Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07369/2017

THE IMMIGRATION ACTS

Heard at: Field House
On: 28th June 2019

Decision & Reasons Promulgated
On: 23rd August 2019

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

AR
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr West, Counsel instructed by Kalam Solicitors
For the Respondent: Ms Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Bangladesh born in 1991.

2. He seeks protection on the ground that he has a well-founded fear of persecution in Bangladesh for his political/religious belief. He states that he is an atheist and that he has publicly declared as much on his Facebook page. He has spoken about women's rights and made statements attacking conservative Islamic values. He fears that these beliefs have brought him to the adverse attention of Islamic fundamentalists who will seek to harm or kill him, and asserts that he

has received threats to that effect online. A second limb of the Appellant's case is that in 2009 he was a witness to an assault on a friend of his by a gang known to have associations with the Awami League. The Appellant gave a statement to the police and agreed to go to court to testify. As a result he fears politically motivated retribution.

3. This account has twice been rejected by the First-tier Tribunal. On the 14th September 2017 First-tier Tribunal Seelhoff dismissed his appeal, and on the 6th March 2019 Judge NMK Lawrence did the same. Judge Seelhoff's determination was set aside by the Upper Tribunal without objection by the Secretary of State; so it is with the decision of Judge NMK Lawrence. That is a most unfortunate state of affairs, particularly where the errors resulting in these decisions being set aside are largely the same: a failure to consider the evidence with anxious scrutiny and conduct a proper *Tanveer Ahmed* assessment of the documentary evidence.

4. Judge NMK Lawrence conducted an extensive forensic analysis of the evidence relating to the attack on the Appellant's friend. He gave several reasons for rejecting this account. Before me Ms Everett was bound to concede that at least some of these reasons were unsustainable and that being so, the credibility findings overall were infected by error. That was a concession properly made and had it not been, that would almost certainly have been my own conclusion. Among the errors are these:

   a. Failure to reflect a complete and holistic reading of the evidence, and to take material evidence into account. The Judge found there to be discrepancies in the evidence of the Appellant in relation to how many men attacked his friend. In his screening interview he said that it was "5 or 6". In his asylum interview he said that it was "6". That is identified as a discrepancy at paragraph 10 of the determination. Had that been the extent of the adverse finding I would have found it to be perverse, since it is plainly not really a discrepancy at all. The Judge goes on, however, to record that the Appellant later claimed there to be 9 assailants. I accept that this is a more significant inflation and that had that been the evidence, it would properly have been a matter that a decision-maker could take into account. The error here arises, however, from a failure to recognise material evidence, that being the Appellant's explanation that there were about 9 men who arrived at the scene by motorbike, with only some – i.e. 5 or 6 – dismounting to conduct the attack (see for instance Q56, 74 AIR).

   b. Perversity. At paragraph 21 the Judge draws adverse inference from the fact that the Appellant gave various descriptions of the site of the attack on his friend, it being referred to as 'Red Field', 'Red Ground' and 'Lal Field'. Although the Tribunal does acknowledge it to be a minor point, it is mentioned twice and features in the reasoning. I find it to be irrational. First because it is, again, not really a discrepancy at all ('Lal' meaning 'red' in several

languages of the subcontinent including Bengali) and second because the Judge has completely failed to take into account the fact that in all three instances the Appellant's words were being translated into English by a different interpreter.

c. Placing undue weight on the answers given at screening interview and failing to apply the guidance in YL (rely on SEF) China [2004] UKIAT 00145. The Tribunal attaches weight to the Appellant's failure to mention details in that initial interview without taking into account the fact that interviewees are expressly instructed not to give detailed accounts on that occasion.

d. Perversity (II)/unclear reasoning. The Tribunal draws adverse inference from the fact that the Appellant was in oral evidence unable to give the exact date of the attack on his friend in May 2009. This is found to a be particularly egregious failure because the Appellant could have read his own documentary evidence (i.e. the contemporaneous deposition he gave to the police in Bangladesh) in order to regurgitate the date:

> "… it is not too much to expect the appellant to have downloaded the documents sent to him by email and read them to refresh his memory and provide a [more] definitive answer than "*I think*". This vague answer undermines his credibility".

I find this reasoning to be baffling. The measure of risk in protection cases is not to be conducted by way of memory testing.

5. For those reasons the decision in respect of the 2009 attack is set aside.

6. As Ms Everett accepted, it is unfortunately the case that the Tribunal's reasoning on the entirely unrelated *sur place* limb of the Appellant's case must also be set aside. That is because the central reason for rejecting this element of the claim is that he has rejected the other, ie the claimed events in Bangladesh. I accept that as a matter of principle an adverse credibility finding will inevitably feed into the overall assessment, but the consequence of that is that where that adverse assessment is found to be unsafe the whole decision will collapse. What the *sur place* material required here was an assessment of whether there was a real risk that the threats made to the Appellant online did indeed emanate from conservative Islamists who would seek to do him harm, and that assessment had to be made taking objective country background material into account. It is not apparent from the determination that such a rounded assessment was made.

7. Given that the whole decision needs to be made again I agree with Mr West that the most appropriate forum to do that would be the First-tier Tribunal. I therefore remit the matter. In light of its history I do so with considerable reluctance, in the hope that it will not be returning to the Upper Tribunal again.

Anonymity Order

8. 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"

Decisions

9. The determination of the First-tier Tribunal is set aside for error of law.

10. The decision is to be remade in the First-tier Tribunal.

11. There is an order for anonymity.

Upper Tribunal Judge Bruce
29th June 2019