



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/00443/2017

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice
On 22 May 2017

Decision & Reasons Promulgated
On 5 June 2017

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR MOHAMED SOHEL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Wilford, Counsel, instructed by Duncan Lewis & Co
Solicitors

For the Respondent: Mr N Bramble, Senior Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Hembrough promulgated on 14 February 2017 dismissing his appeal against the respondent's decision of 4 January 2017 to refuse his claim for asylum.

The Appellant's Case

2. The appellant arrived in the United Kingdom in 1996 with leave to enter as a visitor. He has remained here since. An application for leave to remain on compassionate grounds was refused on 29 January with no right of appeal and on 24 September 2016 he was encountered whilst working illegally, arrested and subsequently claimed asylum. That claim was refused on 4 January 2017.
3. The appellant's case is that he is at risk on return to Bangladesh on account of his political opinion as a former member of the BNP and on account of being a gay man. His case is that he is a member of the BNP since 1991, having helped organise demonstrations, and, being between 1992 and 1996 a publicity secretary. In 1995 he was attacked in his local bazaars by members of the Awami League and beaten; as a result he was hospitalised for six days. His father reported the matter to the police but they refused to take any action. He was also, he says, threatened by members of the Awami League between ten and twelve times during the 1996 election campaign and that he fears return to Bangladesh and that he would be targeted by a member of the Awami League who are now in power.
4. The appellant states that he realised he was gay around 1995 and that his relationship with a friend, Bilal, was discovered by his family. The appellant has not had any same sex relationships either in Bangladesh with anyone else or in the United Kingdom and fears that if returned to Bangladesh he would not be able to live openly as a gay man.
5. The appellant also stated that he was at risk on from an agent in Bangladesh to whom he owed money.
6. The respondent did not accept the appellant's case either to have been involved with the BNP nor did she accept that the appellant is gay nor, for that matter did she accept that the appellant was at risk from an agent who had brought him to the United Kingdom and to whom he owed money.
7. When the matter came before Judge Hembrough the appellant's representatives requested that the matter be adjourned on the basis that a witness might be available who would have access to the appellant's BNP membership card and medical evidence confirming that he had been ill-treated by members of the Awami League in 1995. The judge rejected that application, noting that the appellant has had ample time to prepare his case and that the documents that he sought to adduce would not assist in assessing the risk on return.
8. The judge found that: -
 - (i) taking the appellant's claim at its highest, he was a low-level member of the BNP in his local area [39]; did not come to the adverse attention of the authorities whilst living in Bangladesh; had not had any significant profile with the BNP; and, the repercussions of his claimed involvement in one incident of violence did not extend beyond its immediate aftermath [41];

- (ii) appellant had not engaged in any political activity since 1996 indicating a lack of ongoing commitment to the BNP cause or continuing interest in Bangladeshi politics;
 - (iii) having had regard to the appellant's profile and conduct since coming to the United Kingdom, that he would engage in activity on return to Bangladesh which would create a real risk of him coming to the adverse attention of the authorities [42];
 - (iv) even were he to have difficulties with the Awami League in his local area he could avoid that by relocation within Bangladesh and it would not be unduly harsh to expect him to do so [43];
 - (v) he was not satisfied that the appellant is a gay man [49], given [50] the failure to provide a clear and coherent account of the realisation of his sexuality; that he could not remember Bilal's surname and had made no inquiries about what happened to him after he had been thrown out of the house [51]; that he was not satisfied by the appellant's explanation that he had not taken any steps to express his claimed sexuality in the United Kingdom since 1996 as being due to his concerns that news might get back to Bangladesh given that his family already knew that he was gay having been caught in the past and having been ridiculed within the community [53]; but
 - (vi) even if he were a gay man, it was clear that he had lived his life in the United Kingdom privately not out of fear of persecution but because of his natural disposition [54];
 - (vii) he was not satisfied by the appellant's account that he was at risk from an agent, given. findings on credibility [55];
 - (viii) Article 8 had not been pursued at the hearing [60].
9. The appellant sought permission to appeal on the grounds that the judge had erred: -
- (i) in failing to adjourn the case when additional evidence was available [8];
 - (ii) that there was an inconsistency between the judge's self-direction [45] that an appellant's sexuality cannot be determined by a checklist of factors such as an active sex life, attendance at gay bars, subscription to gay media, etc., the judge had at [53] erred by rejecting the appellant's case on the basis that he had not taken steps to express his claimed sexuality;
 - (iii) that the judge had erred in failing properly to follow **HJ Iran [2012] UKSC 38** in finding that the appellant could conduct himself as he had done in the United Kingdom so that he would not be a risk, the appellant's claim always having been that he could not return to Bangladesh because he could not express himself as a homosexual and could not be expected to hide his sexuality;

(iv) that the judge had failed to have proper regard to material which confirmed his case and that he would be at risk of persecution on return [7].

10. On 23 March 2017 First-tier Tribunal Judge Keane granted permission to appeal.

The Hearing

11. Mr Wilford, relying on his speaking note, sought permission to amend the grounds of appeal to challenge the decision on two new grounds: -

(i) that the judge had not properly taken into account a letter from a lawyer in Bangladesh contained within the appellant's bundle at page 113; and,

(ii) that the judge had erred in not addressing Article 8, the appellant's representative having informed the Tribunal that submissions would not be made in respect of Article 8 because this was not covered by funding to cover representations in respect of Article 8; and, under the issue of Article 8, given the appellant had been resident in the United Kingdom since 1996, was "**Robinson** obvious".

12. Mr Wilford accepted that it was necessary to obtain an amendment of these grounds to advance these points given that they were not covered by the existing grounds of appeal.

13. I refused permission to amend the grounds for reasons which I now give.

14. The proposed amendments were being brought at the last minute and was not as a result of matters which had recently come to light. The application was not made on notice to the respondent and no good reason was advanced as to why this has not been done before. Further, and in any event, for the reasons set out below, they are without merit.

15. Turning to the first proposed additional ground, as Mr Wilford accepted, the date of the letter is unclear. It cannot therefore be said that a letter from a lawyer which in part confirms the appellant's activity in Bangladesh before he left is relevant to the assessment of risk on return, given that it mentions no dates after 1996, that being the date at which the appellant's father contacted him. The letter is at best a confirmation of what the appellant's father told to a lawyer on an unknown date. In the light of that, it could not be argued that the judge failed to give proper weight to a document of which there is no indication it was expressly drawn to his attention and upon which, given that it is undated, little weight could properly be attached thereto. Thus, even were I to permit the amendment, it cannot be shown that the judge's approach to the letter involved the making of an error of law.

16. Turning to the second proposed additional ground, a claimed failure on the part of the judge to take into account Article 8. It was accepted by Mr Wilford that Article 8 had not been raised in the grounds of appeal to the First-tier Tribunal. He also accepted that other than an oblique reference to the length of time that he had lived

here at paragraph [4] of his witness statement, there was no indication that this issue was pursued in any way.

17. I accept that legal aid funding may be restricted to cover a refugee and/or Article 3 claim, but there is no evidence that this point was put to the judge as an explanation for not pursuing article 8. When asked, Mr Wilford was unable to provide evidence that the representative had made this clear to the judge. There is no note from her, nor is there any indication in the judge's decision that that was the point made to him.
18. Article 8 was not raised in the grounds of appeal and there is no indication that any application was made to amend the grounds to include Article 8 prior to the First-tier Tribunal's decision. In the circumstances it was open to the judge not to address Article 8 in his findings given that it had not been raised as a ground of appeal, and had not been pursued before him and, in any event, it is difficult to see how had it been advanced, it would have assisted the appellant.
19. On his own evidence his presence in the United Kingdom had been unlawful and at the very least precarious for a very substantial period. It is not suggested by him that he met the requirements of paragraph 276ADE or any other part of the Immigration Rules or that there are any exceptional circumstances, both of which were matters raised in the refusal letter, yet he chose not to address these either in the grounds or in his statement. Given that by operation of Section 117B of the 2002 Act little weight could have been attached to the Article 8 case, it is difficult to see how it could have succeeded in any event and certainly not on the very limited evidence produced.
20. It cannot, in these circumstances, be said that article 8 was Robinson obvious, or that the judge otherwise erred in not taking it into account.
21. For these reasons I am not satisfied that it would be in the interests of justice to permit the appellant to amend his grounds and, for the reasons given, even had he done so I would have concluded that neither of the proposed grounds demonstrated that the decision of the First-tier tribunal involved the making of an error of law.
22. I am not satisfied that the judge erred in failing to adjourn the hearing. As Mr Wilford accepted, the judge had then gone on to take the appellant's case at its highest - see paragraphs [39] to [43]. The evidence now produced is limited to events in Bangladesh prior to the appellant's departure, and confirms he had been attacked and beaten, matters which the judge had accepted; it does not confirm material aspects of the case beyond that which the judge had accepted. It was open to the judge to conclude in the circumstances that the witness statement which was awaited (and which has been produced to me), would not assist and I consider that he was right to do so.
23. In the circumstances it cannot be argued that the failure to adjourn the proceedings created any unfairness given the evidence that was sought to be adduced did not advance the case,

24. Mr Wilford had no submissions to make about the other grounds of appeal. I consider that they are without merit. It was open to the judge to reject the appellant's explanation for not taking any steps to express his sexuality. It cannot be argued that the judge here was inconsistent with the self-direction at [45] in that he did not draw inferences adverse to the appellant failing to have an active sex life or attend gay bars or subscribe to gay friendly media, so on but rather that it was the explanation for not doing so that was not credible. It was open to him to note that the appellant had already said in his evidence that his sexuality had come to the adverse attention of his family and the wider community. It therefore made little sense that the fear of this coming to the notice of people in Bangladesh is what prevented him from expressing his sexuality in the United Kingdom. There is thus no merit in that ground.
25. There is no merit in the challenge to the judge's findings at paragraph [54]. This is a consideration taken in the alternative. Given that it had been open to the judge and he had given adequate reasons for finding that the appellant was not a gay man, then any issue of him concealing his sexuality is not a material error.
26. For these reasons I consider that the decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

SUMMARY OF CONCLUSIONS

1. The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.
2. No anonymity direction is made.

Signed

Date 1 June 2017



Upper Tribunal Judge Rintoul