Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07388/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 December 2019	**On 31 December 2019**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

OG
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S. Panagiotopoulou, Counsel, instructed by Montague Solicitors
For the Respondent: Mr N. Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, OG, is a citizen of Turkey, born on 29 December 1986. He appeals against a decision of First-tier Tribunal Judge Lucas promulgated on 19 September 2019 dismissing his appeal against a decision of the respondent dated 21 July 2019 to refuse his asylum and humanitarian protection claim.

Factual background

2. The appellant is of Kurdish descent. He arrived in this country on 2 November 2017 on a visitors' visa. He claimed asylum on 12 October 2018. The appellant's claim for asylum was set against the background of decades of harassment and oppression suffered by his family and other Kurds at the hands of the Turkish state. He claims he was a member of the HDP (the People's Democratic Party) and the BDP (the Peace and Democracy Party). His case is that he had attended a number of public demonstrations in support of each party, many of which featured clashes with the police. This led to him being arrested on four separate occasions. The arrests were on account of his suspected support and involvement with the HDP and BDP, and also on suspicion of supporting the PKK (Kurdistan Worker's Party). He claims that he was mistreated and tortured when he was detained. His claim for asylum was, he says, prompted by the authorities' continued interest in him following his departure for this country. Following the failed coup in Turkey, the authorities were more interested in people with known dissenting opinions such as him. He claims the police raided his parents' home on 20 May 2018. That prompted him to claim asylum.

3. The appellant's appeal was dismissed by the judge on credibility terms, to which I shall return shortly.

4. Permission to appeal was granted by Resident Judge J F W Phillips in these terms:

> "The grounds assert that the judge failed to give reasons for material findings, erred in his assessment of the evidence, had regard to irrelevant considerations and failed to have regard to relevant considerations.
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> The grounds have arguable merit. In particular the finding at paragraph 64 that the appellant was not a member of the HDP and in the following paragraph that he had no political involvement appear only to be reasoned on the statement at paragraph 54, 'the point is that the appellant did not claim asylum on arrival.' Equally the findings at paragraphs 61 and 62 appear to have little reasoning."

Discussion

5. At the outset, it is necessary to recall that it is only possible to appeal to this tribunal on the basis of an error of law, rather than a disagreement of fact. Challenges based on a judge's claimed erroneous assessment of the evidence are limited to the contention that the judge reached irrational findings, or findings that were not properly open to the judge on the evidence before the tribunal below. It is also trite law that it is not necessary for a fact-finding judge to recite or rehearse every piece of evidence in the case, or to produce an overly long decision which descends into unnecessary levels of detail. Similarly, it is important for judges of the Upper Tribunal to resist the temptation to substitute their own analysis for that of the judge below, provided the judge below reached a sufficiently reasoned decision, which was open to the judge on the evidence.

6. Mr Bramble accepted that there was superficial force in the appellant's submission that the judge had not given sufficient reasons, but submitted that, when read as a whole, it was a judgment which was open to the judge on the evidence before him. Mr Bramble submitted that brevity is an admirable quality in judgments, and that the judge's findings at [51] onwards should be read as bullet points providing a sufficiency of reasons.

7. I consider that the judge did fall into errors of law when reaching his findings of fact.

8. First, the judge appeared to accept that the appellant had provided a reasonably detailed account which was consistent with the background materials concerning Turkey, Kurdish people, and those perceived by the state to be its opponents. The judge said, at [53]:

> "The Tribunal has carefully considered the account given by the Appellant. The detail is both generic and consistent with the objective evidence in relation to the treatment of those suspected of involvement with the HDP or [of] those suspected of association with the PKK. This, [sic] is especially so since the failed coup in 2016."

9. Bearing in mind that the standard of proof applicable in protection proceedings is the lower standard of reasonable likelihood (as the judge had correctly directed himself at an earlier point in the decision), it appears that the operative reasoning of the judge expected a standard of proof which exceeded that which was applicable in the proceedings. The judge appeared to accept that the appellant had given an account of persecution which was consistent with the background materials in relation to those suspected of involvement with the HDP or the PKK. The judge correctly noted that the failed coup in 2016 had resulted in a heightened atmosphere of scrutiny and potential persecution of those deemed to be opponents of the state. It is not clear what the judge meant by "generic" because, as Ms Panagiotopoulou highlights, there was nothing "generic" about the highly detailed and specific account provided by the appellant of each of his four claimed detention experiences in the course of his witness statement provided to the respondent, his statement prepared for the proceedings before the First-tier Tribunal, and under lengthy cross-examination (see [34]).

10. The judge found against the appellant for reasons which were not clear. At [54], the judge said, "the point is that the appellant did not claim asylum upon arrival into the UK. He waited until October 2018." At [62], the judge said that, "the tribunal does not accept his explanation as to why he decided to claim asylum in October 2018." It is not apparent from the terms of the decision what the appellant's explanation was, as the judge did not explain what the appellant had claimed or analyse it in terms to which the reader of the decision could be privy. Nor can the reader be expected to know what the judge's reasons were for rejecting it were. In a single line paragraph, the judge simply stated that the tribunal "does not accept" the appellant's explanation. He did not give any reasons.

11. The reason given by the appellant for the "delay" in claiming asylum was set out in his witness statement dated 4 February 2019 (see [15]). He said that there had been a police raid on his parents' home in Turkey on 20 May 2018. In answer to question 101 in his asylum interview, the appellant gave the same explanation.

12. In his February 2019 statement, the appellant described how his parents told the police that the appellant was out of the country, and that the police arrested his brother instead. By this stage in the UK, the appellant had submitted an application to the respondent under the European Communities-Turkey Association Agreement, which was being processed. Although the judge noted at [59] that he had not seen any evidence of the detail of that application, that was not in the context of the appellant's explanation for the delay in considering asylum, it was in relation to finding the judge made that, "the point is that he has a clear intention both to enter the UK and stay here."

13. It is trite law that a judge must give sufficient reasons for findings in a decision: MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC), headnote (1). Again, I emphasise that detailed reasons are not necessarily required. But *some* reasons are essential. The difficulty here is that the judge gave *no* reasons for rejecting the explanation for the delay. That was a significant omission, given the operative reason the judge provided at [54] for his rejection of the credibility of the appellant's asylum claim was the delay in the appellant making his claim. This was a pivotal point in the judge's reasoning. Given the judge had already made positive preliminary findings concerning the overall consistency of the appellant's account (presumably the judge's reference to "the detail" at [53] was to the highly detailed account provided by the appellant as set out in his witness statements) and its consistency with the background position, when the judge said that the appellant's delay was "the point", it was incumbent upon the judge to consider – in more than cursory terms – the explanation provided by the appellant. The judge simply provided no reasoning for the key reason he cited in finding against the appellant. In doing so, the judge fell into error by failing to provide "sufficient" reasons.

14. By failing to engage the reasons provided by the appellant, the judge approached the issue of delay on a basis not properly open to him. The appellant's case was *not* that he had reasons to claim asylum upon his arrival, but he chose to wait. Rather it was that he was only prompted to claim asylum when he realised that there was an ongoing issue with the police continuing to take an interest in him in Turkey. As a result of the summary dismissal of the appellant's explanation for the delay, the judge did not analyse the facts of the case through the lens of appellant's evidence. That was a failure to take into account material factors.

15. The judge said that it was a "surprising omission" that, although the appellant has had extensive involvement in Kurdish diaspora groups in this country, he did not provide any witnesses from that community: see [54]. At [63], the judge categorised the appellant's involvement with "Kurdish activities and groups within UK" as "at best… somewhat peripheral or minimal, or at worst, as an opportunistic attempt to seek to show a commitment which otherwise did not exist." It is not clear why the

judge ascribed significance to the absence of witnesses from the Kurdish community. It was no part of the appellant's case that his detention was witnessed by persons in the United Kingdom, or that anyone here was present when he claimed the police raided his home on 20 May 2018. He had not claimed that such persons could support his case. He had not made a *sur place* claim. The judge criticised the appellant for not adducing witnesses to support a case that he was not advancing. The judge took into account an irrelevant consideration.

16. The judge said at [61] that, given the appellant was of no general interest to the Turkish authorities prior to his departure, "there could be no reason for further raids upon his house unless someone had then implicated him." The judge did not think that would be plausible: see [60]. It is not clear on what basis the judge purported to be able to know the likely investigative priorities or tactical techniques employed by the Turkish police. He had already noted at [52] that there was a "more oppressive climate" in Turkey since the failed coup. It did not refer to any background evidence as to the likely – or otherwise – approach of the Turkish police.

17. The judge appeared to approach his findings on plausibility based entirely on his own subjective assumptions. Judges should be careful when doing so, especially where – as here – the account provided is "consistent with the objective evidence in relation to the treatment of those suspected of involvement with the HDP or [of] those suspected of association with the PKK…" (see [53])

18. In Y v Secretary of State for the Home Department [2006] EWCA Civ 1223, Keene LJ held:

> "25. There seems to me to be very little dispute between the parties as to the legal principles applicable to the approach which an adjudicator, now known as an immigration judge, should adopt towards issues of credibility. The fundamental one is that he should be cautious before finding an account to be inherently incredible, because there is a considerable risk that he will be over influenced by his own views on what is or is not plausible, and those views will have inevitably been influenced by his own background in this country and by the customs and ways of our own society. It is therefore important that he should seek to view an appellant's account of events, as Mr Singh rightly argues, in the context of conditions in the country from which the appellant comes. The dangers were well described in an article by Sir Thomas Bingham, as he then was, in 1985 in a passage quoted by the IAT in Kasolo v SSHD 13190, the passage being taken from an article in Current Legal Problems. Sir Thomas Bingham said this:
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> > "'An English judge may have, or think that he has, a shrewd idea of how a Lloyds Broker or a Bristol wholesaler, or a Norfolk farmer, might react in some situation which is canvassed in the course of a case but he may, and I think should, feel very much more uncertain about the reactions of a Nigerian merchant, or an Indian ships' engineer, or a Yugoslav banker. Or even, to take a more homely example, a Sikh shopkeeper trading in Bradford. No judge worth his salt could possibl[y] assume that men of different nationalities, educations, trades, experience, creeds and temperaments would act

> as he might think he would have done or even - which may be quite different - in accordance with his concept of what a reasonable man would have done."
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> 26. None of this, however, means that an adjudicator is required to take at face value an account of facts proffered by an appellant, no matter how contrary to common sense and experience of human behaviour the account may be. The decision maker is not expected to suspend his own judgment, nor does Mr Singh contend that he should. In appropriate cases, he is entitled to find that an account of events is so far-fetched and contrary to reason as to be incapable of belief. The point was well put in the Awala case by Lord Brodie at paragraph 24 when he said this:
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> > "… the tribunal of fact need not necessarily accept an applicant's account simply because it is not contradicted at the relevant hearing. The tribunal of fact is entitled to make reasonable findings based on implausibilities, common sense and rationality, and may reject evidence if it is not consistent with the probabilities affecting the case as a whole".
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> He then added a little later:
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> > "… while a decision on credibility must be reached rationally, in doing so the decision maker is entitled to draw on his common sense and his ability, as a practical and informed person, to identify what is or is not plausible".
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> 27. I agree. A decision maker is entitled to regard an account as incredible by such standards, but he must take care not to do so merely because it would not seem reasonable if it had happened in this country. **In essence, he must look through the spectacles provided by the information he has about conditions in the country in question.** That is, in effect, what Neuberger LJ was saying in the case of HK and I do not regard Chadwick LJ in the passage referred to as seeking to disagree." (Emphasis added)

19. As the judge had already accepted the general consistency of the appellant's account, it was not open to him to dismiss this aspect of it on plausibility grounds alone, especially given the inadequacies in the remaining reasoning of the judge.

20. By the time the judge reached [64], he categorised the appellant's asylum claim as "lacking in credibility". For those reasons, the judge said, a letter provided by the appellant purportedly from the HDP purportedly confirming the appellant's membership since 2014 lacked weight, pursuant to Tanveer Ahmed (Documents unreliable and forged) Pakistan * [2002] UKIAT 00439. This led to a global finding of fact at [65], that the "appellant" – by which, I think, the judge meant the tribunal – did not accept that the appellant was politically involved at all, prior to leaving Turkey in 2017. A translation of the letter may be found at pages 19 and 20 of the appellant's bundle. It is a brief letter, and simply states that the appellant has been a member of the HDP since 10 September 2014 and has "participated in our party activities". The difficulty with the judge's approach to the HDP letter is that, rather than engaging with its contents (other than to state that no one from the HDP attended the tribunal on behalf of the appellant) and taking it into account as part of

his global assessment of the appellant's credibility, the judge found that, because the appellant was not credible, it followed that the letter lacked credibility also. In doing so, the judge failed to follow the approach required by Tanveer Ahmed and reached findings on credibility *before* considering the evidence in the round.

Conclusion

21. The judge's decision involved the making of an error of law on a material matter. The entirety of his credibility assessment was infected. The remedy is for the decision to be set aside and for the matter to be remitted to the First-tier Tribunal to be heard by a different judge.

Notice of Decision

Judge Lucas's decision involved the making of an error of law and is set aside.

The appeal is remitted to the First-tier Tribunal with no findings of Judge Lucas preserved.

The rehearing must take place before a different judge.

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 *Stephen H Smith* Date 17 December 2019

Upper Tribunal Judge Stephen Smith