



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/12465/2015

THE IMMIGRATION ACTS

**Heard at: Liverpool
On: 27th November 2017**

**Decision & Reasons Promulgated
On: 8th December 2017**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

**MH
(anonymity direction made)**

Appellant

And

Secretary of State for the Home Department

Respondent

Representation:

**For the Appellant:
Solicitors**

Mr Khan, Counsel instructed by Waterstone

**For the Respondent: Mr McVeety, Senior Home Office Presenting
Officer**

DETERMINATION AND REASONS

1. The Appellant is of disputed nationality. He claims to be a national of Myanmar, and on that basis claimed that he has a well-founded fear of persecution for reasons of his ethnicity, namely Rohingya. The Respondent believed him to be a national of Bangladesh and rejected the entire account. The First-tier Tribunal agreed and dismissed the appeal.

2. The Appellant now has permission to appeal.

Anonymity Order

3. The Appellant seeks international protection. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order 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 his 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”

Background and Findings of the First-tier Tribunal

4. The Appellant’s claim is as follows. He was born in 1986 in Burma. In 1992 he was taken by his parents across the border into Bangladesh, where they lived in a refugee camp established to accommodate Rohingyas, ‘Balukhaki 1’. In 1994 his father instructed him that he was to leave the camp with two young men who were going to make their way to somewhere that they could work. His father gave him the ‘family book’ which contained confirmation of the family’s right to reside in the camp as refugees. [This] was so that the Appellant would have something to show the police if he was caught, or as he put it, he would “not be shot”. From there the eight-year-old Appellant went to Rajapalong, Jamalkhan then Chittagong. Eventually he got to Dhaka where he got a job in a motor spares shop. He was paid 4000 taka per month and given food and accommodation. He managed to save a substantial sum of money. In 2014 the police raided the shop (it was suspected of selling illegal motor parts) and the Appellant was questioned. When he revealed that he was from Burma they detained him. His employer managed to get him out on bail and he fled, using his savings to get to Europe. The Appellant therefore arrived in the UK and claimed asylum putting forward this proposition: he had lived in Bangladesh for most of his life and spoke fluent Bengali, but because of his heritage he also spoke Rohingya. His country of origin is Myanmar and this makes him a refugee.
5. The Respondent commissioned a report by language analysts Sprakab. That concluded that the Appellant spoke a variety of Bengali spoken in Noakhali district of Bangladesh. The Respondent relied upon this, and what she perceived to be implausibilities in the account, to refuse protection. The Respondent did not accept that the

Appellant was a Rohingya, or that he was from Myanmar.

6. When the matter came before the First-tier Tribunal the Appellant gave evidence in Rohingya. The Tribunal notes that he had no difficulty in understanding the interpreter nor vice versa. He produced a letter purporting to be from the Bangladesh High Commission in London advising him that he would not be issued with a Bangladeshi passport because he was not a national of Bangladesh. The letter is signed by a 'TM Jobaer'. The veracity of that letter was not challenged by the Respondent; in fact the HOPO very fairly acknowledged that when she had run a check on Bangladeshi diplomatic staff in London she had found Mr Jobaer to be listed as 'Minister' (Consular), the very way in which the letter had been signed. The Appellant produced a 'family book' said to be the one that his father had given to him in 1994.
7. The Tribunal rejected the Appellant's evidence. Its analysis begins with the Sprakab report. It notes that the analyst who spoke with the Appellant did so in Bengali, and that he or she is recorded as speaking Hindi, Bengali, Arakan Bengali and Burmese. It did not accept, as he asserted, that the Appellant had spoken to the analyst in Rohingya, since the Judge would have expected the analyst to have mentioned that fact. Sprakab's conclusion was that the Appellant spoken a variant of Bengali spoken in Noakhali. The Judge found that to be consistent with the Appellant's account that he escaped from the camp as a child and grew up with people in the Bangladeshi community. It was not however consistent with his claim to have spent so much time in Dhaka. The Tribunal found it implausible that the Appellant would have managed to save enough money to travel to Europe, that the police would have given him bail, and that his employer would have helped him in the manner claimed. Taking all of these findings together, the Tribunal concluded that in fact the Appellant is from the Noakhali district.
8. From there it went on to examine the Appellant's account of his childhood. It found it to be implausible that his father would have given the Appellant the family book, given that the family remaining in the camp would have needed it to get food. If his parents intended to escape they would have escaped with him. It was implausible that he would have kept the book all that time given that he did not need it, speaking Bengali as he did to a native level. The letter from the High Commission is rejected because it does not have a formal letterhead and because the Appellant had not produced a copy of the form he used to apply for a Bangladeshi passport. Finally turning to deal with the only evidence that went in the Appellant's favour, the fact that he speaks Rohingya, the Tribunal said this:

"the SPRAKAB report suggests that he has spent a considerable period of time in South East Bangladesh

(because it is “highly likely” that his linguistic background is Noakhali, Bangladesh). Noakhali is in the Chittagong Division of Bangladesh, that is to say the division closest to Rakhine State in Burma, where Rohingya is spoken. There are many possible explanations in these circumstances for the appellant speaking some Rohingya other than him being a Rohingya citizen of Burma who fled to Bangladesh”

9. The appeal was thereby dismissed, with the Tribunal concluding that the Appellant had not established himself to be either Burmese or a Rohingya; the apparent explanation for the Appellant being able to speak that language being that he is from the border area and has therefore picked it up.

Error of Law

10. Mr Khan submitted that the Tribunal’s first error was one of fact. Noakhali is not, contrary to the Judge’s finding, anywhere near the Burmese border. It might be in Chittagong, a huge state, but it is in fact some 270km by road from Cox’s Bazaar, the nearest populated crossing point and the place where the Appellant claims to have initially lived. This error is material because it goes to the Tribunal’s explanation as to how the Appellant might have learned to speak Rohingya. The grounds of appeal include a helpful map to illustrate the point. Mr McVeety conceded that this ground is made out. He further agreed that the reasoning in this respect is not particularly clear. The insinuation in the passage (set out above) is that this Bangladeshi Appellant learned the language from Burmese refugees living in the border area, but there is no clear finding to that effect, nor any assessment of whether a more likely – or even reasonably likely – explanation is that the Appellant is in fact a Rohingya refugee himself.
11. Mr Khan next submitted that the Tribunal erred in its approach to the Sprakab report. He relied on the *dicta* in Secretary of State for the Home Department v MN and KY [2014] UKSC 30 to the effect that decision-makers should avoid simply looking to Sprakab’s conclusions: it is incumbent on any Tribunal to examine such reports critically in light of all of the evidence. It is important that the strength of the reasoning therein is examined. There is particular difficulty in adopting Sprakab’s conclusions where they are expressed in terms of ‘certainty’ or ‘near certainty’. The analyst will only have examined one part of the evidence, whereas the Tribunal will be making a global appraisal. Mr Khan submits that this is just what has happened here. The Sprakab analyst could not speak Rohingya. It was his or her evidence, accepted by the Tribunal, that the entire interview had taken place in Bengali. It was on that basis that the conclusion was reached, with a “very high” degree of certainty, that the Appellant

spoke the kind of Bengali spoken in Noakhali. As illustrated in the paragraph above, that gave very little assistance to the Tribunal in determining why the Appellant might speak Rohingya. I find this ground to be made out. Much of the reasoning in the determination is concerned with the Sprakab report, but none of it grapples with that central issue.

12. Finally, Mr Khan submitted that the approach taken to the letter from the Bangladeshi High Commission was flawed for unfairness. The Appellant had been advised that he should contact the Bangladeshi authorities and seek a passport. That was because the burden lay on him to prove that he is in fact Burmese; in this case that involved him proving a negative, ie that he is not Bangladeshi. He did so, and the resulting letter is dated the 18th October 2016. It is not on a formal letterhead but bears the High Commission's address at the top, is signed by a TM Jobaer, who is designated a 'Minister (Consular)' and bears an official stamp. We know that the Presenting Officer had sight of this document before the hearing in April 2017, since she went to the trouble of conducting a check on whether there is in fact a TM Jobaer working at the Bangladeshi High Commission. She found that there was. She did not challenge the veracity of the letter in either cross examination or submissions.

13. Notwithstanding the Respondent's position the Tribunal found that no reliance could be placed upon the letter. Three reasons are given. First that the application form was not produced. Mr Khan points out that neither the Tribunal or Respondent had put the Appellant on notice that this was a document he should produce. It is not even clear if there was ever an application form, or whether Mr Jobaer simply wrote in response to an enquiry. Second, the Tribunal finds it to be "highly improbable" that TM Jobaer would have written a letter on paper without a letterhead. Again, Mr Khan submits that this is unfair. If the Tribunal was concerned about this matter it should have put the Appellant on notice of this forensic challenge and given him an opportunity to remedy the perceived defect in the evidence. Finally the Tribunal rejects the letter because it has already found the Appellant not to be credible. Whilst this might be a questionable application of the *Tanveer Ahmed*¹ principles, this was not a point taken by Mr Khan, who was content to focus on the procedural unfairness. Mr McVeety accepted that this ground was made out, and I entirely agree. The HOPO had not challenged the letter. In contrast she had submitted evidence, by way of a printout of embassy staff, capable of supporting it. In those circumstances the Tribunal should have put the Appellant on notice that it had concerns about the lack of letterhead and application form and given him an opportunity to respond.

14. With the consent of the Secretary of State, the determination of

¹ *TA v Secretary of State for the Home Department* [2002] UKIAT 00439

the First-tier Tribunal is found to contain errors of law such that it must be set aside.

The Re-Made Decision

15. The evidence in support of the Appellant's claim is as follows:
- i) He speaks Rohingya. The First-tier Tribunal found as fact that this is so (he had given all of his evidence before the Tribunal in Rohingya). Ethnologue notes that this is a language spoken in the Cox's Bazaar area of Bangladesh, amongst the population of Rohingya refugees from Burma.
 - ii) The Family Book. This states on the front that it was issued in Banu Khali 1 to the head of household 'Norul Islam'. The Appellant's name is listed amongst family members as the eldest son, born in 1986. The book contains ledgers relating to food entitlement for the family (rice, daal, oil etc) which show that food was received against a date stamped in the book - the first date stamped is (illegible) November 1992; the last is (illegible) July 1994. The book contains similar records in respect of medical treatment received by family members. The first treatment recorded is in February 1993 when the Appellant was treated for worms. The last is on the 5th September 1994 when his sister is treated for the same affliction. Other illnesses recorded during the two years covered in the book include fever and malaria. The entries in the book are recorded in various handwritings. The date stamps are of various depth of colour and clarity, suggesting that they were made using different stamps/ink pads. The book itself appears to be worn around the edges and to have sustained some damage to the front cover.
 - iii) The letter from the Bangladeshi High Commission. Mr TM Jobaer writes "you have applied for a Bangladeshi passport on 11-10-16. But your document reveals that you are a Myanmar national. As such, we are unable to provide you with a Bangladeshi passport". I read this document alongside the printout provided by the HOPO before the First-tier Tribunal confirming that TM Jobaer does work at the Bangladeshi HC.
 - iv) His evidence has been consistent at its core.
16. The Respondent submits that the following matters weigh against

the Appellant:

- i) The Family Book would have been required by the Appellant's family in the camp in order to access basic services, as illustrated by the contents. It is submitted to be implausible that his father would have given him that document, rather than retain it for the use of the family in the camp. The refusal letter further asserts there to have been alterations to some of the handwriting and "abrasions" to some of the pages. The UNHCR note that these books are all old, predating 1993, and that they did not contain security features; as such they are susceptible to tampering such as the adding/omission of names. It is not inconceivable that the Appellant simply bought the book to bolster a false claim for asylum.
 - ii) It is not considered plausible that the Appellant would have been able to escape from a hole in the fence in the refugee camp, nor that the authorities would have released him on bail having arrested him and threatened him with deportation to Burma.
 - iii) It is not plausible that the Appellant's boss would have helped him in the manner claimed.
 - iv) The Sprakab report indicates that the Appellant does not speak the kind of Bengali spoken in Dhaka, which indicates that he may not have spent as long in the city as he claims.
17. I find that the Appellant has demonstrated, to the lower standard of proof, that he is in fact a national of Myanmar of Rohingya ethnicity.
18. The fact that he has been largely consistent in his telling of his account is not a matter that I attach very significant weight to. A learned story can be consistent, just as a true account might very well become confused.
19. I am minded to attach significant weight to the now uncontested fact that he speaks Rohingya. There was no evidence at all before me to indicate that native Bangladeshis are able to speak that language. The people in Cox's Bazaar who use Rohingya do so because they are Rohingyas from Burma. I find it wholly improbable that the Appellant has learnt a whole language in order to found a false asylum claim. I also find it improbable, although less so, that he has managed by chance, perhaps by having Rohingya friends, to 'pick it up'. If he had made friends in the refugee community it is altogether more likely that they would learn Bengali

from him, given that they were all living in Bangladesh. The fact that the Appellant speaks Rohingya strongly indicates that he is of Rohingya origin. It also tends to suggest that he originates from Burma.

20. I attach significant weight to the Family Book. As to the plausibility point made by the Respondent, and adopted by the First-tier Tribunal, I accept that it is a submission of some force. The Appellant's family would have needed that book in order to obtain services within the camp. His evidence, however, was that his family were planning to leave the camp very shortly after the Appellant had gone. Whatever the reason for that, we cannot surmise. People in desperate circumstances make desperate choices. I accept that there is good reason why the Appellant is unable to offer an explanation for his father's actions: he was eight years old and he did what he was told. Although this point is not relied upon by Mr McVeety for the sake of completeness I address the point made by the First-tier Tribunal, that there was no need for the Appellant to have this book because he speaks fluent Bengali so could have passed for a local if questioned by the police. I discount this point: it is not the evidence that the Appellant was able to speak fluent Bengali when he left the camp, nor indeed immediately thereafter. He would have needed that document for several years to prove his identity, and there is no reason why he would have disposed of it.
21. The book itself is entirely consistent with the Appellant's account, in terms of the make-up of his family, and the dates that they were in the camp. Although I have only been given a copy, it is apparent from that that the book is appropriately aged. I bear in mind the objective evidence that these books were easily tampered with, given the lack of security features, but it is clear from the page entitled 'members of family' that this page has not been altered. The Appellant's name appears third in a list of seven, and so cannot have been simply added to an existing book. I am unable to tell, looking at the copy I have been given, what the Respondent means when she says that the handwriting has been altered in places. In the medical notes there are some words added in parenthesis, which I think refer to pharmaceutical prescriptions. I have been unable to identify any "abrasions". Before me Mr McVeety did not elaborate on what these might be. As I note above the entries in the book all have the appearance of being made by different people at different times. It appears to me to be authentic, and I place significant weight upon it.
22. I attach some weight to the letter from the Bangladeshi High Commission. This Tribunal is familiar with documents from institutions in and of South Asia, and I do not think that the lack of letterhead is itself unusual. Absent a challenge to the document's veracity I am prepared to treat it as genuine. I note that the Respondent has been in possession of Mr Jobaer's contact details since at least April 2017

and no attempt has been made to contact him. The letter is nevertheless of only limited weight, since it does not indicate the extent to which the Appellant tried to demonstrate that he might be entitled to Bangladeshi nationality. What can be inferred from the language used by Mr Jobaer is that he was provided with the Family Book, a document which he treated as genuine, and which established to his satisfaction, as a representative of the Bangladeshi government, that the Appellant was formerly a Rohingya refugee living in Bangladesh.

23. I have assessed the plausibility of the Appellant's account. For my part there is nothing at all in it that I find to be implausible. Parents across South Asia might send their eldest sons - as young as eight - off to find work. The Appellant was sent away with two other young men whom his parents knew from the camp. There is nothing inherently implausible in that. Nor in my view is it unlikely that the Appellant would manage to save money, or that his boss of some 20 years would help him in the way he describes - I bear in mind the evidence that the Appellant was a full time assistant in a small shop and the two men no doubt had built up a good relationship.
24. In my view the only evidence that really weighs against the Appellant is the Sprakab report, which concludes that the variety of Bengali that he speaks is associated with Noakhali as opposed to Dhaka. This is plainly at variance with the Appellant's own evidence about where he lived, and where he learnt Bengali. There may be a number of explanations for that. The analyst might be wrong. The Appellant may have lived in Dhaka amongst migrants from Noakhali and so picked up their vernacular. The Appellant might be lying about what he was doing in Bangladesh all of that time. I have given careful consideration to the latter possibility, but have concluded that it cannot defeat the Appellant's case. That is because the evidence in his favour is such that I am satisfied, on the lower standard of proof, that he is a Rohingya who formerly lived in Balu Khali 1. What he was doing in the intervening years cannot change that.
25. Accordingly I allow the appeal, since the Secretary of State has expressly conceded that if the Appellant is a national of Myanmar of Rohingya ethnicity, then his appeal must be allowed.

Decisions

26. The decision of the First-tier Tribunal contains a material error of law and it is set aside.
27. I remake the decision by allowing the appeal.

28. There is an order for anonymity.

Upper Tribunal Judge Bruce
27th November 2017