IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-001632
First-tier Tribunal No: PA/51161/2020
IA/02453/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 6 April 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

OA (Turkey)
(ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Ms S. Ferguson, Counsel instructed by Freemans Law LLP
For the Respondent: Mr T. Melvin, Senior Home Office Presenting Officer

Heard at Field House on 17 January 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellant is a citizen of Turkey born in 1997. He arrived in the UK clandestinely in early April 2018 and claimed asylum around two weeks later. The claim was refused, and he appealed under section 82 of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”). The appeal was heard by First-tier Tribunal Judge Kudhail (“the judge”) who, by a decision dated 5 November 2021 dismissed the appeal. The appellant now appeals to this tribunal with the permission of First-tier Tribunal Judge Adio.

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Factual background

2. Only a brief factual summary is necessary. The appellant is Kurdish. He is not a member of the Alevi faith. He claims to be at risk of being persecuted on account of his support for the HDP, the People's Democratic Party. His case was that he had been arrested and detained by the Turkish authorities following his attendance at an anti-government, pro-Kurdish protest in 2014. He was detained again in 2016 and 2017, in different circumstances, but nevertheless targeted on account of his ethnicity and support for the HDP. He claims that he was tortured during the 2017 detention, and accused of being an agent for the PKK, a proscribed terrorist organisation in Turkey. He will continue to be at risk of being persecuted upon his return.

3. In her decision, the judge described the appellant as a member of the Alevi faith (para. 1). She rejected his case to be a supporter of the HDP.

4. The judge appeared to accept that the appellant was detained in at least 2014, and that the protest he claims to have attended was objectively verifiable. However, she seems to have rejected his case to have been released on reporting conditions (see para. 31). As for the 2016 detention, there was "no evidence that the authorities even in his home area were interested in him *beyond the requirement to report*" (emphasis added), suggesting that she accepted that the 2014 detention *had* resulted in the imposition of reporting conditions. Ultimately, however, the judge did not accept that the appellant was of any interest to the authorities due to his suspected association with HDP or the PKK in 2016 (para. 32).

5. The judge attached weight to the detail in the account of the 2017 detention. It was consistent with the background materials about the practice of the Turkish authorities (para. 34) but there was no medicolegal report pertaining to the scars the appellant claimed resulted from the torture to which he was subject (para. 35). The account given by the appellant was plausible, found the judge, but it could have been concocted (para. 36).

6. The judge had other credibility concerns. A key witness in the appellant's narrative had not attended the tribunal. None of his many family members in the UK had attended to support his case. The appellant's account of claiming asylum in the Netherlands, and why he left the country for the UK, lacked credibility. Her global findings were at para. 38, in which she said, "…for credibility reasons I do not accept the appellant was a HDP supporter. I do not accept he was arrested, detained or tortured." The judge dismissed the appeal.

Grounds of appeal

7. There are three grounds of appeal. First, the judge failed to consider or apply the relevant country guidance, *IA HC KD RO HG (Risk-Guidelines-Separatist) Turkey CG* [2003] UKIAT 00034 ("*IA and others*"), which supports the appellant's case as to his prospective future risk. Secondly, the judge placed too much weight on the perceived inconsistencies in the appellant's account. Thirdly, the judge erred by expecting the appellant to provide documentary evidence supporting his account, and unreasonably drew inferences against him on account of his failure to do so.

Submissions

8. Ms Ferguson expanded upon the grounds of appeal in her submissions. Resisting the appeal for the Secretary of State, Mr Melvin relied on the respondent's rule 24 notice dated 18 March 2022. It was not an error for the judge not to refer to *IA and others,* he submitted. The judge had a number of credibility concerns, all of which were legitimately open to her. The appellant's case was a disagreement of fact and weight.

9. The appellant also applied under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to rely on a medico legal report of Dr A. I. Martin following a consultation on 7 June 2022. I address this application at the conclusion of my decision.

The law

10. In *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982, the Court of Appeal summarised some of the commonly occurring facets of an error of law in this jurisdiction. They include:

> "i) Making perverse or irrational findings on a matter or matters that were material to the outcome ("material matters");
>
> ii) Failing to give reasons or any adequate reasons for findings on material matters;
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> iii) Failing to take into account and/or resolve conflicts of fact or opinion on material matters;
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> iv) Giving weight to immaterial matters;
>
> v) Making a material misdirection of law on any material matter;
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> vi) Committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings;
>
> vii) Making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made."

Discussion

11. By way of a preliminary observation, some of the judge's findings appear to contradict themselves. As I have set out in my summary of findings above, at times she appears to accept that the appellant was detained as he claims, particularly in 2014, and that he was placed in some form of reporting conditions which continued to apply in 2016. Those findings conflict with the judge's global finding para. 38 that he was not detained at all. Plainly, those findings cannot both be accurate, and cannot stand alongside each other.

12. Similarly, at para. 31, the judge appeared to reject the appellant's case to have been subjected to reporting requirements in 2014, yet, at para. 32, refers to such requirements as though the appellant *had* been subject to them. On the appellant's case, the continued engagement of the reporting conditions was significant. They were the link between his initial detention in 2014 and the authorities' repeated and continued interest in him in 2016 and 2017 and, on his

case, future occasions in the event that he is returned. The judge also incorrectly referred to the appellant as being of the Alevi faith; he is not.

13. The lack of clarity in the judge's decision means that it is difficult for the reader of the decision fully to understand the judge's reasons for dismissing the appeal because the basis upon which she did so is not sufficiently clear. Of course, appellate tribunals and courts must approach first instance findings of fact with considerable deference, and not engage "island hopping", as it was put in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at para. 114. However, where, as here, the findings of fact are difficult to reconcile with each other, and feature basic mistakes of fact, the need for deference reduces.

14. I turn to the first ground of appeal. In her substantive analysis, although the judge referred to the "CIPN" [sic], which must have been a reference to the respondent's *Country Policy and Information Note – Turkey: Peoples' Democratic Party Version 4.0, March 2020* ("the CPIN"), she did not refer to or otherwise discuss *IA and others*. In many cases, that would be an omission of form and not substance. Judges of an expert tribunal are usually to be taken to have applied the relevant authorities, even if they did not expressly say so.

15. The difficulty with the judge's failure to refer to *IA and others* is that, on her findings of fact, the appellant met a number of the risk indicators listed at para. 46. Prior detention may give rise to a real risk of future persecution, as *IA and others* recognised at para. 46(b) and following. Being placed on reporting restrictions is an additional indicator: para.46(d). It was incumbent upon the judge to address the appellant's risk profile in light of what appeared to be her findings fact that the appellant had been detained. The presumption that expert judges have applied the relevant authorities is capable of being displaced where, as here, findings have been reached which appear to be at odds with the authority. I emphasise that that is not to say that a proper application of *IA and others* would lead to the inevitable conclusion that the appellant's appeal should be allowed, but rather it is necessary for a judge to give sufficient reasons to address the import of the relevant country guidance in light of the relevant findings of fact.

16. In light of the above analysis, it is not necessary to dwell on the remaining grounds of appeal in any depth. I have already found that the judge reached findings that were either inconsistent or inadequately reasoned. In doing so, she failed to apply or otherwise engage with the relevant country guidance, and so failed to take into account a relevant consideration. Those errors are sufficient to merit the conclusion that the judge's decision involve the making of an error of law such that it must be set aside. I consider that it is not possible to isolate any individual findings reached by the judge for the purposes of the decision being remade in this tribunal. While many of the judge's credibility concerns were open to her, those findings were reached in the context of unclear findings of fact that failed to apply the relevant country guidance. The decision of the judge must therefore be set aside in its entirety.

17. In light of the scope of the fact-finding task which must be conducted in order for the appeal to be remade, consistent with the practice statement, I remit the appeal to the First-tier Tribunal, to be heard afresh before a different judge.

18. It is not necessary, therefore, for me to rule on the appellant's application to rely on Dr Martin's medical report. Any case management directions required for

the appellant to rely on that report will be a matter for the First-tier Tribunal upon the appeal being remade.

19. I maintain the anonymity order that is already in force because this appeal is still pending.

Notice of Decision

The decision of Judge Kudhail involved the making of an error of law and is set aside.

The appeal is remitted to the First-tier Tribunal to be heard by a different judge.

Stephen H Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber

27 February 2023