill-treated, but then released again because there was no evidence against him (paragraph 11).

6. He then decided to return to Gaziantep, but was arrested at his home on 1st February 2011 during an anti-terrorist operation. He was accused of being a member of the PKK, detained, interrogated, and ill-treated again over three days, after which he took the opportunity to leave Turkey (paragraph 12).

7. Once in the UK, he did not claim asylum when he first arrived, because he was told that he could not do so as a visitor, and so made an application under the Ankara Agreement (paragraph 13).

The Respondent's Decision

8. The Respondent accepted the Appellant's identity, nationality, and his ethnicity as being Kurdish. It was also accepted that "he has been consistent in his reasons for supporting Kurdish parties, and his account of the Kurdish People's Party having a number of transient identities over the period from 2001 to 2010" (paragraph 14). The rest of the Appellant's claim was not considered to be plausible.

The Respondent's Decision

9. The judge accepted "that the Appellant has been largely consistent as to the core elements of his claim, namely that he had been politically active since the age of 15, had been expelled from school in 2001 following his arrest at a demonstration, that he had been a member of various political parties, and had been arrested, detained and tortured on three further occasions (2008, 2010 and 2011) before leaving the country" (paragraph 46). Nevertheless, it was determined that the Appellant, having "answered most questions without hesitation" (paragraph 48) failed to provide the necessary clarification in relation to "highly probative matters" where he had a tendency "to avoid answering directly" (paragraph 49).

10. The judge concluded that the Appellant "was repeating a well rehearsed script rather than recounting a personally lived experience". As an example, the judge explained that "at Q.86 when asked about the discrepancy and his answers about when he was first interested in politics he responded, '*I am saying it slowly because I am answering your questions so I don't mix it up*'" (paragraph 50). It was said that in relation to question at Q.101 the Appellant "gave a curious response", because initially he had explained directly what had happened to him in detention but then "the Appellant then launched immediately into a description of Kurdish political parties, which was not relevant to the question" (paragraph 51).

11. It was moreover determined by the judge that she found the Appellant's evidence "about his involvement with various different parties inconsistent" (paragraph 54). It was said that the Appellant "was inconsistent and vague in his answers in interview about his membership and activities for the DTP and BDP" (paragraph 55). The judge then went on to make adverse findings of fact against the Appellant (at paragraphs 58 to 59).

12. Having considered the Appellant's oral evidence, and come to clear findings of fact in relation to the evidence, the judge then went on to

consider the documentary evidence that the Appellant had submitted (paragraph 62) and went on to evaluate the expert medical report of Dr Hajioff, who was a consultant psychiatrist, and had been employed by the Home Office as a visiting psychiatrist at Pentonville Prison for fifteen years. He had assessed refugees and asylum seekers and provided medical reports for the court. He had done so in compliance with the Istanbul Protocol (paragraph 63).

13. Dr Hajioff had made a diagnosis of PTSD, which is based in part on the Appellant's own version of events, and he had concluded that the Appellant was displaying symptoms of re-experiencing the trauma, avoidant behaviour, and persistent symptoms of increased arousal. The judge, however, found that, "I do not find Dr Hajioff's report of the Appellant's present state (at paragraphs 32 to 42) to support his conclusions regarding the symptoms he found present under the various categories" (paragraph 64).

14. One reason for this was that, although Dr Hajioff recorded that the Appellant was having nightmares two or three times a week, "there is no indication the Appellant was asked by Dr Hajioff what these nightmares were about, or that they related to the traumas he claimed to have suffered", and "nor does Dr Hajioff provide any evidence to support his conclusion that the Appellant displays avoidant behaviour or making efforts to avoid thoughts, feelings, conversations or activities associated with the trauma" (paragraph 64). The report by Dr Hajioff was accordingly not considered to be persuasive.

15. The appeal was dismissed.

Grounds of Application

16. The grounds of application state that the judge, having accepted that the questioning of the Appellant was difficult to understand, had then gone on to unfairly criticise the Appellant's responses. She also unfairly placed emphasis on discrepancies and answers to interview questions without having put those concerns to the Appellant.

17. On 21st November 2017 permission to appeal was granted on the basis that it was arguably axiomatic to credibility to put matters of concern to the Appellant, and a failure to do this "in turn influenced the approach to the medical evidence" by the judge.

18. On 13th December 2017, a Rule 24 response was entered by the Respondent Secretary of State to the effect that it was apparent at paragraphs 48 and 49 that the judge confirmed the questions were clarified and that the Appellant's concerns were without merit.

Submissions

19. At the hearing before us Ms Sirikanda relied upon her detailed skeleton argument and made the following three broad submissions.

20. First, there was the troubling observation by the judge that the Appellant's evidence was to be disbelieved, despite appearing to the "largely consistent as to the core elements of his claim" (paragraph 46), because "his evidence to the Tribunal indicated he was repeating a well rehearsed script rather than recounting a personally lived experience" (paragraph 50). Ms Sirikanda submitted that it was difficult to work out the difference between a "pre-rehearsed and unreliable script" and a "well-rehearsed script". An honest witness could not be distinguished from a "well-rehearsed" witness. The distinction that was being made was unsustainable in the absence of an explanation as to how the Tribunal was possessed with the expertise to discern such a distinction.

21. Furthermore, in purporting to provide an explanation for why this was a "well-rehearsed script" the judge referred to the Appellant's apparent discrepancy at Q.87, explaining how he first became interested in politics, when he had responded with the remark, "I am saying it slowly because I am answering your questions so I don't mix it up" (paragraph 50). Ms Sirikanda submitted that it was difficult to make sense of this answer without the benefit of knowing what it was that had been put to the Appellant.

22. In the same way, when the Appellant is criticised in relation to his answer to Q.101, it is difficult to know why his answer was lacking in credibility as far as the essence of his protection claim was concerned. These matters were important because it was not clear why the Appellant's consistent evidence was not being given the importance that it deserved.

23. In fact, insofar as reasons were being given by the judge, they plainly appeared to be the wrong reasons designed to demonstrate the lack of credibility in the Appellant. It was also not insignificant that the refusal letter at no point referred to the Appellant's claim as having been well-rehearsed. On the contrary, the refusal letter accepted that the account was a consistent one.

24. Second, such ambiguities as there were in the Appellant's answers to the questions put to him during the hearing, were in no small degree on account of the cross-examination by Mr Eaton, the Home Office Presenting Officer. As the judge has self-observed, the Appellant "on a few occasions had difficulty understanding Mr Eaton's questions". So much so, that the judge noted that, "I did not find this surprising as I had to intervene a few times to clarify the question being asked". The judge even agreed with the Appellant's legal representative at the hearing, "that many of Mr Eaton's questions were prefaced by a long statement, making the question difficult to understand, and often it only required one word answer" (paragraph 48).

25. This being so, Ms Sirikanda argued, the answers that the Appellant was criticised for, during the course of the Tribunal hearing, as not being able to provide clarification "on highly probative matters" "not all delayed at the Appellant's door. Accordingly, the conclusions that the judge came to

"when looking at the evidence in the round" and determining that the Appellant was not credible (at paragraphs 58 to 59) were unsustainable.

26. Ms Sirikanda returned to her primary concern, namely, that the judge's preoccupation with the Appellant "repeating a well-rehearsed script" was the result of her having adopted "a hostile theory" and to the evidence, such that she overlooked the consistency as to the core elements of the Appellant's claim.

27. Third, there was a matter of the medical report of Dr Hajioff which had been viewed through the "prism of disbelief". The report may well have been a concise one, but it did not stand criticism, when Dr Hajioff based his diagnosis on the Appellant displaying symptoms of re-experiencing the trauma, on the ground that "his report does not give any indication that the Appellant reported persistent re-experiencing of the traumatic event". However, the report by Dr Hajioff (at paragraphs 32 to 42) had a section entitled "Present State" and in this there was an account of the Appellant's ill-treatment in Turkey (see paragraphs 18 to 31 of the MLR).

28. Furthermore, in the section on "Present State" the report had gone on to state (at paragraphs 36 to 41) that the Appellant "is uneasy in the dark and tries to avoid being out late in the day". Police and public places make him feel anxious and he is wary of crowds. Loud noises make him jump. He finds it takes a long time to get to sleep because his mind turns to memories of his experiences ...".

29. Ms Sirikanda submitted that it was quite clear that the nightmares described by the Appellant to Dr Hajioff related to his adverse experiences in Turkey. The criticism by the Tribunal (at paragraph 64) that, "nor does Dr Hajioff provide any evidence to support his conclusion that the Appellant displays avoidant behaviour" was equally untenable because the MLR does specifically state that the Appellant felt "uneasy in the dark and tried to avoid being out late in the day"; that "police in public places made him feel anxious"; that "loud noises make him jump"; and that "he does little most of the time other than play with his sister's children".

30. For her part, Ms Everett submitted that the determination by Judge R Cooper was sustainable. This was because there plainly was inconsistencies in the Appellant's evidence. The judge had given cogent reasons for refusing the appeal. At one point the Appellant wished to avoid having to answer questions because he had "asked for a break as his '*head was very mixed up'* and he was feeling unwell" (see paragraph 53 of the determination". Ms Everett submitted that it was not enough to avoid having to answer questions by claiming to be unwell.

31. Secondly, insofar as the judge, having considered the evidence in the round, does find the Appellant not to be credible, she provides cogent reasons for so doing. For example the Appellant was asked what HDP stood for, and he was unable to say and the judge rightly referred to "his

seeming lack of knowledge of the parties he claimed to belong to" (paragraph 58).

32. Thirdly, a criticism of the medical report was not misplaced because it was not particularly long, and even if it had not been factored into the body of the Appellant's evidence when given at the hearing, it did not lead to a material error of law, given that the refusal by the judge was largely based upon the oral evidence that he had himself given.

33. In reply, Ms Sirikanda submitted that many of the questions asked by Mr Eaton, the Home Office Presenting Officer themselves led to a difficulty in the Appellant having to answer, and given that this was openly accepted by the judge (paragraph 48), the Appellant could not be criticised for having providing vague answers, if that was the case. Moreover, the adoption of an approach that looked to the Appellant "repeating a well-rehearsed script rather than recounting a personally lived experience" was a novel idea which prevented the judge from giving credit to the Appellant for having given his evidence consistently all along".

Error of Law

34. We are satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that we should set aside the decision and remake the decision. Our reasons are as follows.

35. First, this is a case where the judge had found (at paragraph 46) the Appellant to have "been largely consistent as to the core elements of his claim", and that this was so much so that consistency was accepted across the entire gamut of events complained of, from being expelled from school at the age of 15, to the Appellant's involvement with "various political parties", and to his being arrested and detained on three occasions in 2008, 2010 and 2011. It had also been accepted by the Respondent in the refusal letter that the Appellant had been consistent in his reasons for supporting Kurdish parties (paragraph 14 of the determination). Indeed, the Appellant's claim, set out by the judge in her determination was not inconsistent with what the judge had found on the lower standard (see paragraphs 7 to 13). To accept that claim, as being consistent in the evidence given by the Appellant, on the basis that it had "indicated he was repeating a well-rehearsed script rather than recounting a personally lived experience" (paragraph 50) was not a serviceable distinction for an adjudicating body to make. This was not least given that the example that the judge gives (at question Q.87) that when asked about when the Appellant first became interested in politics, he had replied, "I am saying it slowly because I'm answering your questions so I don't mix it up" (paragraph 50) is no more illuminating, if the discrepancy that is alleged in the Appellant's answer is not actually put to him.

36. Second, insofar as it is the case that the Appellant gave answers where the "tendency was to avoid answering directly" (paragraph 49) this too is

difficult to make out for two reasons. First, such a conclusion by the judge follows after the acceptance by the judge that the Appellant "answered most questions without hesitation", and that insofar as there were any occasions of difficulty these were occasioned because "many of Mr Eaton's questions were prefaced by a long statement, making the question difficult to understand" (paragraph 48). As the judge explained often the questions put by the Presenting Officer "only required a one word answer" (paragraph 48). Second, notwithstanding the fact that the questions themselves were not put in the most felicitous of ways, if one looks at the answers to the questions given by the Appellant, it is far from clear that they are indeed as problematic as it is made out. For example, given that it had always been the Appellant's case that he had been supporting various parties, when the question was put to him whether his brother was a member of any Kurdish party, he had responded by answering, "he is supporting all these parties". It is difficult to see why this answer is not acceptable. In the same way when the Appellant stated that he was under pressure from the Turkish authorities, the judge stated that "he could not explain how he was being pressured by the authorities", whilst at the same time pointing out that he "gave two examples" and then thereafter, "he only gave one further example". Similarly, the fact that (at Q.93) the Appellant, said that there was "a lot of people" at a protest, or that he had usually attended "all protests" in this country", without giving a specific figure, does not mean to say that he was answering the questions inaccurately or implausibly (see question 49(i), (iii), (v), and (vi)). There was criticism at length by the judge of the Appellant having failed to answer Q.101 properly. This criticism does not bear closer scrutiny.

37. Although the judge referred to the Appellant as having given "a curious response" when asked what happened to him when he was detained for 24 hours in April 2001, the judge accepted that the Appellant "initially answered the question directly and explained what happened in detention", but then went on to state that, "however, the Appellant then launched immediately into a description of Kurdish political parties, which was not relevant to the question" (paragraph 51). The fact that it was relevant or irrelevant is besides the point. The Appellant may well have wanted to just talk about other things relating to Kurdish parties, which he regarded as being relevant, but that does not mean to say that he had not answered the question put to him specifically first. It is not unknown for witnesses to go off the track. It is equally well understood that it is a function of the Tribunal authorities, not to mention the legal representatives, to bring the Appellant back onto track, so that the minds of all concerned are fully focused on the issues that have to be decided.

38. One final example may suffice to make the errors on the part of the judge clear in this respect. It is said that the Appellant had a "seeming lack of knowledge of the parties he claimed to belong to" (paragraph 58), and this was because when questioned about the aims of the BDP, one answer he had given was that it was "defending the downtrodden people". The answer that was referred to by the judge was not an answer that the

Appellant was giving in oral evidence before the Tribunal, but an answer that he gave during interview (see Qs.154-155).

39. Even so, however, it can by no means necessarily be concluded from this answer that the Appellant lacked knowledge of the parties. He had, after all, supported a number of Kurdish parties. The judge had recognised at the outset of the determination how the Appellant had first been involved in DTP activities, and subsequently with the Peace and Democracy Party (BDP) "when the DTP was banned in December 2009" (paragraph 11). This was the Appellant's claim.

40. The Respondent's decision with respect to this, also recognised the indeterminate nature of the parties, because the judge referred to, "his account of the Kurdish People's Party having a number of transient identities of the period from 2001 to 2010" (paragraph 14). On their own, these matters may well have been rather more significant than they were made out to be, but when placed alongside the "largely consistent" account given by the Appellant as to the "core elements of his claim" (paragraph 46) they did not show the Appellant as lacking in credibility on the lower standard.

41. Third, there is the matter of the medical report. It is trite law that expert evidence cannot be accepted separated from and considered as an adjunct to the oral evidence of the witnesses, but must be considered alongside and in conjunction with the evidence taken as a whole. Yet, in this case the judge has first come to very firm findings of fact in relation to the Appellant's claim, which has been found to have been lacking in credibility, before dealing with the expert report of Dr Hajioff rather late in the determination from paragraph 63 onwards. That was bound to have led to a conclusion that deprived the Appellant of the benefits of the medical report in his favour. However, even insofar as this is done, the criticism by the judge of the expert report is unwarranted and flies in the face of guidance given in **Y (Sri Lanka) EWCA Civ 362** (at paragraph 12) and **B [2002] EWHC 1469**.

42. Dr Hajioff had concluded that the Appellant displayed symptoms of re-experiencing the trauma and persistent symptoms of increased arousal and it is not the case, as Ms Sirikanda has explained, that Dr Hajioff does not address the Appellant's present state because he claimed he does under the heading "Present State" (at paragraphs 32 to 42) in a fairly significant manner. Dr Hajioff refers to how the Appellant "finds it a long time to get to sleep because his mind turns to memories of his experiences" and that he has nightmares "about to two or three times a week". The fact that the Appellant was not specifically asked what the nightmares related to, when he had suffered adverse experiences in Turkey, a matter referred to by Dr Hajioff (at paragraph 18 to 31), is not a criticism of Dr Hajioff's approach to the Appellant.

43. It is also not the case that the Appellant had not displayed avoidant behaviour because Dr Hajioff had in terms stated that the Appellant found

it difficult to be in the dark, or to be out late in the day, or to trust the police, or to be subjected to loud noise, and led a fairly reclusive life playing with the sister's children.

44. In fact, there is clear evidence that the judge strayed into the professional terrain of Dr Hajioff in a manner that cannot be justified when observing that, contrary to what Dr Hajioff had stated at paragraph 33, the Appellant "responded quickly to my questions and allowed me to examine him", whereas Dr Hajioff reported the Appellant as exhibiting avoidant behaviour. This overlooks the fact that Dr Hajioff was operating in a clinical setting whereas the Appellant was required to give evidence before a judge in a Tribunal.

45. It is also not the case (at paragraph 65) that Dr Hajioff did not give consideration to whether the Appellant's symptoms were caused by any other event because the medical report records how the Appellant had no family history of mental illness, had no emotional problems before being arrested, had been questioned as to his past "adverse experiences" by Dr Hajioff himself, and other causes for the reported symptoms were not considered to be viable.

Re-Making the Decision

46. Our finding that the First-tier Tribunal has given unlawful reasons for disbelieving the evidence does not mean that the Judge should have found that the Appellant was truthful. Regrettably the error can only be corrected by a rehearing. We are allowing this appeal to the extent that it is remitted back to the First-tier Tribunal, to be heard by a judge other than Judge R Cooper, pursuant to Practice Statement 7.2(b) because the nature or extent of any judicial fact-finding which is necessary in order for the decision in the appeal to be remade is such that, having regard to the overriding objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal.

47. An anonymity order is made.

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 Juss 19 April 2018