Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/13882/2017

THE IMMIGRATION ACTS

Heard at North Shields	**Decision & Reasons Promulgated**
On 4 January 2019	**On 6 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

M. M.
(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Cleghorn, Counsel instructed by Legal Justice Solicitors
For the Respondent: Mr Diwnycz, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant was granted leave to enter the United Kingdom, and did so on 20 January 2010 as a Tier 4 student. On 30 December 2011, shortly before its expiry, he applied for his leave to be varied, but this was refused on 18 January 2012.

2. On 29 February 2012 the Appellant applied for leave to remain as a Tier 1 Post Study work migrant, but this was refused on 18 October 2012. The Appellant lodged an appeal against this decision, but it was dismissed on 11 March 2013 with amongst other reasons, a finding that he had relied upon a false bank statement when making that application.
3. After some considerable time as an overstayer the Appellant applied for leave to remain on the basis of his Article 8 rights on 24 October 2014. This was refused on 4 November 2014, and no appeal was lodged.
4. After a further considerable period of time as an overstayer the Appellant the Appellant made a protection claim on 9 June 2017, based upon events that he said had occurred in Bangladesh in 2007-8, and that had caused him to flee that country with a genuine fear of harm at the hands of the authorities. This claim was refused on 8 December 2017. The refusal challenged his account of his experiences as untrue. The Appellant's appeal against the refusal of his protection claim was heard and dismissed by First Tier Tribunal Judge Arullendran in a decision promulgated on 20 February 2018.
5. The Appellant's application for permission to appeal was refused by the First tier Tribunal, but a renewed application to the Upper Tribunal was granted by First tier Tribunal Judge Perkins on 17 September 2018 in the following terms;

   All grounds may be argued but point 15 seems the most pertinent on asylum grounds.

   Without in any way wishing to suggest that the appellant has a strong case it is clearly arguable that the Article 8 balancing exercise has not had regard to the best interests of the child, and additionally is not structured properly. The Appellant is reminded of the need to show that any error is material and that if an error is established the Tribunal will endeavour to correct it without a further hearing.
6. No Rule 24 Notice has been lodged in response to the grant of permission to appeal. Neither party has applied pursuant to Rule 15(2A) for permission to rely upon further evidence. Thus the matter came before me.

<u>The challenge</u>

7. Ms Cleghorn (who did not draft the grounds, or appear below) advanced the appeal on the six (re-numbered) grounds of the application that had been settled by Counsel who did appear below. Of those, grounds 1-2 raised a challenge to the Judge's disposal of the Article 8

appeal, and grounds 3-6 raised a challenge to her disposal of the protection appeal. It makes more sense to deal with grounds 3-6 first.

8. Ground 3 asserts that the Judge's findings were inconsistent, when she accepted that the Appellant had been physically present at a football match prior to it deteriorating into a riot, but rejected his claim that he was of any adverse interest to the authorities in Bangladesh. As framed, there is in my judgement no merit in that complaint, and indeed Ms Cleghorn appeared to recognise as much, because she sought to reframe it. Thus she accepted that it was open to the Judge to make the findings of fact that she had made given the evidence that was before her. Instead she complained that the Judge had not in fact made any finding to the effect that the Appellant was of no interest to the authorities.

9. Thus I reject both the original, and the reframed complaint. The latter is plainly based upon a misreading of the decision [77]. The Judge found that the Appellant had attended the football match of 20.8.07, and that even on his own account he had left before any riot commenced, and that he took no part in any riot, because he had already been injured and taken to hospital before any riot commenced [76]. As such he was never in a position to be able to identify any rioter, and since this was the only reason he had given to the Judge for the authorities having an adverse interest in him, the Judge was entitled to make the finding that she did, for the reasons that she gave, upon the way that the Appellant had advanced his appeal [77].

10. Ms Cleghorn then sought to advance an argument that the Judge's findings of fact were perverse because they were irrational. In so doing she accepted that the grounds [#15-18] advanced no such complaint, and thus no permission had been granted for such an argument. I can see no merit in this argument either, which in my judgement is based either upon a misreading of the decision, or a failure to recognise the way in which the Appellant had advanced his appeal before the Judge.

11. Ground 4 is a complaint about the Judge's approach to the assessment of the weight that could be attached to the documents that the Appellant had produced with his witness statement of 6 February 2018 as corroborative evidence of his account. In the light of the Appellant's immigration history, his past dishonesty in his dealings with the Respondent and the Tribunal, and his very lengthy delay in seeking international protection, the

Judge's approach to the weight that could be attached to these documents, and to the Appellant's evidence, was one that was well open to her. In my judgement her conclusions as to the weight she could attach to these documents was adequately reasoned. The Respondent was under no obligation to prove that these documents were forgeries, before the Judge could conclude that she could attach no weight to them, and that they had been procured to bolster a false asylum claim. There is no error of law in the self direction at paragraph 8 of the decision.

12. Ground 5 is a complaint that it was not open to the Judge to conclude that the Appellant had not told the truth when he claimed never to have attended an immigration appeal hearing previously. The grounds do not assert (and there is no evidence to suggest) that the Appellant did not answer the question as the Judge recorded him doing. Given his undisputed immigration history, if he did answer in the way she recorded, then the answer he gave was either a mistake, or untrue. The Appellant's Counsel had the opportunity at the time to lead evidence to clarify or to explain his answer, and as the Judge noted, that opportunity was not taken. In the circumstances I am satisfied that it was open to the Judge to reach the conclusion that she did, for the reasons that she gave, and to conclude that the Appellant was not a reliable witness when stepping back to look at all of the evidence in the round [75-6]. Thus there is no merit in this complaint as framed either, but the conclusion that he was not a reliable witness would have followed in any event given the Tribunal's previous finding that he had relied upon forged documents.

13. Ground 6 is a complaint that although the Judge made reference to the principles to be found set out in JT (Cameroon) [2008] EWCA Civ 878, and to the statutory provisions of s8 of the 2004 Act, in the course of her decision [74], she failed to apply them properly. It was however plainly well open to the Judge to ask herself whether the Appellant would really have acted as he did, if upon arrival in the UK in January 2010 he genuinely believed himself to be a real risk of harm anywhere in Bangladesh from either the Bangladesh armed forces in particular, or, the authorities in Bangladesh in general. It was plainly open to her conclude that he would not, and that the protection claim he had advanced for the first time on 9 June 2017 after having been an overstayer for many years, and after having applied for leave to remain on other grounds, and after having attended an appeal before

the Tribunal, was a fiction. She gave adequate reasons for that conclusion, and she analysed the evidence that was before her before making that conclusion, rather than simply taking the delay in making the protection claim as determinative of his reliability as a witness.

14. I turn then to consider Grounds 1 and 2 which challenge the Judge's disposal of the Appellant's Article 8 appeal.

15. The Appellant married his wife in Bangladesh on 19 October 2009. She too is a citizen of Bangladesh. Although she gave written evidence in support of the Appellant's appeal, she failed to explain within that witness statement either the date upon which she came to the UK, or to make any mention of her daughter. She completely failed to offer any evidence to suggest that she had a "private life" in the UK of significant strength or quality that would permit a conclusion that her Article 8 rights were engaged by the decision under appeal.

16. I note that the Appellant's own witness statement is similarly lacking – the only reference to his child is the claim that he cannot be expected to expose a young child to such a horrific government as exists in Bangladesh. There is no explanation of how he has spent his time since he ceased any study that he has undertaken, and no explanation of how he has supported himself and his family as an overstayer. No friend or community group offered evidence in support of the appeal.

17. The Judge noted that the Appellant's wife joined him in the UK in 2011 as his dependent shortly before the expiry of his own leave to remain. It has never been suggested that the Appellant's wife has enjoyed had any other grant of leave. She is not a "qualifying partner". She advanced no evidence (and nor did the Appellant) to suggest that she believed there would be any difficulties in re-integration into society in Bangladesh for either herself or her daughter, and neither did the Appellant.

18. The Appellant's daughter was born on 8 November 2013 in the UK. She is a citizen of Bangladesh, who has never enjoyed leave to remain in the UK. At the date of the hearing she was four years old, and living with her parents. She was not a "qualifying child".

19. The Judge's record of proceedings shows that no attempt was made by Counsel to lead evidence in chief from the Appellant or his wife any other evidence to support their Article 8 claims.

20. In the circumstances although the three members of this family plainly enjoyed "family life" together, Article 8 was not thereby engaged by the decision under

appeal. Neither of them enjoyed leave to remain in the UK, and they all faced removal together as a family unit, so there was no basis upon which to suppose they might be separated through removal.

21. At its highest, the Appellant's Article 8 appeal was therefore a "private life" appeal, for which he had offered no evidence beyond the bald facts of the length of time that each of the members of his immediate family had lived in the UK. In my judgement, the Appellant therefore failed to offer evidence to the Judge that meant that it would have been an error of law on her part to fail to conclude that Article 8 was engaged by the decision under appeal. It was plainly open to the Judge to conclude that Article 8 was not engaged on this evidence, as indeed she did. In those circumstances, in my judgement both grounds 1 and 2 fall away.

22. However, even if the Judge were considered to have been wrong to have reached such a conclusion, given the low threshold of engagement of Article 8, there was no evidential basis upon which she could have rationally gone on to conclude that the balance of proportionality required the Appellant and his family to be granted a period of discretionary leave to remain. There was a clear public interest in his removal as an overstayer who did not meet the requirements of the Immigration Rules, enhanced by his immigration history which included his past use of forged documents when seeking a grant of leave to which he was plainly not entitled. Moreover, given the findings upon the protection appeal, it was implicit that the family would be returning to Bangladesh in safety, and able to build a life together there with the support of their family and friends.

23. Although, as the grant of permission to appeal noted, the Judge failed to assess what the best interests of the Appellant's child were, there was no evidence before the Judge that would have permitted a conclusion that the child's best interests required a grant of discretionary leave be made to either her, or her parents. There was no evidence of health needs that could not be met in Bangladesh. She had barely started any form of education in the UK, and there was no evidence of educational needs could not be met in Bangladesh. Thus the only rational conclusion open to the Judge upon the evidence was that the child's best interests were served by being brought up by her parents, and living in a household with them, but with access to the members of the extended family so that she could develop relationships with her grandparents, aunts, uncles and cousins through face to face contact. Since the

Appellant had failed to demonstrate that any of the wider family were present (lawfully or otherwise) in the UK, and had accepted that his own parents and siblings remained in Bangladesh, it followed inevitably that the only possible assessment was that the child's best interests were served by removal to Bangladesh with her parents, so that she could enjoy the benefits of the country of which she was a citizen.

24. In the circumstances a decision to dismiss the Article 8 appeal was the only rational outcome on the evidence placed by the Appellant before the Tribunal. The Judge's overall conclusion that the appeal should be dismissed is entirely consistent with the guidance offered recently by the Supreme Court, in particular in Rhuppiah [2018] UKSC 58. Accordingly the grounds fail to disclose any material error of law in the approach taken by the Judge to the appeal that requires her decision to be set aside and remade.

DECISION

The Determination of the First Tier Tribunal which was promulgated on 20 February 2018 contained no material error of law in the decision to dismiss the Appellant's appeal which requires that decision to be set aside and remade, and it is accordingly confirmed.

Direction regarding anonymity – Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until the Tribunal directs otherwise the Appellant is granted anonymity throughout these proceedings. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.

Signed
Deputy Upper Tribunal Judge JM Holmes
Dated 18 January 2018