Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/00343/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 March 2018	**On 13 March 2018**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A A N (BANGLADESH)
[ANONYMITY ORDER MADE]

Respondent

Representation:

For the appellant: Ms Zakera Ahmed, a Senior Home Office Presenting Officer
For the respondent: Mr Gianpiero Franco, Counsel instructed by Scheider Goldstein Immigration

DECISION AND REASONS

Anonymity order

The First-tier Tribunal made an order pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. I continue that order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008: unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall identify the original appellant, whether directly or indirectly. This order applies to, amongst others, all parties. Any failure to comply with this order could give rise to contempt of court proceedings.

Decision and reasons

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal allowing the claimant's appeal against her decision to refuse him

international protection under the Refugee Convention or humanitarian protection grounds, or leave to remain on human rights grounds. The claimant is a citizen of Bangladesh.

Background

2. The claimant is now 34 years old. His Bangladeshi nationality is not disputed. He came to the United Kingdom on 8 October 2006 with a visa valid until 17 September 2007. He did not embark for Bangladesh and was arrested on 18 November 2007 as an overstayer. He then claimed asylum, citing in his screening interview on 22 November 2007, the risk arising from a land dispute in his home area. That application was unsuccessful. The claimant did not attend his appeal hearing on 18 April 2008 and his appeal was dismissed.

3. On 16 December 2013, the claimant made a further application for leave to remain, which was refused on 18 December 2013. That decision was not challenged.

4. The claimant's present appeal arises out of his association with the opposition Bangladesh National Party (BNP) both in Bangladesh and in the United Kingdom. The claimant made further submissions on 5 February 2016, saying that in March 2011 politically motivated trumped-up charges had been filed against him in Bangladesh, that he had been convicted *in absentia* and sentenced to 4 years' imprisonment, and that if returned to Bangladesh he would be imprisoned, ill-treated, and possibly killed. The claimant also said that he had been taking part in BNP diaspora activities in London.

5. On 12 February 2016, the Secretary of State refused the claimant's application for protection, in a 26-page refusal letter, with an in-country right of appeal. She considered that a letter from the BNP's Sylhet Mohangor Branch, confirming that the claimant was President of the BNP's student branch during his studies at Modon Mohan University College, lacked credibility because at his screening interview in 2007, he had not mentioned attending the College. She also considered that the claimant had failed to mention his BNP affiliation or the risks it entailed, in 2007 at the screening interview, and that his reliance thereon in 2016 was a fabrication.

6. No section 94 or section 96 certificates were applied to the decision letter. The claimant had a full in-country right of appeal to the First-tier Tribunal, which he exercised.

First-tier Tribunal decision

7. The First-tier Tribunal Judge heard oral evidence (set out at [12]-[16] of the decision) and considered documents as follows:

   - A letter from the President of the Sylhet Mohangor BNP Branch, confirming that the claimant joined the BNP in 2003 and was President of the student branch of the BNP at Modon Mohan University College;

   - A letter from the claimant's Bangladesh lawyer, confirming his account of the criminal charge raised in 2005, leading to his conviction *in absentia* in March 2011. The lawyer's letter says that the claimant and several other men were arrested on 25

February 2005 in connection with an alleged assault on 23 February 2005, in which the claimant and his co-defendants were said to have viciously assaulted a man, breaking his hand in two with iron rods. The alleged victim's father filed a First Information Report (FIR). The claimant and his co-defendants were all detained for a week, then released on bail. All of them absconded. The State called 11 witnesses, the trial concluded on 17 March 2011, and the claimant was sentenced to 4 years' 'rigorous imprisonment'. The Court was satisfied that it was safe to convict him based on the evidence of one eyewitness. A warrant of conviction was issued. A newspaper report from a local newspaper, dated 18 March 2011, reporting the conviction and sentence.

8. The appeal had been adjourned from 8 August 2016 to 3 February 2017 to give the Secretary of State an opportunity to verify the documentary evidence. At the beginning of the 3 February 2017 hearing, the Home Office Presenting Officer told the Tribunal that the Secretary of State had not taken that opportunity, that she had no verification report, and that she had no instructions on why the Secretary of State, having asked for time to verify, had not done so. The First-tier Tribunal Judge treated the letter from the Sylhet Mohangor BPN Branch and the claimant's lawyer as reliable documents on *Tanveer Ahmed* principles. The Judge also accepted the claimant's evidence of his BNP diaspora activities in the United Kingdom, and treated him as a credible witness overall.

9. In particular, the Judge recorded at [15] the claimant's explanation as to why he did not disclose the alleged BNP-related conviction in Bangladesh when he learned about it in 2011. The claimant told the Tribunal that before the 2016 application, he did not mention it because he was not able to provide the documentary evidence which his protection claim required. The claimant said that to obtain Court documents and orders, he first had to pay the lawyer in Bangladesh about £3000 for his fees; his father was retired and the claimant could not burden him with that expense. The claimant 'had to sort this out himself' and worked when he could, borrowing money from friends and family members living outside Bangladesh, until he had sufficient funds to obtain the documentary evidence to support the claim he was now making. The judgment includes country evidence which is supportive of the claimant's account of politically motivated violence and ill-treatment and of impunity where abuses occurred.

10. At [25], the Judge noted the adverse credibility finding by the Secretary of State, based on section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. He took the approach set out by the Upper Tribunal in *SM* (Section 8: Judge's process) Iran [2005] UKAIT 00116 and assessed the evidence as a whole. The Judge was satisfied that the claimant had given credible evidence, and a credible and plausible explanation of the delay in advancing the BNP claim.

11. The Judge applied paragraph 339K of the Immigration Rules HC395 (as amended). Having accepted that the claimant had previously been detained and questioned in Bangladesh in 2005, and that the events before his departure were capable of amounting to persecution, he was not satisfied that there had been a change in

circumstances such that there was now no risk of persecution or serious harm. He allowed the appeal under the Refugee Convention and Article 3 and 8 ECHR.

Permission to appeal

12. The Secretary of State sought permission to appeal, out of time, arguing that the Judge had not placed sufficient weight on her assessment of the claimant's credibility; that the Judge had given insufficient reasons for accepting the claimant's reason for the delay; that the decision was not sufficiently reasoned to allow her to understand properly why the appeal had been allowed; that the material matters in dispute had not been sufficiently reasoned (see *South Bucks District Council and another v Porter* [2004] UKHL 67); and in particular, that the difference between the claimant's screening interview in 2007, and his current claim, had not been adequately considered or explained; and that, applying *Tanveer Ahmed,* it was not open to the Judge to find that the documents were reliable.

13. The Secretary of State now said that she had in fact obtained a verification report in November 2016, on which she would seek to rely if the appeal was reheard, but that she would not rely thereon in the error of law hearing. That report is not in evidence for this error of law hearing and I can give no weight to a document I have not seen.

14. Permission was granted by Upper Tribunal Judge Canavan who extended time for appealing. The basis of the grant is at [3] in her decision:

> "3. The grounds seek to challenge the credibility findings made by the First-tier Tribunal. Many of the Judge's findings were likely to be open to her to make, but it is at least arguable that the Judge failed to give reasons to explain why she found the [claimant's] explanation for the delay in claiming asylum 'credible and plausible' [25] and failed to engage adequately with the points raised in the decision letter. The grounds of appeal merit more detailed consideration at a hearing."

Rule 24 Reply

15. The claimant did not file a Rule 24 Reply following the grant of permission to appeal. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

16. At the hearing, Ms Ahmed for the Secretary of State recognised that the Secretary of State had not provided the First-tier Tribunal with the verification report which was contemplated, and for which the hearing had been expressly adjourned. Ms Ahmed relied on *South Bucks v Porter* at [36] in relation to the particularity of reasoning required.

17. Ms Ahmed also relied on section 8 of the 2004 Act as determinative, or very heavily persuasive, in relation to the claimant's explanation of the delay in claiming international protection on the BNP risk grounds, and the difference between his allegation of a local land dispute in the screening interview in 2007, and his BNP-based protection claim on the basis of his conviction, in 2016.

18. She confirmed that section 96 had not been invoked in the refusal letter and that her file note of the Secretary of State's closing submissions, like that of the First-tier Tribunal on the Tribunal file, did not mention any reliance on section 8.

19. I did not consider it necessary to call on Mr Franco for the claimant.

Discussion

20. There are two main issues here, the first whether the Judge was entitled to differ from the Secretary of State in her assessment of the claimant's credibility. That is unarguable: this was a full rehearing on the facts, the First-tier Tribunal Judge heard the claimant's oral evidence, and she explained, albeit briefly, why she believed him.

21. I turn first to the question of adequacy of reasoning. At [36] in the decision of the House of Lords in the *Porter* case, Lord Brown of Eaton-under-Heywood, with whom Lord Steyn, Lord Rodger of Earlsferry and Lord Carswell agreed, the following guidance was given:

> "36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. ... A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

22. The *Porter* decision was in the context of a planning case. A similar approach was taken more recently by the Court of Appeal in *EA v Secretary of State for the Home Department* [2017] EWCA Civ 10 at [27] by Lord Justice Burnett, with whom the Chancellor of the High Court, Lord Justice Vos agreed:

> "27. Decisions of tribunals should not become formulaic and rarely benefit from copious citation of authority. Arguments that reduce to the proposition that the F-tT has failed to mention dicta from a series of cases in the Court of Appeal or elsewhere will rarely prosper. Similarly, as Lord Hoffmann said in *Piglowska v Piglowski* [1999] 1 WLR 1360, 1372, "reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account". He added that an "appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself". Moreover, some principles are so firmly embedded in judicial thinking that they do not need to be recited. For example, it would be surprising to see in every civil judgment a paragraph dealing with the burden and standard of proof; or in every running down action a treatise, however short, on the law of negligence. That said, the reader of any judicial decision must be reassured from

its content that the court or tribunal has applied the correct legal test to any question it is deciding."

23. The Secretary of State relies on section 8 of the 2004 Act as weighing heavily against the claimant on credibility. *SM (Judge's process)* remains authoritative on that issue, the principal guidance being at [8]-[10] of the Tribunal's decision:

> "8. The impact of section 8 will no doubt be different in different types of case. In cases where there is some reason to doubt a variety of elements of the Appellant's story, the effect of section 8 may well be simply to reinforce the salutary principle that if a person does not appear to be telling the truth on those parts of his evidence that can be checked, there is no real reason for believing that he is telling the truth in those parts of his evidence that cannot be checked. Where, on the other hand, for example, a person appears to be telling the truth about having passed through a number of countries on his or her journey to the United Kingdom, the effect of section 8 on a deciding authority will be to draw clear and specific attention to certain features of the evidence as aspects which must (by statute) be regarded as casting some doubt upon the credibility of the Appellant's claim to be a refugee.
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> 9. Given the terms of section 8, it is inevitable that the general fact-finding process is somewhat distorted, but that distortion must be kept to a minimum. There is no warrant at all for the claim, made in the grounds, that the matters identified by section 8 should be treated as the starting point of a decision on credibility. The matters mentioned in section 8 may or may not be part of any particular claim; and their importance will vary with the nature of the claim that is being made, and the other evidence that supports it or undermines it. In some cases, (of which the most obvious are perhaps those where there is contested evidence about the journey to the United Kingdom) it will simply not be possible to know whether section 8 applies until a preliminary view has been taken on the credibility of some other part of the evidence.
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> 10. In our judgment, although section 8 of the 2004 Act has the undeniably novel feature of requiring the deciding authority to treat certain aspects of the evidence in a particular way, it is not intended to, and does not, otherwise affect the general process of deriving facts from evidence. It is the task of the fact-finder, whether official or judge, to look at all the evidence in the round, to try and grasp it as a whole and to see how it fits together and whether it is sufficient to discharge the burden of proof. Some aspects of the evidence may themselves contain the seeds of doubt. Some aspects of the evidence may cause doubt to be cast on other parts of the evidence. Some aspects of the evidence may be matters to which section 8 applies. Some parts of the evidence may shine with the light of credibility. The fact-finder must consider all these points together; and, despite section 8, and although some matters may go against and some matters count in favour of credibility, it is for the fact-finder to decide which are the important, and which are the less important features of the evidence, and to reach his view as a whole on the evidence as a whole."

24. I note that there is no record, either on the Secretary of State's file note or the manuscript note kept by the First-tier Tribunal Judge of the closing arguments before him, to indicate that section 8 was relied upon by the Secretary of State at the First-tier Tribunal as determinative or supportive of a negative credibility finding. I note, also, that the respondent did not certify the further submissions under section 96 of the 2002

Act. The Judge in this case found the claimant to be a person who appeared to be telling the truth about events in Bangladesh and the United Kingdom.

25. The point about the screening interview is a weak one. When he came to the United Kingdom, the claimant had been detained and released on the basis of a politically-motivated assault charge. He had no documents to prove that had occurred.

26. The asylum screening interview was in November 2007. The conviction and sentence now relied upon occurred in March 2011. The claimant cannot be criticised for failing to disclose an event which had not yet occurred, or the risk it entailed on return.

27. I consider that the First-tier Tribunal Judge gave proper, intelligible and adequate reasons for finding the claimant's evidence to be credible, and not significantly damaged by the delay in claiming. He did take account of the negative view taken on credibility in the refusal letter, but having heard and seen the claimant give evidence, he took a different view. He was fully entitled to do so, for the reasons he gave.

28. The arguments advanced now by the Secretary of State are a disagreement with findings of fact and credibility which do not come close to the standard set for interference with findings of fact and/or credibility at [90] in the judgement of the late Lord Justice Brooke in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982.

29. The Secretary of State's appeal is dismissed.

DECISION

30. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law I do not set aside the decision but order that it shall stand.

Date: 9 March 2018 Signed *Judith AJC Gleeson*

Upper Tribunal Judge Gleeson