Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07181/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9th November 2021	**On 19th November 2021**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

IS
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms N Nnamani, of Counsel, instructed by Howe & Co Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

Interpretation: Mr A Sahan, in the Turkish language

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Turkey born in August 1986. He arrived in the UK in December 2014. He applied for leave on the basis of the Ankara Agreement in May 2015, but this was refused in October 2015.

He made two further Ankara Agreement applications which were also unsuccessful. On 1st December 2017 he was served with a notice as an overstayer, and claimed asylum. His application for asylum was refused on 29th May 2018. His appeal against the decision was dismissed by First-tier Tribunal Judge Cohen in a determination promulgated on the 20th November 2019.

2. Permission to appeal was granted by Upper Tribunal Judge Pitt on the basis that it was arguable that the First-tier judge had erred in law, and Upper Tribunal Judge Blundell found in a decision promulgated on 15th March 2021 that the First-tier Tribunal had erred in law for the reasons set out in his decision which I append as Annex A to my decision.

3. The matter comes before me now pursuant to a transfer order to remake the appeal de novo as no findings were preserved.

Evidence & Submissions - Remaking

4. The evidence of the appellant in his statement and oral evidence is in short summary as follows. He is a Kurd of the Alevi faith who had come to the attention of the Turkish authorities as a result of political activity. He is a lorry driver by profession. He had lived in Istanbul from 2004.

5. He attended the Gezi Park protests on 3rd June 2013 with two of his cousins. This was an anti-government protest. He was subjected to teargas. His cousins escaped but he was caught by police and hit with truncheon, and his leg was cut when he was being dragged by police. He was taken to Beyolu Security Headquarters and detained for two nights. During this time he was fingerprinted and photographed, he was accused of taking part in illegal activities and being a PKK terrorist. He was ill-treated with beatings during his questioning, but then released via a hospital, where a doctor wrote a report without examining him saying he had no health concerns.

6. The appellant supported the BHP and then, from August 2014 became a member of the HDP (Peoples Democratic Party) in Turkey. He joined this party because they protect all minority rights, including those of Alevi Kurds like himself. His activities included distributing leaflets and attending Newroz celebrations. The appellant found it hard to quantify how often these took place, saying that they were just linked to incidents such as the Roboski incident. He said he spent as much time as he could spare when he was not working going to the party building. He found it hard to remember details, frequency and timings of the activities he had undertaken, but there were activities linked to parliamentary and presidential elections; the demand for education in mother tongue; and the Kobani incident protests. He had attended the HDP building to meet friends and chat as well as undertake political activities roughly on a monthly basis whilst he was in Turkey. He had attended a meeting at which the HDP MP Sirri Sureyya Onder had spoken at the HDP Building in Bagcilar.

7. The appellant states that he was detained again on 6th December 2014. He had attended a meeting with his brother-in-law, YM, at the HDP party building as a result of the Kobani protests. He left the building alone, and a short distance from the building was arrested by three plain clothes policemen. He was pushed to the floor and handcuffed. He was taken to Bagiclar Security Headquarters and detained for one night. He was again fingerprinted and photographed. He was interrogated and asked about leaflets, and what he was doing in the HDP building. He was accused of taking part in illegal activities for the PKK, called a traitor, tortured and then released with a threat of further investigations.

8. The appellant left the country lawfully, and subsequently arrived in the UK, using a properly issued business visa, in December 2014. He had hoped that the situation in Turkey would calm down, however his house was raided, and his wife was detained in January 2015. She was asked about his whereabouts, and continued to be harassed by the authorities until, in 2016, they divorced, and she was able to show the authorities the divorce papers and they left her alone. His wife joined him in the UK in 2018, and they have remarried in a religious ceremony.

9. The appellant explains that he did not claim asylum initially as a solicitor, Ms Simsek, he consulted said that as he did not have evidence to support his refugee claim it would be better if he applied under the Ankara Agreement. He claimed asylum later when he was refused under the Ankara Agreement because he was still afraid of returning to Turkey. He believes that he is at risk because he was active with HDP, and it is not simply the senior members of HDP who are targeted by the authorities.

10. The appellant continues his political activities in the UK as he attends the Kurdish Community Centre, where he meets like-minded Kurdish friends. He has also attended May Day events and Newroz celebrations. In response to cross-examination he was unable to say when he last attended the Kurdish Community Centre, although he then did say in re-examination that he had met his lawyer there last Tuesday, and was unable to detail any volunteering he had done for them beyond going to protests but he did say that he had met three Turkish HDP MPs there some time this year including Sirri Sureyya Onder. The appellant explained that the photographs in the appellant's bundle were mostly of him at Newroz and May Day demonstrations in the UK in 2018 or 2019, some also showing his witness, and brother-in-law, YM, although there were also three photographs of Istanbul, one of which was a picture of the Gezi protests.

11. CA attended the Upper Tribunal. Her evidence from her statement and oral evidence is, in summary as follows. She was married to the appellant in August 2009, and they have a child together. He was involved with the BDP from 2013, and then took part in HDP activities and became a member. She could not give details about his HDP

activities as she has no interest in politics, but she was able to explain what she lived through and that he had been quite often involved with party activities, demonstrations, meetings and rallies. The appellant was detained on 3rd June 2013 and 6th December 2014 by the authorities. He was detained and tortured on both occasions. The appellant left Turkey in December 2014 because of the investigation into his activities, and because he was scared for his safety.

12. Police came to their home in January 2015, and she was detained at Bagcilar Security Headquarters for about four hours even though she said that the appellant had gone abroad. They accused him of being a terrorist, and said she should make him surrender to them and asked her questions about his political activities. They refused to believe the appellant was in the UK and swore at her. The police continued to visit her at her home and harass her through phone calls. She made a complaint to the Public Prosecution Office about this harassment but nothing happened about it.

13. In 2016 CA decided that she would get divorced so it was clear she had nothing to do with the appellant, and at that point the police left her alone. CA then had a relationship with ET whom she met on social media. She told the authorities that ET was her boyfriend when she applied for her tourist visa to come to the UK. CA varied her leave to enter to stay in the UK on the basis of a business application made under the Ankara Agreement. She was first given that permission in 2018 for one year, and then had it extended so she now has permission to remain until August 2022. She reconciled with the appellant in the UK, and they had an Alevi religious wedding in this country. She believes that her husband's life would be at risk in Turkey if he were returned because of his commitment to Kurdish rights. She knows the appellant continues his political activities in the UK and has been on demonstrations, but she does not know the details. She wants to put all of the bad things in the past and does not like to talk about politics with the appellant. She and the appellant have not had a civil marriage because he does not have his passport. She said it would be very hard on her daughter if after all that has happened the appellant was sent back to Turkey.

14. YM attended the Upper Tribunal. His evidence from his statement and oral evidence is, in summary, as follows. He is a citizen of Turkey who claimed asylum in September 2016, and was granted refugee status as a result of being persecuted for his HDP membership and activities following a successful appeal to the First-tier Tribunal in 2017. The appellant is his brother-in-law, because his wife is the appellant's sister. He has known the appellant since 2012. He can confirm that the appellant was involved with the BDP and HDP, and they took part in political activities together. He knows that he was detained in Turkey on two occasions: 3rd June 2013 and 6th December 2014. The appellant had just married in May 2013 when he was detained on 3rd June 2013. When YM met the appellant after this detention he had cuts on his face. When

he was detained on 6th December 2014 they had both attended a meeting at the HDP building as a result of the Kobani protests. The appellant had been given some leaflets to distribute and left the building alone. He was detained over-night, and YM saw him after this, and he was in a very bad way with lots of bruises. YM know that the appellant left Turkey because he was afraid that there was an investigation into his activities and that he would be tortured again. YM is aware that the appellant's wife, was detained in January 2015 because of the appellant, and then harassed about his whereabouts after this and so decided to divorce the appellant so that the police would leave her alone. YM believes that the appellant would be at risk of being detained as a political activist and ill-treated if returned to Turkey. He was caught with some 200/300 HDP leaflets in December 2014, and this will mean that he is seen to be guilty in the eyes of the authorities

15. In the UK YM has attended some political events such as Newroz celebrations with the appellant. He is not a member of any Turkish community centre currently in the UK. He believes the appellant continues some political activities but he could give no details as he had not discussed them with the appellant.

16. The medical report of Dr J Hajioff, consultant psychiatrist, dated 27th June 2018 finds that the appellant has injuries on his forehead and near his left eye which are typical of blunt instrument injuries; injuries on the backs of his fingers which are typical of defence injuries; he has scars near the back of his left thumb and on front of his right thigh which he says happened when he was dragged to the police car, which Dr Hajioff finds to be consistent with injuries from contact with irregular and sharp objects. Dr Hajioff considers whether the injuries properly and classifies them applying the Istanbul Protocol; he considered whether they could have been caused in other ways than the ill-treatment described by the appellant, or whether they could have been caused by deliberate self-harm or by proxy, but finds it unlikely that this was the case. He also concludes that the appellant suffers from chronic PTSD.

17. The appellant has also provided a document from Turkey detailing that he has been a member of the HDP from 28th August 2014, along with his UK Kurdish People's Democratic Assembly ID card dated 25th January 2019, and a letter saying he has been a member of their community joining in political and other activities since January 2015. He has also provided a card from the Kurdish Community Centre dated January 2015, which is an organisation with the same address. His wife, CA, has provided a document dated 16th March 2016 about being harassed about the whereabouts of her husband in the form of a complaint to the Public Prosecutor in Bakirkoy, and another document which states that the court would not open an investigation due to the lack of evidence dated 24th March 2016. The couple have provided a copy of their British Alevi Belief Board religious marriage certificate dated 4th June 2018.

18. Ms Everett submitted for the respondent that reliance was placed on the reasons for refusal letter dated 29th May 2018 and made further oral submissions. She accepted that if the claim was true then the appellant would be entitled to succeed in his asylum appeal as he would be at real risk of being persecuted for his imputed political beliefs, the authorities thinking that HDP is a cover for the PKK. She also accepted that the claim put forward by the appellant was broadly consistent with the country of origin materials, and that the appellant and his witnesses had put forward a consistent account which was supported to some extent by the scarring report, although clearly there could be an alternative explanation for the scars as they were not diagnostic of being caused in the way claimed.

19. Ms Everett argued however that the evidence of the witnesses did not amount to a coherent history which supports his having been detained and ill-treated. The account was lacklustre in the extreme. She argued that the appellant has not given a persuasive account of his political beliefs. He had been very vague with respect to his activities, and the letter from the Kurdish community centre suggested that he had been volunteering for them and was actively involved which was not the case given his evidence. There is no documentary evidence to support his claimed history of detentions in Turkey, and it is unclear why they would seek him after his departure if they would be aware he had left through the GBTS system, given he left legally on his own passport with a proper visa. The fact that he made three Turkey EC Association Agreement applications prior to claiming asylum also reduces the credibility of his asylum claim. It is also not accepted that the appellant has a right to remain on human rights grounds, as it is not accepted that weight should be given to the fact that his wife and child have leave to remain in the UK on the basis of an EU Association Agreement application. They had only been in the UK for three years and could return to work and attend school in Turkey.

20. Ms Nnamani relied upon her skeleton argument and made oral submission, in summary, as follows. It is argued for the appellant that he is entitled to refugee status because he was an activist with the HDP in Turkey, and has maintained his support for the Kurdish movement in the UK. He has been previously detained and ill-treated due to his political activities, and the police have a desire to obtain further information from him. His wife was harassed regarding his whereabouts and activities after he left Turkey. It is argued that he is at risk in accordance with IK (Returnees – Records – IFA) Turkey CG [2004] UKIAT 312 which is the current country guidance, and has a well founded fear of persecution in Turkey as a result of his actual and imputed political beliefs.

21. Ms Nnamani argued that the answers the appellant gave at his asylum interview with respect to his political views and activities, and his two periods of detention, were in fact detailed and were not vague. It was reasonable that the appellant's wife did not know about his politics, and

again her statement about what happened to her was detailed. The appellant's brother-in-law and witness, YM, was a person found to be credible in his own asylum appeal and so his evidence should be given weight. He did not know about the appellant's activities in the UK beyond Newroz demonstrations, but he was able to confirm what had happened in Turkey. Ms Nnamani argued that in line with IK that the appellant would be at risk on return to Turkey both at the airport and in his home area. She said that his detentions can be logged via the "Tab" system: he might be at risk at the airport because he could be questioned about what he had been doing in the UK and why he had left Turkey; he could be at risk in his home area due to his political activities, his previous detention and the investigation which was on-going after his Kobani protest meeting detention in 2014.

22. Ms Nnamani made it clear that she was only making submissions on Article 8 ECHR on a pro bono basis, as these were beyond her legal aid brief. She argued that it would be disproportionate to require the appellant's child to return to Turkey given the disruption in her life to date, and given that she would have a private life here as a nine year old child attending school in the UK.

23. At the end of the hearing I reserved my decision.

Conclusions - Remaking

24. As Ms Everett has properly conceded that the appellant would be entitled to succeed in his appeal if his history is found to be credible my focus in determining the appeal is to decide if the appellant has shown to the lower civil standard of proof that the history he has put forward is credible.

25. Ms Everett accepts that the history the appellant puts forward is internally consistent; is consistent with the evidence of his witnesses; is consistent and supported by the scarring and psychiatric report of Dr Hajioff; is consistent with the background evidence, with the exception of the issue of whether his exit should have been known to the Turkish authorities given the existence of the GBTS system given his lawful departure raising questions as to why his wife would have been questioned about his whereabouts after he left. She argues that he should not be believed as he was not able to give a coherent explanation of his politics and particularly his regular political activities in Turkey and the UK, and because the Kurdish Community Association has significantly overstated the level of what he did through them politically.

26. With respect to the appellant's struggle to explain his political activities and beliefs in oral evidence I note that from the very first screening interview he has given indications of having psychological problems due

to what happened to him in Turkey: at this point in time he said he could not sleep, could not use the lift or stay in confined places and was afraid of being attacked from behind when alone. At his full asylum interview he said he was not feeling well, that he needed to see a doctor but had not been able to do so, and as a result was taking his sister's medication to try to sleep. The psychiatric report of Dr Hajioff records the appellant saying that the appellant told him inter alia that he is anxious all of the time; sleeps badly; is apprehensive in public places if he sees men in uniforms. Dr Hajioff concludes that the appellant is suffering from chronic PTSD, in part because he tries to avoid reminders of past experience and has impaired concentration. After giving evidence before the Upper Tribunal the appellant asked to be allowed to leave the Tribunal hearing room and have a glass of water. It was clearly important to him to leave the room as I offered him a glass of water in the hearing room. He then returned and said he was okay for the hearing to continue, but did appear stressed. I find that the appellant suffers from PTSD, based on the evidence of Dr Hajioff which was not challenged by Ms Everett, and that he has been consistent in indicating that his psychological state makes it hard to put forward his account of persecution, and that I should consider this as a relevant factor, when assessing the quality of his evidence.

27. The appellant struggled to give an account of his day to day political activities in the UK before the Upper Tribunal. He said he could not remember and felt confused, and struggled even to place and date the photographs of him on demonstrations in the UK, even though he was clearly present in the pictures and it was clear from some of them that they were Newroz events from the banners (for instance p60 of the appellant's bundle). I note that at some point between 2018 and the present the appellant and the two witnesses have moved from east London to Mansfield in Nottinghamshire. This may have some relevance to the issue, but no evidence was called on this point. His two witnesses could not assist as both said that they knew no detail of his political activities in the UK, beyond YM having attended the Newroz events with him and CA believing he did continue with some politics and attendance at demonstrations. I take note that his PTSD will have made giving oral evidence more difficult. I find however that the appellant is not, and has not been for some time, an active member of the UK Kurdish Community Association/ the Kurdish People's Democratic Assembly volunteering or attending it regularly as a social place where he could meet political friends and drink tea and coffee. I find he could not give a credible account of any political activities in the UK beyond attending a few May Day and Newroz celebrations in 2018/2019 and hearing some Kurdish MPs speak this year, and having at some point in the past, prior to about 2018, having used the Kurdish community centre as a place to socialise with politically likeminded people. The letter from the Kurdish People's Assembly Management Committee was written over two years ago in 2019, and I find that it has the feel of a standard letter, which I find

does not accurately reflect the level of this appellant's political involvements in the UK.

28. With respect to his political beliefs I find that the appellant was able to explain both in his written evidence, interviews and his oral answers why he supported HDP, he has said that he believes that they work for all minorities including Kurdish Alevis like himself, promoting education in the Kurdish language, and have an understanding of human rights and equality, and are left-wing. In his asylum interview he also explains he comes from a political family, in the sense that they all support HDP, and was able to give details of the people who founded the HDP. I find that this level of political understanding is commensurate with his level of education/chosen work; and the level of activity he says that he has engaged in whilst in Turkey and with his limited political engagements in the UK: celebrating May Day and Newroz; attending protests such as that in Gezi Park; wishing to protest about the Kobani incidents; going to hear HDP MPs speak; attending meetings of HDP when elections were going on; and leafleting.

29. With respect to his activities in Turkey I find that the appellant was able to say in oral evidence he had gone to the HDP building roughly once a month in oral evidence, and I accept that given his work as a lorry driver in Turkey it would be harder to estimate average amounts of activity as he would have been away from home with work. He also explained that there were meetings connected to political events such as elections and protests, and I understood that sometimes his attendance would have been more on a level of socialising with political friends. In his asylum interview he said that he had attended about 5 meetings. I am satisfied that the appellant has given a sufficiently detailed account of his political activities in Turkey, particularly given that the description of the Gezi Park demonstration and the reasons he attended are very compelling in the sense of containing both detail and indications of the fear that the appellant felt. This is the case in the response to question 22 as to why he attended the Gezi Park demonstration; the detail about the police response to that demonstration given to question 31; and the detail given with respect to his detention following this protest in response to questions 34 -36. Similarly, there is significant detail given of his detention with the Kobani leaflets in response to questions 42 – 44 of the asylum interview and at paragraphs 13 to 17 of the appellant's asylum statement.

30. Whilst the two witnesses were unable to provide any useful supporting evidence with respect to the appellant's political activities in the UK they provide very compelling additional evidence with respect to the aftermath of the appellant's detentions in Turkey: YM describes seeing the appellant after both detentions and the bruising and cuts from beatings, and his fear after the second detention. CA gives a detailed account of her detention and harassment via phone calls in 2015 and

2016 after the appellant left Turkey, and has provided documentation, which has not been challenged in submissions by Ms Everett as being unreliable in any way, with respect to a complaint that she made to the Public Prosecutor in 2016 about the telephone harassment. YM is a recognised refugee whose own evidence was found credible by a First-tier Tribunal Judge and CA has been granted leave to remain by the respondent on the basis of an Ankara Agreement application. I find no reason not to find their testimony in support of the appellant credible.

31. The evidence at paragraph 63 and 66 of IK (Returnees – Records – IFA) Turkey CG is not such that the appellant's two Istanbul detentions would be expected to be included in the GBTS records held in computers at an airport, as the appellant was not formally arrested (taken to court) whilst in Turkey, and records of legal departures are also not kept on GBTS. Whilst there are records of the appellant's lawful departure from Turkey, as they are printed out in the appellant's bundle, this would not be on the GBTS, and given it was only evidence of his having gone into Bulgaria by lorry it might well have been assumed that he was on a work trip and would return, as he had many times previously, or might find a way to re-enter over-land without this being registered given he had not necessarily gone far. I find that it is credible that the police would have been interested to investigate the appellant further given the number of HDP leaflets that he was found with, which his witness YM put at 200/300 and he said were about 3 inches thick in answer to question 42 at his interview, and given the position taken in IK (Returnees – Records – IFA) Turkey CG that the Turkish authorities do maintain records beyond the GBTS about people they consider to be of adverse interest, and given the appellant's had been detained twice within an 18 month period and on both occasions accused of supporting the separatist PKK.

32. I note the other matters in the appellant's favour: that it is accepted by Ms Everett for the respondent that his history has been given consistently at interview, in statements and before the Upper Tribunal; that his witnesses give consistent evidence; that his history is consistent with the country of origin evidence; and that the scars report of Dr Hajioff finds that two sets of scars the appellant attributes to his ill-treatment are typical of being caused in the way that the appellant claims and one set of scars are consistent with the ill-treatment.

33. I find applying, s.8 of the Asylum, Immigration (Treatment of Claimants etc.) Act 2004, that the delay of three years in applying for asylum and the timing of the claim, which came after he was served with a notice as an overstayer, damages the appellant's credibility. I place this in the balance against him, along with my conclusion that he has only had a small amount of political engagement in the UK, and very little since 2018/19.

34. I conclude, having weighed all of the evidence before me, that the appellant has provided a credible account of being a politically engaged person with HDP in Turkey. I find that he joined HDP in August 2014 as set out in the document from them which appears at page 51 of the appellant's bundle. I find that he engaged in the political activities he has described in Turkey and was detained on two occasions in the circumstances he has described. I find that he left Turkey for the reasons he has claimed, and that his wife was detained and harassed as a result in the way she has claimed. I find that he did initially engage with some political activities in the UK up to 2018/19, attending Newroz celebrations and May Day marches, and going to the Kurdish Community Association/ the Kurdish People's Democratic Assembly, but that since this time he has only been there very seldom.

35. I find that the appellant has come to the attention of the authorities as a member of HDP, and, whilst he is not a high level member, I note that the authorities contended that he was a member of a separatist organisation (the PKK) during his two periods of detention; that he was beaten and ill-treated; that he left Turkey within two days of his last release from detention; that he is a Kurdish Alevi; and that the authorities did pursue an interest in the appellant after he left by detaining and harassing his wife until she divorced him in 2016. Applying the guidance in K (Returnees – Records – IFA) Turkey CG and the country of origin material set out in respondent's CPIN Turkey Peoples Democratic Party Version 4 March 2020 I am satisfied to the lower civil standard of proof that the appellant has a well founded fear of persecution on account of his political activities whilst in Turkey as I find he is at real risk of being detained and further investigated if returned there as a follow on to his detention in December 2014, and of serious harm as I find there is a serious possibility he will be ill-treated and tortured during any such detention. It follows that the appellant is entitled to succeed in this appeal under the Refugee Convention and under Article 3 ECHR. I do not need to consider his Article 8 ECHR claim, about which I have almost no information, in these circumstances.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. The decision and all of the findings of the First-tier Tribunal were set aside by Upper Tribunal Judge Blundell.

3. I re-make the decision in the appeal by allowing it on asylum and Article 3 ECHR grounds.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of his protection claim.

Signed: Fiona Lindsley Date: 10th November 2021
Upper Tribunal Judge Lindsley

Annex A: Error of Law Decision

DECISION AND REASONS

1. The appellant is a Turkish national who was born on 23 August 1986. He appeals, with permission granted by Upper Tribunal Judge Pitt, against the decision of First-tier Tribunal Judge Cohen. By that decision, which was issued on 20 November 2019, Judge Cohen ("the judge") dismissed the appellant's appeal on international protection and human rights grounds.

Background

2. The background is set out in detail at [2]-[6] of the judge's decision and need not be repeated herein. For present purposes, it suffices to note that the appellant claimed that he is a Kurd of the Alevi faith who had come to the attention of the Turkish authorities for pro-Kurdish activity. He is a lorry driver by profession. He stated that he had been detained twice, in June 2013 and December 2014 and that the interest of the authorities had continued after his release. He left the country lawfully, driving his own lorry, and subsequently arrived in the UK, using a properly issued visit visa, in December 2014. Having made three unsuccessful applications for leave to remain as a self-employed Turkish businessperson under the 1973 Immigration Rules, he finally claimed asylum on 1 December 2017. The respondent did not accept the appellant's claims of detention and ill-treatment on account of his political activity and refused his asylum claim. The appellant appealed.

The Appeal to the First-tier Tribunal

3. The judge heard the appeal at Hatton Cross on 21 October 2019. The appellant was represented by Ms Nnamani of counsel, as he was before me. The respondent was represented by a Presenting Officer. The judge heard oral evidence from the appellant, the appellant's wife and the appellant's brother-in-law, YM. He heard submissions from the Presenting Officer and Ms Nnamani before reserving his decision.

4. In his reserved decision, the judge found that the appellant's account of political activity on behalf of the Kurdish HDP party was a fabrication. He did not accept that the appellant had ever been the subject of adverse interest on the part of the Turkish authorities and he concluded that the appellant could return to Turkey in safety. The judge gave the following reasons for reaching those conclusions:

   (i) Limited weight was to be attached to a medical report from Dr Hajioff which documented the appellant's scars and his mental health difficulties, including PTSD: [38]-[40];

   (ii) The evidence from the HDP was unsatisfactory in a number of respects: [42]-[43];

   (iii) The appellant's account of short detentions without charge was implausible and contrary to the background evidence: [44];

   (iv) The appellant had only been able to give basic details of the HDP and had not explained why his family had not become members of the party: [45]-[46];

(v) The appellant had given discrepant evidence over whether he was tortured or 'merely manhandled and beaten' during his first detention: [47];

(vi) The appellant had applied for a UK visit visa four months before he supposedly decided to flee Turkey: [48];

(vii) The making of three applications under the Ankara Agreement suggested that his subsequent asylum claim was untrue: [49];

(viii) The evidence given by the appellant's wife was discrepant with Dr Hajioff's report: [50];

(ix) The evidence given by the appellant's wife and his brother-in-law was discrepant as regards the length of her detention: [51];

(x) The appellant's wife and his brother-in-law were unimpressive witnesses: [52]-[53];

(xi) The appellant had been able to leave Turkey on his own passport: [54]; and

(xii) There were further aspects of the account which were discrepant and implausible although the judge did not set out the details: [55].

5. In her grounds of appeal to the Upper Tribunal, Ms Nnamani advanced the following complaints. Firstly, she submitted that the judge had erred in his decision to attach little weight to the medical evidence, since the principal reason given for doing so was not rationally capable of reducing the weight given to an Istanbul Protocol compliant report. Secondly, she submitted that the judge had misunderstood the background material when he found that short periods of detention without charge were implausible. Thirdly, the judge had given inadequate reasons for rejecting the evidence of the appellant's brother-in-law and his wife. Insofar as the judge had concluded that the appellant would not be at risk if his account was taken at its highest, she submitted that this conclusion could not be sustained on the background material or the country guidance of IK (Turkey) CG [2004] UKIAT 312.

6. Ms Nnamani developed these grounds of appeal in her oral submissions. For the Secretary of State, Mr Walker accepted that some of the judge's findings were unsustainable but submitted that his credibility findings should nevertheless stand when it was recalled that the appellant had failed to claim asylum for three years, during which time he had made three unsuccessful applications for leave to remain as a businessperson.

7. I reserved my decision.

Analysis

8. I consider there to be three clear errors of law in the judge's decision.

9. The first error occurred in the judge's treatment of the medical evidence of Dr Hajioff, who had examined the appellant's scars and had stated that he was suffering from PTSD. The judge stated at [37] that the report identified scarring on the appellant's body 'which is said to be consistent or highly consistent in the main with how the appellant claims it was caused…"

That statement represents either a misunderstanding of the medical report, or a misunderstanding of the Istanbul Protocol, or both. Although the report does indeed describe some scars which are consistent or highly consistent with the attribution given by the appellant, the high points of that report for the appellant are Dr Hajioff's conclusions that there are also scars which are *typical of* the attribution given by the appellant. These included scars on the appellant's fingers which were said to be defence injuries and scars on his face which were said to have been from blunt force trauma inflicted in detention: [36] and [39] of Dr Hajioff's report refers. As Lord Wilson noted at [16] of KV (Sri Lanka) [2019] UKSC 10, with reference to [187] of the Istanbul Protocol, 'typical of' represents a conclusion on the part of the physician that an injury has a higher degree of consistency with the attribution given by the patient than a conclusion that an injury is merely 'consistent with' or 'highly consistent with'. The significance, or potential significance, of Dr Hajioff's conclusions in these regards was not understood by the judge.

10. I am bound to record that it is particularly concerning that the judge fell into error in this respect given that he was considering an appeal which had been remitted by the Upper Tribunal. I note that the first decision of the Upper Tribunal (DUTJ Doyle) recorded, at [9], the fact that Dr Hajioff's report contained reference to two injuries which were typical of the attribution given. DUTJ Doyle noted, correctly, that 'the finding that injuries are typical of an account by reference to the Istanbul protocol is the second strongest of five potential findings'. The point having been identified in that way, in the clearest possible terms, it is not at all clear how the judge came to misunderstand the medical evidence as he did.

11. Ms Nnamani's central point about the judge's treatment of Dr Hajioff's report, however, is that one the reasons given for attaching little weight to that report was not logically capable of justifying that reduction. At [38], the judge attached significance to what he thought was a discrepancy between the appellant's evidence and the report of Dr Hajioff. He explained his finding as follows:

> In considering the medical report, I firstly note that the doctor indicates that the appellant's wife joined the appellant in the UK. It is the evidence of the appellant and his wife however that the appellant and his wife had divorced. The appellant's wife came to the UK unbeknownst [sic] the appellant and they only reunited after a period of time. I find that the evidence in the doctor's report is discrepant with the evidence of the appellant and his wife and find that this course [sic] into question to some extent the evidential value of the medical report.

12. The judge's finding was based on the statement at [26] of Dr Hajioff's report, that the appellant's wife had 'managed to leave Turkey and joined him here about four months ago' and on the appellant's oral evidence at the hearing that he had only become aware that his wife was in the UK following her arrival: [25] of the judge's decision refers. The first difficulty with the judge's reasoning is that the two statements are not necessarily inconsistent. The fact that the appellant's wife is said to have 'joined' him in the UK does not indicate in and of itself that the appellant knew that she was coming to the UK. As a matter of ordinary language, I may 'join' a person for a meal in a restaurant after meeting them there by chance, just as I may 'join' a person in the UK who has no forewarning of my visit.

13. The second, and more fundamental, difficulty is that any such discrepancy cannot logically bear on the weight to be given to the medical evidence, the most important aspect of which was that the appellant had scars which were typical of the attribution given by him. The

report was positively supportive (MN (Albania) [2020] EWCA Civ 1746 refers, at [104]) of the appellant's account and the reason given at [38] did not logically reduce the support provided.

14. For these reasons, I consider the judge to have fallen into error in his consideration of the medical evidence.

15. The judge's second error concerns the finding, at [44] of his decision, that the appellant's account of two short detentions was implausible and contrary to the background evidence. Ms Nnamani asserted in her grounds of appeal that this conclusion was flatly inconsistent with the background material and with IK (Turkey) itself. As I explained to her at the hearing, I was instinctively sympathetic to that submission, based on two decades of experience (whether as judge or advocate) of Turkish asylum appeals. It was my own recollection of the background material that the Turkish authorities were known to arrest and release without charge those in the appellant's position (ie low-level supporters of the HDP or other such parties).

16. The difficulty that I had in my pre-reading of the papers in this case was that I could find nothing which expressly supported my instinct. I asked Ms Nnamani at the hearing to take me to the specific parts of the background material which contradicted the judge's finding. She was unable in her opening submissions to do so. Nor was she able to take me to a specific part of IK (Turkey) which supported her submission. In her reply, she directed my attention to section 8.2 of the respondent's Country Information and Policy Note on *Kurdish Political Parties*. Nothing in that section was directly on point, although I do note that there is reference to a large number of 'politicians and activists being detained and later arrested' in operations which started in 2009. That highlights a distinction between arrest and detention which is often misunderstood and was the subject of the following explanation at [16] of IK (Turkey):

> However, in early 2004 some new evidence emerged about the scope of the records held on the GBTS, which suggested that they might be more limited than had hitherto been assumed. It has been known, since the Netherlands Government report of July 2001, and this was accepted in A (Turkey), that essentially only personal data relating to outstanding arrests warrants, previous arrests, restrictions on travel abroad, possible draft evasion or refusal to perform military service, and tax arrears would be recorded on GBTS. However evidence came to light in 2004 that for the first time drew a distinction between "arrests", which in the Turkish context require a court decision, and "detentions" by the security forces without court sanction or charge. This was not something new in the sense that some change had taken place in Turkey, but was rather a correction of a long-standing misunderstanding about what an "arrest" meant in the context of Turkey and the GBTS. As there is well established objective evidence that the large majority of detentions (sometimes put as high as 90%) are relatively brief and end in release without charge or court appearance, this new evidence is potentially significant.

17. As the final sentence of that excerpt shows, short detentions without charge or court appearance were commonplace at the time that IK (Turkey) was decided. The fact that a person who was thought to support HADEP (as it then was) suggested that they had been detained for a short period, ill-treated, and then released without charge was not surprising; it was the modus operandi of the Turkish state at that time.

18. The judge was considering the appeal in 2019, however, and it is necessary to consider whether the background material before him established a different approach on the part of the Turkish authorities towards actual or suspected HDP or BDP members (as they had by this stage become). It is not difficult to see why the judge thought that it did. For reasons which are not immediately apparent to me, the background material which was before the judge related, almost exclusively, to the immediate aftermath of the attempted coup on 15 July 2016. During that time, the Turkish government demonstrably adopted a draconian approach to any form of dissent, whether on the part of Kurds or otherwise, and lengthy periods of detention without charge became much more commonplace. But this background material was irrelevant to the appellant's appeal. The judge's task was twofold. He had to consider, firstly, whether the appellant's account was reasonably likely to be a truthful one. And he had to consider, secondly, whether the appellant would be at risk on return to Turkey as things stood in 2019.

19. In respect of the first task, the judge should have been presented with background material relating to the chronology described by the appellant, between 2013 and 2014. In respect of the second task, the judge should have been presented with background evidence relating to the situation in October 2019, that being the date of the hearing before him. The fact that he was presented with evidence which related to neither period appears to have wrongfooted him in the first of those tasks. Whilst his conclusion that the appellant would not have been released without charge would have been perfectly sustainable on the basis of the background material from 2016/2017, it was not sustainable on the basis of the evidence for the relevant period. As is clear from paragraph 8.2.1 of the CPIN, the period between early 2013 and the rekindling of the armed conflict between the authorities and the PKK in July 2015 was one of relative calm. Against that backdrop, and bearing in mind what was said in IK (Turkey), there was nothing implausible about the appellant having been subjected to short detentions and ill treatment before being released without charge; that account chimed with the familiar modus operandi of the Turkish state when not in times of heightened tension.

20. For those reasons, I consider that the judge also fell into error in reaching the finding that the appellant's account of short detentions was implausible when set against the background material. Through no real fault of his own, he considered the wrong background material when he reached that finding.

21. Thirdly, I consider the judge to have given inadequate reasons for rejecting the supportive evidence given by the appellant's brother-in-law and his wife. At [52], he stated that the appellant's brother in law 'did not know significant aspects concerning the appellant's claim' but he failed to particularise these aspects. In the same paragraph, he branded the evidence given by the brother-in-law as 'self-serving' without any further explanation of what he meant by that (see R (SS) v SSHD ('self-serving statements) [2017] UKUT 164 (IAC). In circumstances in which it was accepted on all sides that the appellant's brother-in-law was a refugee, it is not easy to see why his statement in support of the appellant might have been made in his own interest.

22. Then, at [53], the appellant's wife was also said to be an 'unimpressive witness'. The judge seized, wrongly for the reasons I have set out above, on what he perceived to be the discrepancy between her evidence and the report of Dr Hajioff. He also accused her of giving evidence which was 'vague and contained discrepancies and evidence which I found to be

totally implausible concerning divorce and reconciliation with the appellant' without any further particularisation of these concerns.

23. There is a further absence of particularisation at [55], where the judge merely referred to 'further discrepancies in the appellant's account' before stating that he would 'not set out in further detail herein.' None of these paragraphs gives the appellant any clear idea of the basis upon which the evidence was rejected and it is trite that a judge should give his reasons in sufficient detail to enable the losing party to understand the basis of his defeat.

24. In the circumstances, I am satisfied that there are serious errors in the judge's evaluation of the appellant's account. Mr Walker submitted that the decision might nevertheless be upheld on the basis that these errors were immaterial to the ultimate outcome. Although I accept that it is legitimate to ask that question (see, for example, what was said by Auld LJ at [8]-[12] of Erdogan [2004] EWCA Civ 1472), and although the removal of the offending paragraphs leaves a host of cogent reasons for disbelieving the appellant's claim, I consider that the judge's errors were serious and fundamental. His conclusions regarding the appellant's credibility are vitiated by those errors.

25. Mr Walker did not attempt to submit that the judge's alternative finding at [59] (that the appellant would not be at risk even if all that he said was true) sufficed to render the errors in the credibility findings immaterial. He was wise not to do so. If the appellant is actively sought by the Turkish state to the extent that his wife was forced to leave the country, it can hardly be suggested that he would not be at risk on return. In the circumstances, the proper course is for the judge's decision to be set aside and for the appeal to be reheard de novo.

26. In the event that I reached that conclusion, I was urged by both representatives to retain the appeal in the Upper Tribunal. I consider that this was a proper request, given that this is the second time a decision of the FtT has been set aside as erroneous in law in this case. The appellant is entitled to a final resolution of this appeal, as is the public purse. I will retain the appeal in the Upper Tribunal for the decision to be remade.

27. I should add this. It was an unusual feature of this case that evidence was given by a recognised refugee (the appellant's brother-in-law) without the judge having sight of the decision by which he was granted that status. That omission only became apparent at the hearing before me and Ms Nnamani swiftly undertook to ensure that a copy of the decision in his appeal (PA/07849/2017) was filed and served immediately. The decision in that case (of FtT Judge Morgan) was indeed sent to the Upper Tribunal by email shortly after the hearing and a copy is now within the physical file for consideration by the next judge.

28. Secondly, I do hope that the parties will note what I have said above about the need for relevant background material. The relevant events in this case occurred in 2013 and 2014 and the risk to the appellant is to be assessed as at 2021. Background evidence relating to the aftermath of the 2016 coup is not likely to assist the next judge in any part of his or her task.

Notice of Decision

The decision of the FtT involved the making of an error of law. That decision is set aside in full. The decision on the appeal will be remade following a de novo hearing in the Upper Tribunal.

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 his 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.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

15 March 2021