Upper Tribunal

(Immigration and Asylum Chamber) **Appeal number: PA/11810/2019 (P)**

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC	**Decision & Reasons Promulgated**
On 18 September 2020	**On 22 September 2020**

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

AD

(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the appellant: Ms A Nnamani, instructed by Howe & Co

For the Respondent: Mr A Tan, Senior Presenting Officer

DECISION AND REASONS (P)

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. At the conclusion of the hearing I announced that I found an error of law in

the decision of the First-tier Tribunal, reserved my full reasons, which I now give. The order made is described at the end of these reasons.

1. The appellant, who is a Turkish national with date of birth given as 11.11.94, has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 23.1.20, dismissing on all grounds her appeal against the decision of the Secretary of State, dated 22.11.19, to refuse her claim made on 18.9.19 for international protection on the basis of political opinion as a HDP member and on the basis of her Kurdish ethnicity.

2. I have carefully considered the decision of the First-tier Tribunal in the light of the submissions and the grounds of application for permission to appeal to the Upper Tribunal. I have also been assisted by the appellant's consolidated bundle served pursuant to the directions issued on 27.7.20. However, the appellant was also directed to serve a skeleton argument, with which direction there has been no compliance.

3. For the reasons set out below, I accept the submissions of Ms Nnamani, not opposed by Mr Tan, to the effect that there is such error of law in the decision of the First-tier Tribunal to require it to be set aside in its entirety and remitted to the First-tier Tribunal to be remade de novo.

4. In summary, the grounds assert that the First-tier Tribunal erred in reaching flawed credibility findings, in the assessment of the medical evidence, and failed o assess the risk on return on the basis of findings made. In particular, it is argued that the judge failed to consider or make findings as to the reliability of a document submitted at the hearing confirming that the appellant's appeal against sentence had been dismissed.

5. Permission to appeal was granted by the First-tier Tribunal on 30.3.20, pointing out that the decision is not helped by the fact that the judge variously refers to the female appellant as 'he' and 'she'. It was considered arguable that the judge had failed to take account of the document confirming dismissal of the appellant's appeal. It was also arguable that consideration of the medical evidence was flawed. At [15] of the decision the judge stated that the findings of Dr Hajioff were accepted but, contrary to that evidence, the judge went on to state that the appellant did not meet the diagnosis for PTSD. At [11] the judge accepted the respondent's concession that the appellant was a member of HDP but arguably failed to adequately assess the risk on return as a result of that membership. Permission was granted on all grounds.

6. The respondent accepted the appellant's claimed Turkish nationality and Kurdish ethnicity. It was also accepted that she is a member of HDP, having given a detailed and internally consistent account.

7. The appellant claimed that whilst at university in April 2016 she had been detained by the authorities for 5 days on accusation of being involved with the PKK, during which she was tortured and humiliated before being taken to court, which released her on condition of fortnightly reporting. She claims that she did this for two years before being able to leave Turkey under her own identity and using a new passport issued in January 2019, despite claiming to have been sentenced to 6 years 3 months imprisonment, against which she appealed. The respondent considered this aspect of her claim and in particular being able to obtain a new passport after having been sentenced to imprisonment internally inconsistent and in particular inconsistent with a statement from the Turkish Ministry of Justice stating that as of 12.6.19 she had no criminal record. She had also submitted evidence of employment as a teacher which confirmed that she was on leave between 14.6.19 and 9.9.19. The respondent rejected the claim of detention and criminal conviction for political or any activity, citing country background information that such a person would have had their passport taken away and would not be able to travel. The account of detention and torture was also considered to be inconsistent with the country background information on treatment of low level HDP or PKK supporters.

8. It is unfortunate and perhaps indicative of poor drafting that the decision alternately refers to the appellant in the masculine and feminine. Whilst this complaint is not in itself material to the outcome of the appeal, it is compounded by the judge's misdirection as to the medical evidence, addressed below, and the way in which the decision is drafted which does not disclose a careful consideration of the evidence, or indeed cogent reasoning for rejecting the appellant's account.

9. The grounds assert that the appellant had promptly provided the respondent with corroborating documentary evidence of her prosecution and sentence and additionally provided a document at the hearing confirming that her appeal against sentence had been dismissed. Her claimed fear was that on return to Turkey she would be arrested and tortured. It is asserted that the judge failed to consider the documentary material and make a finding as to its reliability.

10. The judge found at [14] of the decision the appellant's claim of being detained, tortured and prosecuted had been fabricated and that at its highest she was a low level supporter who had not been charged with any offence and who would not be of adverse interest to the authorities on return to Turkey.

11. It is asserted at [9] of the decision that the judge had considered the evidence and submissions. At [14] the judge confirmed that the evidence given during the hearing, her witness statement, and the contents of her interview were all considered. At [15] the judge also confirmed that the skeleton argument had been taken carefully considered. However, on a careful reading of the relatively

short decision, whilst the judge purported to find the claim inconsistent with the objective material, including that from the fact-finding mission, it is not clear that any consideration was given to the documentation adduced in support of the criminal prosecution. At [10] the judge referred to the Tribunal being provided with a copy of the conviction "which had not been previously provided". However, that document was in both the appellant's and the respondent's bundle. The additional document handed to the Tribunal was a purported confirmation from the court that the appellant's appeal against sentence had been dismissed. Again, this suggests a lack of care and attention in making the decision. More significantly, the decision is devoid of any assessment of the criminal prosecution material or reasoning for according it little or no weight. Much of the decision is given over to restating the respondent's position rather than making independent reasoned finding. Whilst it is acceptable for the judge to indicate agreement with the respondent's case, reasoning must be provided for doing so.

12. In a similar vein, there may have been a flawed assessment of the medical evidence, as asserted in the second ground of appeal. Whilst it is clear that the judge considered the medical evidence, the judge misstated the effect of that evidence at [15] of the decision when stating, "I also accept the findings of Dr Hajioff and his conclusion that the appellant does not fulfil the diagnosis for PTSD and that the appellant will benefit form anti depressant medication which may be obtained from Turkey." However, the doctor's finding was that the appellant did fulfil the diagnosis for PTSD. The greater significance is, as submitted by Ms Nnamani and accepted by Mr Tan, is such a diagnosis is relevant as being supportive of the appellant's core account, with PTSD arising from her mistreatment in detention. This aspect does not appear to have been considered by the judge and the way the decision is drafted it is not clear that the medical evidence was taken into account when considering the credibility of the core account of having been detained, tortured and prosecuted.

13. The third ground asserts that the judge failed to reach clear conclusions on whether it was accepted that the appellant had been identified as a member of HDP or a pro-Kurdish activist, and whether she had been detained and tortured as claimed. However, as the grounds appear to accept at paragraph [9], the judge found at [14] the entire claim of criminal prosecution fabricated. At [11] the judge had noted the respondent's acceptance that the appellant is a HDP member and that she had given a detailed and consistent account. The judge concluded that the appellant was a low level HDP supporter who had not been charged with any offence and who would not be of any interest to the authorities on return to Turkey. This was repeated at [17] of the decision.

14. The grounds go on to assert that given that the respondent accepted that the appellant was a HDP member and the judge accepted at [12] that HDP

members were arrested and beaten before being released, the judge failed to adequately assess the risk on return on account of being a HDP membership who had been detained, placed on reporting restrictions, and engaged in sur place activities. It is asserted that the judge either failed to consider or misconstrued the country background evidence, and lengthy extracts from the Fact-finding Mission are cited in the grounds. However, it is clear that the judge rejected the claim to have been detained and at [16] did not accept that the appellant would be at risk on the basis of alleged sur place activities in the UK, where the appellant was unable to give the correct date for the single demonstration she allegedly attended and also carried a flag which was not that of the HDP.

15. Whilst the country background information cited in the grounds suggests that even low level supporters engaged in pro-KDP activity can be targeted for adverse interest by the authorities, there was no evidence that mere HDP membership alone presents a sufficient risk on return. HDP is a legal political party in Turkey mere membership of which does not carry a risk of persecution or serious harm on return. Neither does the appellant's Kurdish ethnicity give rise to discrimination amounting to persecution. The grounds as drafted do not assert that either or a combination of both HDP membership and Kurdish ethnicity would give rise to a risk of persecution on return and this was not asserted by Ms Nnamani. It follows that I do not accept the premise of the third ground. However, in the light of my findings in relation to the previous grounds, I am satisfied that the rejection of the appellant's core account was flawed by an absence of consideration of the relevant evidence and adequate reasoning for the conclusions reached.

16. In the circumstances and for the reasons set out above, I find such material error of law in the decision of the First-tier Tribunal as to require it to be set aside and remade.

17. Both Ms Nnamani and Mr Tan submitted that given that the entire decision will need to be remade with oral evidence from the appellant, assisted by an interpreter in Turkish, the appropriate venue for remaking the decision is the First-tier Tribunal. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. The errors of the First-tier Tribunal identified above vitiate all findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.

18. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that

this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2.

Decision

The appeal of the appellant to the Upper Tribunal is allowed

The decision of the First-tier Tribunal is set aside.

The appeal is remitted to the First-tier Tribunal to be remade de novo

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 18 September 2020

Anonymity Direction

I am satisfied, having had regard to the guidance in the Presidential Guidance Note No 1 of 2013: Anonymity Orders, that it would be appropriate to make an order in accordance with Rules 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in the following terms:

"*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 her family. This direction applies to, amongst others, both the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings*."

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 18 September 2020