IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003686

First-tier Tribunal Nos: PA/50513/2023
LP/02548/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 23rd of October 2024

Before

UPPER TRIBUNAL JUDGE RASTOGI

Between

MMA
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Arafin, Counsel instructed by Shahid Rahman Solicitors
For the Respondent: Mr E Tufan, Senior Presenting Officer

Heard at Field House on 14 October 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellant entered the United Kingdom in 2008. He was encountered then claimed asylum on 23 March 2012 which was refused with no right of appeal. He submitted further submissions on 1 March 2022 on protection grounds on the basis of his membership of the BNP in Bangladesh and in the United Kingdom from 2015 onwards and he is subject to two false police cases for which he has been tried and sentenced in absentia. Since being in the United Kingdom he had attended a number of protests and demonstrations as a member of that party. His asylum claim was refused by the Respondent on 30 December 2022. He appealed that decision and his appeal was heard by First-tier Tribunal Judge Hussain ("the judge"). By way of a decision dated 19 June 2024, the judge dismissed the appellant's claim on protection and human rights' grounds ("the decision"). The appellant appealed the decision to the Upper Tribunal on five grounds and First-tier Tribunal Judge Grant granted permission on all of them on 8 August 2024.

2. At the error of law hearing I had the benefit of a 461 page bundle and a skeleton argument which Mr Arafin produced on the day of the hearing. I heard submissions from both representatives and at the end of the hearing I indicated there was likely to be an error of law in relation to the sur place activities (ground 3) but I formally reserved my decision.

The Legal Framework

3. The appeal to the First-tier Tribunal was pursuant to Section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") and the jurisdiction of the First-tier Tribunal was to decide whether the respondent's decision breached the obligations of the United Kingdom under the Refugee Convention or the European Convention on Human Rights.

4. Pursuant to Sections 11 and 12 of the Tribunal and Enforcement Act 2007 ("the 2007 Act") the appellant has the right to apply for permission to appeal to the Upper Tribunal to establish if an error on a point of law has been made.

The Grounds of Appeal

5. The appellant raises five grounds of challenge to the decision summarised as follows:

   Ground 1. The judge failed to apply the correct standard of proof applying MAH (Egypt) v Secretary of State for the Home Department [2023] EWCA Civ 216 and the judge also failed to take into account relevant evidence, particularly the Country Policy and Information Note, Bangladesh: Political parties and affiliations, version 3, September 2020 ("the political CPIN").

   Ground 2. The judge failed to consider the evidence in the round applying Karanakaran v Secretary of State for the Home Department [2000] EWCA Civ 11.

   Ground 3. The judge failed to assess the appellant's sur place activities against the CPIN and in light of case law WAS (Pakistan) v Secretary of State for the Home Department [2023] EWCA Civ 894 and in light of his involvement with the BNP in Bangladesh and the United Kingdom.

Ground 4. The judge failed to have regard to relevant factors.

Ground 5. In considering the appellant's Article 8 claim the judge failed to properly apply the case law in Kamara [2016] EWCA Civ 813 and failed to carry out a balancing exercise and balance relevant factors to that exercise in order to decide whether the respondent's decision leads to unjustifiably harsh consequences for the appellant, particularly taking into account his sixteen year residence in the United Kingdom.

6. The relevant part of the grant of permission to appeal says as follows:

> "It does appear that the judge has either not given any or not given any clear reasons or findings in respect of the oral evidence of the Appellant as to the two police cases against him. This should have been considered alongside the documents. Ground 2 is therefore arguable. This infects the entire asylum/credibility assessment and therefore there is no need for me to deal with ground 1. I further find ground 3 arguable as it is either wrong not to consider the available objective evidence and law or at the very least to give reasons for not doing so. Paragraph 60 is arguably far too brief. Ground 4 is too unparticularised but the conclusions on asylum are tainted by the errors on ground 2 and 3 in any event.
>
> Ground 5 is made out. There is no proper consideration at all as to very significant obstacles to integration, which is particularly striking given the amount of time spent in the UK. It is furthermore arguable that no proper balancing exercise is carried out".

The Decision of the First-tier Tribunal

7. At [3] the judge set out the basis of the appellant's protection and human rights claim noting that his human rights claim comprised Articles 2, 3 and 8 rights. The judge set out extensively the reasons given in the refusal letter for rejecting the appellant's protection and human rights claim including that the respondent accepted the appellant was a low level member of the BNP [11]. From [24] onwards the judge set out extensively the appellant's evidence as contained within his witness statement and then his oral evidence. At [45] to [47] the judge set out the legal framework and the correct burden and standard of proof that apply in this type of appeal.

8. From [48] the judge set out his findings. He noted at [49] that the issue of the appellant's risk based on his membership of the BNP was an issue within the appeal. He noted that the appellant's case as to risk relied primarily on the bringing of two false police cases against him. At [50] the judge said he had considered the totality of the evidence and then set out in summary terms that the appellant was unable to show a sufficient basis subjectively or objectively on which he should fear persecution on return. The judge then went on to set out his reasons for coming to that conclusion.

9. The judge noted at [51] aspects of the appellant's account which he found contradictory and of concern. From [53] he assessed and evaluated the documentary evidence on which the appellant relied, particularly with reference to the two police cases. The first of those dated back to 1995 and the judge dealt with that at [53]. The second dated from 2018 but concluded in 2024. The judge

concluded at [59] that the appellant's evidence was not reliable and rejected his claim that he is the subject of any police cases at all.

10. At [60] the judge concluded that the appellant had not produced any evidence from which the judge could reasonably infer that as a low level BNP supporter any of his activities in the UK had attracted the attention of the authorities in Bangladesh and, even if it had, it is not reasonably likely he would be identified on return and thereafter persecuted.

11. Moving on to the appellant's human rights claim, the judge adopted the respondent's reasoning in the refusal letter [62]. From [63] to [66] the judge assessed the expert evidence of 26 April 2024 regarding the appellant's mental health, noting it was prepared in absence of any medical notes from the appellant's general practitioner. The judge recognised that he is not to challenge the expert's findings that the appellant suffers from severe depression, profound anxiety, severe stress, high perceived stress, severe post-traumatic stress disorder ("PTSD") and moderate risk of suicide but he made the observation at [64] that the diagnosis was based on a single interview with the appellant and in the absence of evidence of any prior attempts at suicide or indeed suicidal thoughts. He noted at [65] that the conditions do not appear to have arisen as a result of political problems but rather the appellant's personal situation. And finally at [66] he noted the appellant was not receiving any treatment for his symptoms and the evidence in the refusal letter about the availability of treatment in Bangladesh. Having carried out that assessment the judge concluded at [67] "in view of the above, the conclusion to which I have come is that appellant has not shown that if he is not granted leave to remain there would result in unjustifiably harsh consequences".

12. Under the heading 'Notice of Decision', the judge returned to the legal framework for protection and human rights' claims and dismissed the appeal on all grounds.

Discussion and Conclusions

13. I deal first with ground 3 where the appellant challenges the judge's assessment of the appellant's sur place activities. I can deal with this fairly summarily because of the particular wording that the judge used at [60] of his decision. There, the judge made reference to not being provided with any evidence from which he could reasonably infer that any of the appellant's activities including in the UK had come to the attention of the authorities in Bangladesh.

14. Here the judge fell into error because in the appellant's skeleton argument, the judge had been referred directly to to paragraph 2.4.6 of the political CPIN in which reference is made to the Bangladeshi government's surveillance of sur place activities such as those that the appellant carried out. At no point within his decision had the judge rejected the appellant's evidence that he attended demonstrations and protests so in my judgement it was incumbent upon the judge to assess whether or not those activities were reasonably likely to have attracted the attention of the authorities in Bangladesh. To say there was no evidence from which an inference could be drawn is incorrect given the content of the CPIN to which I have just referred. This failure to have regard to what is clearly relevant evidence on this topic or to provide any reasons as to why such evidence is not sufficient to give rise to a risk that the appellant may have come

to the attention of the authorities in Bangladesh as a result of his sur place activities notwithstanding the content of paragraph 2.4.6 of the CPIN is an error of law.

15. Grounds 1 and 2 both deal with the judge's assessment of the appellant's claim to be at risk from the Bangladeshi authorities as a result of two police cases having been brought against him. There are a number of facets to the appellant's challenge of the judge's assessment of this evidence. The first is that the judge failed to consider the political CPIN as regards the propensity of the Bangladeshi government to use the judicial process as a form of targeting political opponents (see paragraph 10.2.6 and 10.2.10 of the political CPIN). In the appellant's skeleton argument at paragraph 26 the judge was specifically directed to the Actors of Protection Country Policy and Information Note, version 1, April 2020 ("the protection CPIN") at paragraph 2.5.3 which also refers to political affiliation acting as a "motive for the arrest and prosecution of people on criminal charges". At paragraph 10.2.7 it says "political affiliation often appeared to be a factor in claims of arrest and prosecution of members of opposition parties, including through spurious charges under the pretext of responding to national security threats".

16. There is no indication from the decision that the judge considered the background country information contained in either of these two CPINs. In my judgement that was an error. One of the established ways of assessing credibility is to assess the extent to which the appellant's account is consistent with background country evidence. Whilst Ground 1 seems to identify this challenge as the judge failing "to apply the correct burden of proof", I do not find that to be the case. But I am satisfied that the judge failed to have regard to material evidence on this issue (which also formed part of the challenge within Ground 1) or considered the reliability of the documentary evidence about the police cases in light of that evidence. It is clearly material as it goes to the core of the appellant's case.

17. My decision on the above issue is enough to put into doubt the safety of the judge's conclusions about the core of the appellant's protection claim and I do not need to address any remaining issues arising from Ground 2 (although in my judgement they are related).

18. Ground 4 is insufficiently particularised and I do not find it made out.

19. Dealing with Ground 5, as was noted in the grant of permission, the judge's Article 8 assessment is brief. In submissions, Mr Tufan relied on the case of Ghelisari [2004] EWCA Civ 1854 to submit that it was not an error of law to adopt the Secretary of State's reasoning in the refusal letter if the judge felt that was appropriate justification for a decision. In effect, this is what the judge purported to do at [62] of his decision where he said:

> "In so far as the appellant's human rights claim is concerned, the respondent has dealt with it adequately. In my view, the appellant's private life claim cannot succeed under the rules. In so far as his claim outside the rules is concerned, he has to demonstrate that his circumstance is exceptional. This means that he has to show that if he is not granted leave, there would be unjustifiably harsh consequences for him".

20. Having said this, the judge then immediately moved on to evaluate the expert evidence regarding the appellant's mental health before coming to the conclusion that the appellant had not shown unjustifiably harsh consequences [67]. No other factors were expressly referred to.

21. At [11] of Gheisari, Sedley LJ said:

> "I have no difficulty in accepting that where the Home Office refusal letter sets out coherent reasons for rejecting an account and the adjudicator having independently considered the question agrees with them, it is permissible for him or her, having set them out, simply to say so. The Home Secretary's reasons then become the adjudicator's by express adoption. But if they turn out to be inadequate, so will the adjudicator's decision be.

22. Therefore, in order to assess whether or not this ground is made out, it is necessary to turn to the respondent's dealing of the appellant's human rights as contained within the refusal letter.

23. The respondent's decision on human rights starts at para. 32 (see page 55 of the appeal bundle). As far as private life within the Immigration Rules is concerned the respondent notes at [35] that the appellant entered the UK in August 2008 and therefore (at that time) had been in the UK for thirteen years. At [36] the respondent noted the appellant's cultural and linguistic links with Bangladesh, that he is "a fit and healthy male" and that he had lived in Bangladesh for 33 years prior to arriving in the UK. Therefore the respondent concluded the appellant had not shown an inability to reintegrate back into Bangladesh or that there are any significant obstacles to him doing so and he relied on the extreme fortitude the appellant had shown to establishing himself in the UK and that he could replicate that on return to Bangladesh. From [37] onwards the respondent considered whether or not the appellant could show any exceptional circumstances for a grant of leave on Article 8 grounds and it is at this point the respondent considered the appellant's claim that he suffered from anxiety and depression as well as cholesterol. However, the respondent concluded at [42] that there is treatment available in Bangladesh for mental health issues and therefore those issues do not amount to an exceptional circumstance, particularly as they do not reach the necessary Article 3 threshold. Therefore the respondent concluded the appellant had not shown sufficient grounds to warrant a grant of leave under Article 8 [43] or Article 3 [50]. It was within that assessment that the respondent noted the lack of evidence to support the appellant's claim to suffer from anxiety and depression [45]. Finally, the respondent decided not to exercise discretion to grant leave to remain in the UK [53].

24. There is a statutory obligation on the Tribunal to have regard to the factors set out, particularly, at section 117B of the 2002 Act assuming that one's Article 8 rights are engaged either by way of private or family life. In this instance, the judge failed to acknowledge whether or not Article 8(1) is engaged in the appellant's case. The appellant has lived in the United Kingdom for some sixteen years by the date of hearing and on the face of it that period of residence alone albeit unlawful, would be sufficient to engage Article 8(1). The judge failed to carry out a structured approach to the assessment of Article 8 (as required by Razgar [2004] UKHL 27) by considering whether or not the appellant's removal potentially engages Article 8(1) or whether or not any of the factors in the public interest justify such interference. In so doing, the judge also failed to have

regard to the factors set out in Section 117B of the 2002 Act and what factors appear on both the respondent's and the appellant's side of the balance sheet. The brief reference to those as contained within para. 62 of the refusal letter do not, in my judgment, rescue this failure. The respondent did not undertake such a structured exercise either and in any event there was evidence before the Tribunal at the date of hearing which was not before the respondent at the date of the refusal letter, for example, the expert evidence on the appellant's mental health and the increased length of residence from the date of the refusal letter. Although the judge made certain comments which appear to suggest he was attaching less weight to the expert evidence it was clear from what he said at [64] and [65] that he was not resiling from the findings of the expert about the appellant's mental health conditions.

25. Whilst it may be that the balancing exercise would resolve itself in the respondent's favour (and I note here the judge's alternative findings that there was no evidence that any treatment the appellant required was not available in Bangladesh [66]), that does not mean to say that the appropriate exercise should not have been carried out with a full assessment of the factors on both sides of the balance sheet. Given the combination of factors on the appellant's side of the balance sheet, a negative outcome was by no means inevitable. In my judgment this was a material error of law.

26. Given the extent of material errors within the judge's decision, I find it necessary to set aside the whole decision without any preserved findings. For that reason, whilst I have discretion to retain the re-making in the Upper Tribunal, I find that the extent of fact-finding means that it is necessary to remit the appeal to the First-tier Tribunal for the decision to be re-made pursuant to section 12(2)(b)(i) of the 2007 Act. There were no submissions to the contrary.

Notice of Decision

The decision involved the making of errors of law.

The decision is to be re-made by any judge of the First-tier Tribunal except Judge Hussain.

S J Rastogi
Judge of the Upper Tribunal
Immigration and Asylum Chamber

21 October 2024