Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/06676/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 1st February 2016	**On 24th February 2016**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

OS
(anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Ms M Sirikanda, Counsel instructed by Duncan Lewis & Co Sols
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Turkey born on the 3rd March 1992. He appeals with permission the decision of the First-tier Tribunal (Judge Devittie) to dismiss his appeal, on asylum and human rights grounds, against a decision to remove him from the United Kingdom pursuant to s10 of the Immigration and Asylum Act 1999.

Background and Matters in Issue

2. The Appellant is a Turkish Kurd. He claimed asylum approximately ten months after his claimed illegal entry to the United Kingdom and advanced a case of persecution for reasons of his political opinion. The Appellant claims to be a supporter of the PKK and the DTP. He states that in 2008 he was arrested and tortured by the Turkish police for 3 days; he was expelled from school; in November 2008 he was arrested on a demonstration and again subjected to torture during a detention which lasted two days and ended in his release without charge. He moved areas and got a job working on construction of a bridge in Dersim. In February 2012 a party of Turkish soldiers were crossing that bridge when it was blown up. All the Kurdish workers on the site were rounded up and arrested. The Appellant's history came to light and he was transferred to Tunceli Security Headquarters. He was, he claims, there subjected to severe torture and accused of involvement in the explosion on the bridge. On the third day of torture the Appellant was threatened with death. He was mentally and physically drained. He agreed to whatever they wanted. They made him sign a statement that he was not allowed to read. He was released on two conditions: that he was to report for military service, and that each week he was to attend the anti-terrorist branch to report on the activities of the PKK. Upon his release he convalesced with a cousin, and thereafter left Turkey with the assistance of the *sebeke*. The Appellant states that he did not claim initially asylum in the UK because he had heard that people were being detained and removed to Turkey.

3. The Respondent disbelieved the entire account. It was found that there were material inconsistencies in the evidence that the Appellant had given on various occasions and his account was not supported by objective country background material.

4. When the matter came before the First-tier Tribunal the Appellant gave oral evidence and relied on his witness statement. He further relied on a lengthy medico-legal report prepared by Freedom From Torture (formerly Medical Foundation for the Care of Victims of Torture). This report had been prepared by a Dr David Hamer, a Consultant Psychiatrist who had seen the Appellant on four occasions. Dr Hamar found *inter alia* that the Appellant bore scars consistent with having been kicked with steel capped boot, had dental repair work consistent with having damaged his teeth in a trauma, and that he met the diagnostic criteria for a diagnosis of Post Traumatic Stress Disorder.

5. The determination sets out the Appellant's account, and gives a detailed summary of all of the reasons for refusal. At paragraph 6 it is noted that the Appellant relies on a medical report in support of his

claim:

> "... The medical report shows evidence of dental repair consistent with his account. It shows two scars which are consistent with his account of being kicked and is diagnosed as suffering from PTSD. I shall consider this medical evidence in the round, and against the background of the totality of the evidence. In this regard I find that there are a number of unsatisfactory features to the Appellant's evidence, which undermine the credibility of his claim of past persecution and the weight of the medical evidence. They are as follows:"

6. The determination then sets out four reasons why the claim does not succeed. The first is an inconsistency in the Appellant's evidence. In his witness statement he claims to have distributed leaflets and attended meetings of the youth wing of the DTP whereas at interview he denied having taken part in such activities. The second was that he had apparently believed that the PPK, DTP and BDP were all the same entity and that they were all led by Abdulla Ocalan. Country background material showed this to be a fundamental misunderstanding. Thirdly there was no objective confirmation that there had been an explosion on a bridge in Dersim in February 2012. The Appellant's explanation that it was not reported for security reasons was rejected, since similar events had been reported in the Turkish press. Finally the Appellant's explanation for the delay in claiming asylum was rejected, since he had on his own evidence been involved in the Kurdish community since his arrival. The appeal was thereby dismissed on all grounds.

7. The grounds of appeal are detailed but in essence submit that the First-tier Tribunal erred in the following material respects:

   i) Failure to give appropriate weight to the medico-legal report/ failure to make findings on what weight should be attached to it;

   ii) Failure to have regard to material evidence, such as an article from *Akifhaber* reporting on a large scale security operation by Gendarmes in the relevant area in February 2012, the reasons for which were unknown to the authors of the report who stated "no explanation has been provided about these operations until this day";

8. Permission was granted on all grounds.

Error of Law

Country Background Material

9. The central feature of the Appellant's case was that in February 2012 he was working for a company called Limak building a new road and bridge near Dersim (Tunceli). He states that a number of Turkish soldiers were killed by a blast on or near that bridge. It is this event which, he claims, led to his detention, ill treatment and caused him to

flee to the UK.

10. The Respondent did not accept that this event occurred. The case-owner took various steps to check the veracity of the Appellant's account. She checked the website for Limak, a large construction company, and found nothing to suggest that they had been contracted to build a bridge in or near Dersim. She further surveyed Turkish media reports to see if there was any evidence that soldiers had been killed in the area in February 2012. Although she found stories relating to soldiers being killed in Dersim, for instance in September 2012, she found nothing to support the claim that a blast had occurred in February 2012. This, taken with inconsistencies in the Appellant's evidence, led her to conclude that his account was not true.

11. The First-tier Tribunal adopted this reasoning at paragraph 6 (iii) of the determination, expressly rejecting the Appellant's explanation that the event was subject to a media blackout.

12. The Appellant now submits that in reaching its conclusions on this central event the Tribunal failed to have regard to material evidence which appears at D7 of the Respondent's bundle. It is an article which appeared in *Aktifhaber*, an online Turkish language news-site. It is dated 24th February 2012 and states that security services have embarked on a large scale operation in Tunceli, in an area believed to be used by the terror organisation the PKK:

> "In the early hours of the morning gendarme special task force was brought down in Skorsi helicopters and began an operation with the support of two Kobra helicopters. No explanation has been provided about these operations until this day".

This, it is submitted, supports the Appellant's case in two material respects. First, it confirms that some incident took place in the Tunceli area in later February 2012 which caused the Turkish security services to mount a large scale operation, and second, it confirms that no-one knows why.

13. Mr Wilding accepted that this evidence was not considered by the Tribunal, but submitted that the logic in the refusal letter nevertheless remains good. There are articles in the Turkish press about other incidents involving the killing of soldiers on other dates: why not this one?

14. I am satisfied that the omission to consider this evidence was a material error of law. Although in the final analysis this article may not be judged sufficient to outweigh the logic in the refusal letter, it was evidence, expressly relied upon by the Appellant, that went directly to one of the central matters in issue. The brevity of the paragraph dealing with this claimed incident belies a lack of anxious

scrutiny, and this evidence should have been considered.

Medical Evidence

15. It is trite asylum law it is not a function of a medical expert to comment on the overall credibility of an account: that is for the decision maker [see for instance HH (Ethiopia) v SSHD [2007] EWCA Civ 306] The medical expert's role is limited to making findings on the subject's clinical presentation, be that physical and/or mental, and assessing the extent to which those findings are consistent with the account given, in accordance with the framework set out in the Istanbul Protocol. When such a report is presented as evidence in an asylum appeal, the Tribunal must consider the contents in the round with the other evidence. It is an error of law to first reject an appellant's credibility, and then to attach no weight to the medical report as a result: Ex parte Virjon B [2002] EWHC 1469, Mibanga v SSHD [2005] EWCA Civ 367.

16. In this case the central feature of the medical report relied upon by Ms Sirikanda was somewhat unusual. It did not so much relate to scarring or to anything that the Appellant had told Dr Hamar, as to what he had *not* said.

17. Dr Hamar was able to comment upon the Appellant's psychological state as well as his physical condition. In respect of the latter Dr Hamar finds the Appellant to have seven identifiable scars, of which only two are attributed to ill treatment: a small mature scar above the Appellant's eye, and a mature scar on his chin that is approximately 3 cm long and shows suture marks. Both are found to be consistent with having been kicked in the face with a steel-capped boot. As to the Appellant's psychological condition Dr Hamar finds that the Appellant experiences enough of the relevant symptoms to be diagnosed with PTSD. He also finds it to be likely that the Appellant was sexually abused whilst in prison [at paragraph 89]. He bases this finding largely on his evaluation of the Appellant's demeanour and responses during their interview, for instance:

> '[O] looked embarrassed, ashamed, his head dropped and tears came to his eyes at this point' [20]
>
> "They did many things. It would have been better to have died than they things they did" ([O]'s demeanour changed and he became still and quiet at this point.) He said "I cant talk about it"[23]
>
> He went quiet and his eyes filled with tears. He replied "can you please ask me something else?" [at 25]'

The only place in which the Appellant appears to have acknowledged any torture with a sexual element is in his witness statement where he states that electrodes were attached to his genitals and nipples in order that electric shocks be administered. He did not volunteer this

information to Dr Hamar but when asked whether it was true he confirmed it was: paragraph 20.

18. Ms Sirikanda complains that Dr Hamar's conclusion about the likelihood of the Appellant having been subjected to sexual abuse does not feature at all in the determination. The only reference to the medical report is at paragraph 6 where it simply notes the findings on the scars and the diagnosis of PTSD. She submits that the Tribunal manifestly failed to consider the entire report, and in doing so erred in its assessment of the Appellant's credibility as a witness. Dr Hamar saw the Appellant over the course of four consultations and made a careful evaluation, which was not based exclusively on what he was told: rather his opinion was based on his own clinical observations. She further observed that Dr Hamar had specifically directed his mind to whether the Appellant could be faking his symptoms, but had discounted this possibility. Ms Sirikanda relied on the Asylum Policy Instruction which advises case-owners in the Home Office that significant weight should be attached to reports published by Freedom From Torture.

19. Mr Wilding submitted that paragraph 6 of the determination showed that the Tribunal had taken the medical evidence into account. It had been weighed in the round in accordance with the principles set down in Mibanga. As to the suggestion of sexual abuse the only evidence of this was Dr Hamar's conjecture. The report had been written in 2013, the appeal heard in 2015, and there was no further evidence to support the claim. There was for instance no evidence that the Appellant had been receiving counselling. Aside from his claim that electrodes had been placed on his genitalia the Appellant himself made no claim to have been sexually abused in detention. If the Appellant himself was not advancing that case it was difficult to see what else the Tribunal could have done.

20. This was (even by the standards of Freedom From Torture) a careful, lengthy and detailed report. Dr Hamar was at pains to show that his conclusions were based not simply on what the Appellant said but on his own clinical observations of his physical responses to certain topics. This is in accordance with the Istanbul Protocol. I am satisfied that paragraph 6 of the determination shows that the Tribunal had regard, albeit briefly, to two of the report's central conclusions (the scars and the PTSD) but no attention is anywhere given to Dr Hamar's view, as an experienced Consultant Psychiatrist, that this man is *likely* to have been sexually abused that he is *unable* to talk about. Errors in approach to medical evidence will very often impinge on the assessment of credibility and this is a paradigm case: for instance it might be argued that a man who cannot face talking about his ill treatment would wish to avoid claiming asylum and doing so. I am satisfied that the determination fails to give adequate consideration to the medical report.

Conclusions

21. This was not at first a promising case. The refusal letter is unusually well-reasoned and carefully researched, and Mr Wilding was quite right to emphasise significant credibility issues such as the Appellant's basic deficit of knowledge about Kurdish politics. I am however satisfied that the First-tier Tribunal failed to consider two material elements of the evidence presented on behalf of the Appellant. In the context of a claim for asylum, where the level of scrutiny must be high and the standard of proof low, this renders the decision unsustainable.

Decisions

22. The decision of the First-tier Tribunal is set aside in its entirety.

23. The parties agreed that should I set the decision aside, the matter should be remitted to the First-tier Tribunal. In view of the extent of the fact-finding required I agree that this is the most suitable course of action.

24. In view of the subject matter, and having had regard to to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders.

> "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".

Upper Tribunal Judge Bruce
8th February 2016