Neutral Citation Number: [2022] EWCA Civ 1578

Case No: CA-2022-000175

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
Upper Tribunal Judge McWilliam
Appeal No PA/01485/2019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/12/2022

Before :

LORD JUSTICE LEWISON
LADY JUSTICE ANDREWS
and
LORD JUSTICE NUGEE

- -

Between:

KG (TURKEY)	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

David Ball (instructed by **Meral Kilic and Kilic Solicitors**) for the **Appellant**
Nicholas Chapman (instructed by the **Treasury Solicitor**) for the **Respondent**

Hearing date: 24 November 2022

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Approved Judgment

Lady Justice Andrews:

INTRODUCTION

1. The sole issue arising on this appeal is whether there was a material error of law in the decision of the First-tier Tribunal ("FtT") which allowed the Appellant's appeal against the refusal by the Respondent ("the SSHD") of his claim for asylum. If the Upper Tribunal ("UT") was right to find such an error of law, there is no challenge to its decision, following a re-hearing, to dismiss the appeal, having independently formed a different view of the Appellant's credibility from that of the FtT judge.

2. Although permission to appeal was granted on the basis that the case raises an important issue as to the proper approach to be taken by the FtT and UT to section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 ("the 2004 Act"), Mr Nicholas Chapman, counsel for the SSHD, more accurately characterised it as a case about the FtT's duty to give comprehensible and coherent reasons for its decisions.

BACKGROUND

3. The Appellant is a national of Turkey who entered the UK lawfully in 2006, when he was 23 years old. He was granted indefinite leave to remain in 2011 on grounds of 5 years' lawful residence. He and his wife, who moved to the UK with him, have three children under the age of 14, all of whom were born in the UK. One of them has special needs.

4. In April 2014 the Appellant became involved in an argument with a fellow employee at his place of work. This culminated in his throwing a sharp object at the other man, causing a puncture wound to his arm. The Appellant subsequently pleaded guilty to an offence under s.20 of the Offences Against the Person Act 1861, and on 15 July 2015 he was sentenced to 14 months' imprisonment. Three days later he was served with a notice of intention to deport. In response to this, he submitted human rights representations to the SSHD based solely on his private and family life in the UK.

5. A deportation order was not made until 11 January 2017. On the same date, the Appellant's human rights claim was rejected by the SSHD and certified as clearly unfounded. A challenge to the certification in judicial review proceedings led to the SSHD making a fresh decision rejecting the claim on 4 August 2017, against which the Appellant had a right of appeal to the FtT, which he exercised.

6. Around 6 months before the deportation order, in July 2016, there was an attempted coup in Turkey which was attributed by the Turkish Government to the supporters and followers of Fethullah Gülen, an Islamic scholar based in the USA. A state of emergency was declared on 21 July 2016, and remained in place until 19 July 2018. In May 2016, shortly before the attempted coup, the Gulenist Movement ("GM") was proscribed as a terrorist organisation by the Turkish Government. The Supreme Court in Turkey ruled in June 2017 that the GM is an armed terrorist organisation and that it was legitimate for the Turkish state to take action against those involved in, and those who actively supported, a coup attempt against the democratically-elected government.

7. There is strong and credible evidence (including in the relevant Country Policy and Information Notes ("CPIN")) that from July 2016 onwards, members and suspected members of the GM in Turkey have been subjected to a sustained campaign of persecution which is still ongoing.

8. The Appellant's appeal on Article 8 grounds was dismissed by the FtT on 13 August 2018. Permission to appeal was refused, and he became appeal rights exhausted on 28 September 2018.

9. On 4 October 2018, the Appellant made a claim for asylum or humanitarian protection on the basis that he had a well-founded fear of persecution by reason of his association with and support for the GM. He had made no mention of this previously, although the mass rounding-up, detention and ill-treatment of members of the GM following the abortive coup was widely publicised.

10. During his asylum interview in November 2018, the Appellant stated that he had attended a private school run by the GM. After completing his military service he worked for a private school run by the GM. He alleged that he had provided the GM with financial support since coming to the UK, not only when he went back on visits to Turkey but also from the UK.

11. The Appellant also said that in September 2018 a postman had delivered a letter addressed to him to his parents' home in Turkey which his sister opened. It contained a "summons" dated 11 September 2018 which stated that he was suspected of being a member of the GM and that he should attend the prosecutor's office to give a statement. His sister took a picture of the summons and sent it to the Appellant. She then called him; he told her to take it to the office of the Prosecutor who had sent it and to tell them that he no longer lived in Turkey. She did this, and the letter was taken back; however since then the police had been round to his family's house several times. He and his family in Turkey were also very concerned that the authorities were monitoring his calls and so he ceased contact with them.

12. When he was asked in his asylum interview: "*why have you only now claimed asylum when this has clearly been known to you as an issue for some time?*" he did not give a coherent answer, but referred to certain advice that he had been given by his legal representative about his human rights claim. However, he did say that he told his legal representative about it "*after the paper came about the prosecutor's office.*"

13. The SSHD refused the claim for asylum in a decision letter dated 1 February 2019. Paragraph 27 of the refusal letter said this:

> "*It is noted that you have only raised your claim for protection after you were served with a deportation order and your appeal failed. It is considered that you have failed to raise your protection claims at the earliest opportunity. You could have raised your concerns regarding return at any time following the Coup in Turkey in 2016 and you have not done so. You could and should have raised your concerns at the appeal hearing in August 2018 yet you failed to do so. Indeed, you only raised grounds for protection in October 2018, shortly after your appeal rights were exhausted on 28 September 2018 and you faced*

> *deportation. It is considered that the timing of your claim for protection throws considerable doubt upon your credibility.*"

14. The Appellant appealed to the First-tier Tribunal (FtT Judge SJ Clarke). In support of his appeal he made a witness statement dated 19 December 2019. In it he gave a succinct account of having been detained at the airport and questioned by the Turkish police on a visit with his family to Turkey in 2014. He said he was challenged as to why his children were not Turkish nationals (they all hold British passports) and burned with a cigarette.

15. He had given a fuller account of this incident in his asylum interview, in which he indicated that the cigarette burns were on a tattoo of his wife on his upper arm. He said that the police officers had also hit him on his shoulders, back and head, and injured his finger. He provided a photocopy of a photo of the injured arm as supporting evidence. He said that the officers let him go to catch his connecting domestic flight. He did not know why they did this to him on that trip. He had never had any problems previously. Following the incident he did not seek medical attention, and he did not tell his wife or children what had happened to him. However he became anxious. He left his wife and children in Turkey after two days, and went back to the UK. He returned a few days later to bring them back. On that occasion he travelled out to Turkey via a different airport, but because they already had the return tickets, the family took the original route back to the UK. This time there were no problems. He had not gone back to Turkey since then.

16. The incident at the airport pre-dated the failed coup by some 18 months, and there was nothing to link it with the Appellant's involvement or perceived involvement with the GM.

17. Although the Appellant and his legal representatives were put on notice that the SSHD was specifically relying on the delay in claiming asylum from July 2016 to October 2018, his witness statement affords no explanation for that delay. Nor does it mention the "summons" he received in September 2018. Nevertheless it does appear that the case advanced on the Appellant's behalf by his counsel, Mr David Ball, before the FtT and again before the UT (acknowledged by the UT judge in para 24 of her error of law decision) was that the summons was genuine and it was that which prompted the Appellant to make the claim for asylum.

18. In a determination promulgated on 13 March 2020, the FtT judge allowed the Appellant's appeal, making positive findings of credibility. On 23 February 2021, the Upper Tribunal (UT Judge McWilliam) set aside that decision on the basis that the FtT judge did not resolve a significant issue raised by the SSHD, namely, the issue of delay in raising the asylum claim. That was an issue clearly raised in the refusal letter and relied on by the SSHD. She said:

> "*it cannot be understood from the decision what the judge made of the delay and whether [she] applied Section 8 of the 2004 Act when assessing credibility.*"

19. Having set aside the decision of the FtT on that basis, the UT judge directed that the decision would be re-made in the UT and the matter was adjourned for a hearing on 8 September 2021. The Appellant and his wife gave evidence and were cross-examined.

In a thorough and carefully reasoned decision promulgated on 2 November 2021, the UT judge accepted some of the Appellant's evidence, including his evidence of the incident at the airport in 2014. She also expressly accepted his commitment to the GM before 2006. However she also found that no credible reason had been advanced by the Appellant or his wife for the delay in claiming asylum, and that this was damaging to his credibility.

20. After considering the evidence as a whole, she rejected the contention that the Appellant would be at risk on return by reason of his past activities in 2006, and found that he had not established that he had a connection with the GM since then. His appeal was therefore dismissed.

SECTION 8 OF THE 2004 ACT

21. Section 8 of the 2004 Act provides, so far as is material, as follows:

> "*Claimant's credibility*
>
> *(1) In determining whether to believe a statement made by or on behalf of a person who makes an asylum claim or a human rights claim, a deciding authority shall take account, as damaging the claimant's credibility, of any behaviour to which this section applies….*
>
> *(5) This section also applies to failure by the claimant to make an asylum claim or human rights claim before being notified of an immigration decision, unless the claim relies wholly on matters arising after the notification.*
>
> *(6) This section also applies to failure by the claimant to make an asylum claim or human rights claim before being arrested under an immigration provision, unless –*
>
> *(a) he had no reasonable opportunity to make the claim before the arrest, or*
>
> *(b) the claim relies wholly on matters arising after the arrest."*

22. In *JT (Cameroon) v Secretary of State for the Home Department* [2008] EWCA (Civ) 878, [2009] 1 WLR 1411, it was held that it was mandatory to take the section 8 factors into account when assessing credibility, but that the phrase "as damaging the claimant's credibility" should be interpreted as meaning "as *potentially* damaging the claimant's credibility". It was still open to the fact-finding tribunal to decide on the facts of an individual case that the delay did not damage the claimant's credibility. Pill LJ explained at [21] that the statutory provision was:

> "*no more than a reminder to fact-finding tribunals that conduct coming within the categories stated in section 8 shall be taken into account in assessing credibility."*

23. In an earlier passage, at [19], Pill LJ said that s.8:

> "*plainly has its dangers, first, if it is read as a direction as to how fact-finding should be conducted, which in my judgment it is not, and in any event, in distorting the fact-finding exercise by an undue concentration on minutiae, which may arise under the section at the expense of, and as a distraction from, an overall assessment. Decision makers should guard against that. A global assessment of credibility is required*."

DID THE FTT JUDGE MAKE A MATERIAL ERROR OF LAW?

The correct approach to s.8

24. Mr Ball submitted that it is clear from *JT (Cameroon)* that s.8 considerations form part of the overall assessment of a person's credibility, and should not be compartmentalised. He submitted that the UT Judge fell into error by requiring the FtT judge to have dealt with s.8 as a discrete matter. Although he accepted that the FtT judge's reasoning could have been expressed more clearly, he submitted that when her decision was read as a whole, it was obvious that she had taken into account the Appellant's delay in claiming asylum when making her assessment of his credibility and had decided that, notwithstanding the delay and the single minor inconsistency about dates that she had identified, she believed him.

25. Mr Chapman readily accepted that it would have been open to the FtT judge to have allowed the appeal notwithstanding the delay in making the asylum claim. That was also rightly acknowledged by the UT judge in her error of law determination. However, the issue was whether the FtT judge had given legally adequate reasons for allowing the appeal.

26. Mr Chapman submitted that the FtT judge failed to address the SSHD's central concern about the timing of the claim, which was squarely flagged up in the refusal letter. Even if one took into account the fact that the decision was addressed to parties who were aware what the issues were, the FtT judge had not done the minimum that was necessary to explain to the SSHD why the delay from 2016, and the coincidence of the timing of the asylum claim and the dismissal of the Art 8 appeal, did not have an adverse impact on the Appellant's credibility, or why, if it did, it was counterbalanced by the other factors which she found bolstered or supported his credibility.

The FTT decision

27. It is important to consider the FtT decision in the round. The FtT judge began by identifying in paragraph 5 that:

> "*the thrust of refusal is that this is a late claim for asylum, there is limited evidence to support what he claims, and he does not face persecution upon his return because he is at best low profile*."

She then addressed the background to "*the timing of the asylum claim*" in paragraph 6, by setting out the chronology of the criminal conviction, the deportation decision,

and the history of the human rights appeal. However she made no mention of the attempted coup in Turkey and where that fitted into the chronology.

28. In paragraph 9, the judge found that the Appellant's account was broadly consistent with his earlier statements, and consistent with his wife's evidence. She identified one discrepancy pertaining to the year in which the incident at the Turkish airport occurred (2014 or 2015). However she noted that the incident happened in the context of a family holiday over the New Year. In the next two paragraphs she addressed the absence of supporting or corroborative evidence for the Appellant's account of his involvement with the GM, the explanations given for this, and the submission that the Appellant had not exaggerated his claim.

29. In paragraph 12, the judge correctly stated that the Appellant delayed claiming asylum until after the dismissal of the deportation appeal in which he raised human rights only based on his family life and private life. She then said this:

> "*This is relevant in regard to the discrepancy in the 2014/2015 date of his claimed detention, but given that this is explained because it fell over the New Year holidays, I find less damage is caused to his credibility by the delay in claiming asylum."*

30. That is the sole passage in which delay is addressed. There is no mention in paragraph 12 of the SSHD's case that it would have been open to the Appellant to raise his concerns about the risks of being associated with the GM at any time from 2016 onwards, and that at the very least he could have mentioned that risk in the context of his human rights appeal against the deportation order.

31. The judge went on to find in paragraph 13 that the Appellant's account was consistent with the CPIN 2018. She said that the summons issued [in September 2018] was "consistent with the timings" because there was a mass round-up of people considered to be GM sympathisers. Whilst the mass round-ups were in 2017, she accepted Mr Ball's submission that they did not stop in 2018.

32. She accepted the Appellant's evidence of his activities in support of the GM since his arrival in the UK, and concluded that it was "reasonably likely the Appellant is a Gulenist as claimed". She therefore found that it was reasonably likely that he would be detained by the Turkish authorities on his return and ill-treated because of his affiliation to the GM.

Discussion

33. I accept that the s.8 factors are to be taken into account as part of a holistic assessment of credibility – the UT Judge's own approach when re-making the decision is a good example. So long as it is clear that the decision maker has specifically considered the potentially adverse impact of the relevant period of delay upon credibility, and has given a sufficient explanation for finding that the delay is (or is not) damaging, there is no need for specific mention of the statute or its requirements.

34. However I reject Mr Ball's criticism of the UT judge's approach as requiring s.8 considerations to be "compartmentalised". That was not what she was saying at all. Her complaint about the FtT decision was not that the s.8 factors required separate

consideration, but rather that, in her overall assessment of credibility, the FtT judge had failed altogether to address the SSHD's key concern about the timing of the claim, and failed to give any reasons for rejecting that concern or for regarding the delay as having less of an adverse impact on credibility than it might otherwise have done.

35. However benign an interpretation one places on paragraphs 12 and 13 of the FtT decision, they cannot be read as addressing the delay in claiming asylum once the danger of being labelled a Gulenist or GM sympathiser in Turkey had become widely known, nor as accepting an excuse for the delay from 2016 onwards, which was understandably the period upon which the SSHD had focused.

36. As the UT judge appears to have accepted, it can be inferred from paragraph 13 that the FtT judge found that the summons was genuine. Her comments about the timings and the mass round-ups can be read as supporting that conclusion. However, it cannot be inferred that she was also making a finding that the summons was the trigger for making the asylum claim, let alone that she considered that this afforded a reasonable excuse for the Appellant's delay in claiming asylum since 2016 (or at least since January 2017 when the deportation order was made).

37. The bundles for this appeal did not contain a transcript or note of the Appellant's oral evidence, so we do not know what he said in cross-examination at the first hearing. However I do regard it as significant that his witness statement did not address the delay in claiming asylum, let alone provide an excuse for it. Neither did his answers in interview. That may explain why the FtT judge did not direct her remarks to any excuse. It does not explain why she only identified the delay as being relevant to the discrepancy in the dates given for the Appellant's detention and ill-treatment at the airport, which on any view occurred well before the time when the GM became a proscribed organisation.

38. The UT judge said, and I concur, that the reference to New Year did not make sense in the context of delay. As Mr Chapman submitted, the fact that the Appellant was detained and tortured by the Turkish police whilst embarking on a family holiday over New Year 2014-2015 (for reasons not associated with the GM) did not explain why he waited until October 2018 to make a claim for asylum on grounds of such association. I also agree with the SSHD's criticism that the FtT judge failed to give intelligible and coherent reasons for finding in paragraph 12 that the delay caused "less damage" to the Appellant's credibility.

CONCLUSION

39. Although I do have some sympathy with the Appellant, who might well have succeeded if the FtT judge had spelled out her reasoning more clearly, there was a material error of law in the FtT decision, as the UT Judge identified, and she was entitled to set aside that decision.

40. It follows that this appeal must be dismissed.

Lord Justice Nugee:

41. I agree.

Lord Justice Lewison:

42. I also agree. The critical issue for the FtT was KG's credibility. In paragraph 27 of her refusal letter the SSHD asserted that KG's delay in claiming asylum between the coup in 2016 and the claim that he made in October 2018 (after he had become appeal rights exhausted) threw "considerable doubt" on his credibility. Thus the SSHD's refusal was, in essence, based on reasoning that (a) KG's account was not credible and (b) the reason why it was not credible was the delay between 2016 and October 2018. That reasoning had nothing to do with the incident in 2014/2015.

43. A professional judge has a duty to give reasons for their decision. A failure to give adequate reasons is an error of law. Although reasons may be brief they must address the principal controversial issues. Regrettably, in this case the FtT did not address the SSHD's central reason for concluding that KG's account was not credible. I agree with the UT that that amounted to an error of law which entitled to UT to set aside the decision.

44. For the reasons given by Andrews LJ, I agree that the appeal must be dismissed.