Upper Tribunal

(Immigration and Asylum Chamber) **Appeal Number: HU/11561/2019 (P)**

THE IMMIGRATION ACTS

Decided Under Rule 34 (P)	**Decision & Reasons Promulgated**
On 10 September 2020	**On 14 September 2020**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

MOHAMMED KARIM CHOWDHURY

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation (by way of written submissions)

For the appellant: Mr L Youssefian of Counsel instructed by St Martin Solicitors

For the respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. This joint appeal comes before me following the grant of permission to appeal to the respondent by First-tier Tribunal Judge Ford on 9 April 2020 against the determination of First-tier Tribunal Judge Ross, promulgated on 5 February 2020 following a hearing at Taylor House on 22 January 2020. For convenience, I shall continue to refer to the parties as they were before the First-tier Tribunal.

2. The appellant is a Bangladeshi national born on 10 November 1991. He entered the UK on 30 May 2007 aged 15. No details are given as to his method of entry but as he has claimed he never had a passport one can assume he arrived unlawfully. He then claimed asylum on 15 June 2007. Although this was refused, he was granted discretionary leave from 16 August 2007 until 16 August 2008, presumably because he was a minor. On 4 September 2008 a further application for asylum was made but this was refused on 18 June 2011. The basis of the claim was that the appellant's father was involved with the Jatia Party and he received threats from the BNP and the Awami League party supporters. The appellant maintains that on one occasion he was approached by strangers outside his school but he refused to go with them. He feared he would be kidnapped if he were returned to Bangladesh. An appeal against the decision was heard by First-tier Tribunal Judge Beg on 1 August 2011 and was dismissed. He failed to embark and took no further steps to regularise his stay until 22 September 2017 when he sought leave on the basis that he was stateless. That application was refused on 18 December 2018 with no right of appeal. The decision was maintained on administrative review on 6 February 2019. On 19 February 2019 the appellant made his present application for leave to remain outside the rules. That was refused on 21 June 2019.

3. The respondent noted that of the eleven years and eight months the appellant had been in the UK, only one year was with lawful leave. It was considered that the length of time he had been here since then was not beyond his control and he could not have had any expectations that he would be able to remain on a permanent basis. The respondent considered that the fact that he claimed to have an uncle here was not sufficient to warrant a grant of leave outside the rules. It was noted that the uncle was supporting him and it was considered that he was free to continue supporting him on his return and that friends and family could visit him there should they wished to do so. The respondent noted the claim that the appellant had made friends and integrated into society but considered that there was nothing particularly compelling or exceptional about the ties he had made. His relationships with his uncle and friends were not considered to be in any way remarkable such that they would justify a grant of settlement on an exceptional basis. The claim that the

appellant was of good character with no criminal convictions and had not relied on public funds was noted but the respondent maintained that this was what was expected of any person living here. The respondent acknowledged that it would be difficult for the appellant to return but did not accept that he had lost all social and family connections with Bangladesh or that he would be unable to adjust to life back there because he had spent 15 years there and was familiar with the language, environment and culture. The respondent also noted that the appellant had demonstrated his ability to adapt to life in another country and a completely new environment of which he had no knowledge or experience. On that basis, it was considered that he would be able to reintegrate into a culture and way of life which he was familiar with.

4. The respondent noted that the appellant claimed to have left Bangladesh due to his parents' political activities and threats made on his life. The respondent invited the appellant to make an asylum application if he had a fear of return.

5. It was noted that the appellant was an educated man in his late 20s, that he had lived the majority of his life in Bangladesh, that he had family residing there and that he would, therefore, have some form of support network upon his return. Based on the information he had provided, the respondent found that there were no exceptional circumstances which would warrant a grant of leave outside the rules.

6. The respondent accepted that he arrived in the UK aged 15 1/2 and accepted that he had adapted to life here but did not consider it unreasonable to expect him to return to his country of origin; a country where he was fluent in the language and familiar with the culture and where he would be able to re-establish his life. It was considered that he would have a base to return to and support from his relatives. It was considered that there was nothing particularly compelling or exceptional about the ties he had made here and that friendships and other relationships could be maintained using modern means of communication.

7. Judge Ross heard oral evidence from the appellant and two witnesses described as a "cousin brother" and "an uncle/friend of the appellant's father". Despite objections from the Presenting Officer, he found that the appellant's protection claim was not a new matter but he also noted that the appeal was not concerned with a refusal of asylum and that the previous determination did not assist with the determination of the matter presently before him. He found that the appellant had a family life with those with whom he lived, that he had been unable to establish himself in education or a career because he only had a year of discretionary leave and that his life was confined to living with his uncle. He found that there would be very significant obstacles to reintegration and accordingly he allowed the appeal.

8. The respondent successfully sought permission to appeal. She argued: (i) that the judge had been contradictory in determining that the claim based on political issues was not a new matter yet finding that the appellant had not claimed asylum so that previous credibility issues could not be considered; (ii) that he misdirected himself in law in not taking the previous determination into account and failed to give reasons for departing from it; (iii) that he failed to consider whether the claim was genuine or not and simply accepted the oral evidence without adequate reasoning; (iv) that his reasoning on why he found there were very significant obstacles to re-integration lacked clarity and adequacy, that speculative findings were made and that no unjustifiably harsh consequences of removal were identified (Parveen [2018] EWCA Civ 932); and (v) that the judge made no findings on public interest issues and failed to balance the need for effective immigration control against the appellant's private/family life claim.

9. Permission was granted on 9 April 2020.

Covid-19 crisis: preliminary matters and extension of time

10. The matter would ordinarily have then been listed for a hearing but due to the Covid-19 pandemic and need to take precautions against its spread, this did not happen and instead directions were sent to the parties on 24 June 2020. They were asked to present any objections to the matter being dealt with on the papers and to make any further submissions on the error of law issue within certain time limits.

11. The Tribunal has received written submissions from the respondent dated 1 and 20 July 2020 and from the appellant on 17 July 2020. The appellant also claimed to have made an application for an extension of time to comply on 10 July 2020. I now consider the application for an extension and also whether it is appropriate to determine the matter on the papers.

12. Dealing first with the application for an extension of time, I note that although an email from the appellant's representatives dated 10 July 2020 is on file, the attached application for an extension of time is missing. I do not hold the solicitors responsible for that; it is likely to be a housekeeping issue on the part of the Tribunal. In any event, the submissions have since been received and the respondent has replied without raising any complaints regarding timeliness. She acknowledges that she has not been prejudiced. I, therefore, extend time and admit the submissions.

13. I now consider whether it is appropriate to determine this matter without an oral hearing. In doing so I have regard to the Tribunal Procedure (Upper Tribunal) Rules 2008 (the UT Rules), the judgment of Osborn v The Parole Board [2013] UKSC 61, the Presidential Guidance Note No 1 2020: Arrangements during the Covid-19

pandemic (PGN) and the Senior President's Pilot Practice Direction (PPD). I have regard to the overriding objective which is defined in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 as being "*to enable the Upper Tribunal to deal with cases fairly and justly*". To this end I have considered that dealing with a case fairly and justly includes: dealing with it in ways that are proportionate to the importance of the case, the complexity of the issues, etc; avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; using any special expertise of the Upper Tribunal effectively; and avoiding delay, so far as compatible with proper consideration of the issues (Rule 2(2) UT rules and PGN:5).

14. I have had careful regard to the submissions made and to all the evidence before me before deciding how to proceed. I take the view that a full account of the facts are set out in those papers, that the arguments for and against the appellant have been clearly set out and that the issues to be decided are uncomplicated. There are no matters arising from the papers which would require clarification and so an oral hearing would not be needed for that purpose. I have regard to the importance of the matter to the appellant and consider that a speedy determination of this matter is in their best interests.

15. I have had regard to the appellant's request for an oral hearing. The arguments are largely generic. I do not agree that the matter is "*legally and factually involved*" nor that the respondent's grounds are "*nuanced*". Whilst there may be several points, they are largely repetitive and could have been made more succinctly. Essentially the complaint is that the previous determination was not taken into account in the consideration of credibility and that the assessment of the article 8 claim was flawed. Those are issues which can be addressed on the basis of the evidence on the Tribunal file including the submissions from both sides. I am satisfied that I am able to fairly and justly deal with this matter without an oral hearing and now proceed to do so.

Submissions

16. On 1 July 2020, Mr Whitwell on behalf of the respondent, replied to the directions and confirmed reliance on the grounds for permission. He submitted that there had not been a restricted grant of appeal and all the grounds are therefore addressed in his submissions. With reference to whether the claim based on political opinions was a new matter, it is submitted that the appellant's oral evidence that his life would be at risk on return because of political activities amounted to a ground of appeal listed in section 84(1)(2) of the Nationality, Asylum and Immigration Act 2002 and reliance is placed on Mahmud (s.85 NIAA 2002 - new matters) [2017] UKUT 00488 (IAC). It is accepted, however that the judge ruled solely on the human rights claim and did not bring protection issues into his consideration.

17. It is submitted that the previous determination of the First-tier Tribunal remained the starting point as per Devaseelan (second appeals-ECHR-extra-territorial effect) Sri Lanka [2002] UKIAT 00702. It is argued that that determination and the findings therein with respect to the false account of circumstances provided should, therefore, have been taken into account.

18. It is submitted that the judge made multiple material misdirections of law when finding that the appellant's circumstances were such that there would be very significant obstacles to his re-integration. It is submitted that the two reasons offered by the judge - the appellant's lack of education and employment in the UK and not being able to start his own family here - were far too narrow to underpin a finding of very significant obstacles to re-integration. It is submitted that the reasons given were backward looking at the appellant's ties in the UK rather than his ability to re-integrate into Bangladeshi life and reliance is placed on Kamara [2016] EWCA Civ 813 which outlines the nature of the broad forward facing test being one of whether the appellant would be enough of an 'insider' to be able to participate in his private life on return. It is maintained that the judge does not explain why not having an education or employment whilst remaining in the UK unlawfully hinders the appellant's ability to re-integrate into life in Bangladesh. It is pointed out that the appellant spent the first 15 1/2 years of his life there, that it was not suggested that he had not received any education there, that he has a sister, aunt and paternal uncle in Bangladesh, that he was a 28-year-old healthy male of working age with no dependants who spoke both Bengali and English, had experience of working in the service sector and that there was no suggestion that the financial support currently offered by his uncle's family here would cease on his return to Bangladesh. Given these factors it is argued that the judge's conclusion of very significant obstacle approached perversion. It is submitted that any material error of law in finding that there were very significant obstacles to integration would infect the claim under article 8.

19. The appellant's representatives responded by way of submissions dated 17 July 2020. It is argued that the first ground was without merit and that any error was immaterial because the judge only ruled on the human rights claim and not on protection matters. It is submitted that the appellant's failure to advance a separate asylum claim was immaterial because he had specifically raised the issues of political opinion in his current application and the fact that the respondent chose not to meaningfully engage with them in her decision on article 8 was "neither here nor there". It is submitted that the matter was brought to the respondent's attention and that it was, therefore, no longer a new matter and the Tribunal could, and indeed had to, consider it in determining the appeal. It is submitted that if the respondent felt prejudiced because she had not anticipated that the protection element of the case would form part of the article 8

claim, the proper course of action would have been to seek an adjournment but no such application was made.

20. On the point of the credibility assessment, it is submitted that this ground was also without merit. The judge was entitled to reject the submission that the appellant's failure to claim asylum undermined his credibility. The judge found, in any event, that there was no evidence that he would be politically active in Bangladesh or that he would be of interest to the authorities due to any political activities. It is submitted that this was consistent with the previous determination and, therefore, no issue could be raised in relation to Devaseelan because the judge did not depart from the previous findings. It is submitted that, in any event, there was no evidence that the judge took into account the difficulties the appellant would face in Bangladesh due to his political affiliation when considering the question of very significant obstacles.

21. It is submitted that the respondent sought to re-argue the case and did not identify any clear material errors of law in the judge's assessment on the issue of whether there were very significant obstacles to re-integration. It is submitted that the judge's findings were not based on speculation but rather on evidence. It is submitted that the judge cogently explained his reasons for finding that there was family life. It is submitted that contrary to the respondent's submissions, the judge plainly took into account the binding authorities of Kamara and Parveen. It is pointed out that these two authorities were expressly referenced in the appellant's skeleton argument. It is submitted that the judge considered the cumulative effect of the appellant's young age when he arrived here, the length of his absence from Bangladesh, his diminished ties, the length of his residence here, his limited education and employment, and the ties he had developed with family here and properly concluded that combined they posed significant obstacles to his re-integration on return. It is submitted that it was elementary that a lack of education and employment experience would adversely impinge on an individual's ability to successfully integrate into another country. It is submitted that the respondent's grounds were a straightforward attack on findings of fact which led to a conclusion that the respondent did not agree with. The Tribunal is reminded that it should be slow to interfere with findings of fact made by another tribunal unless the findings were perverse. The Tribunal is invited to find that the judge's determination did not reveal any material errors of law. It is submitted that the appeal was allowed pursuant to paragraph 276ADE of the rules rather than article 8 outwith the rules and that a proportionality assessment was unnecessary. It is submitted that if the Tribunal found there was a material error of law, the appeal should be remitted to the First-tier Tribunal for a fresh hearing in light of the factual findings that would need to be made.

22. Mr Whitwell's response is dated 20 July 2020. he submits that there is nothing in the judge's determination to support the contention that he had taken into account the binding authorities of Kamara and Parveen and that the issue of whether the appellant would be enough of an insider to re-integrate has not been considered.

Discussion and conclusions

23. I have considered all the evidence, the determination, the grounds for permission and the submissions made by both parties.

24. The first and most glaring error made by the judge is his failure to take the determination of Judge Beg as his starting point. Whilst that was mainly the determination of an asylum application, the appellant had also relied on article 8 and the judge made lengthy findings on the appellant's claimed family/private life which included a credibility assessment. She found that the appellant had no family in the UK, that he had admitted that the "*uncle*" he lived with was not a relative but a friend of his father, that he had sought to mislead the court as to family he had in Bangladesh, that he had parents and other relatives still living in Bangladesh, that he had worked and studied here and would have an advantage therefore on his return to Bangladesh when seeking employment, that the delay in the consideration of the claim had not caused consequences which warranted a grant of leave, that he could maintains his relationships and friendships after he returned to Bangladesh and that he could return to live with his family. She also found that he had fabricated his asylum claim and identified numerous inconsistencies and difficulties with the conflicting accounts given.

25. Having noted that the appellant's representative had accepted that the previous decision could be taken into account (and, of course, he did not require the representative's consent for that), Judge Ross was wrong to find that it was not relevant to the claim before him and the issue he had to determine (at 22). The previous judge's findings on the private/family life claim were very relevant to the present matter and the conclusion that the appellant had fabricated his asylum claim also had a bearing on the assessment of the credibility of his current account. The judge did not follow the proper procedure and take Judge Beg's determination as his starting point. His reasoning for not doing so was erroneous in that he failed entirely to appreciate that the determination did not only deal with a protection claim but also addressed the same article 8 claim now relied on. Even without such a claim, the previous judge's credibility findings would have had relevance to the subsequent credibility assessment undertaken by Judge Ross. On that basis, alone, the entire determination is flawed and the findings cannot stand.

26. For completeness, however I consider the other matters raised in the respondent's grounds. First is the issue of whether the appellant's

representations concerning his fear on return to Bangladesh amounted to a new matter. I find that they did because the appellant was advised that he should lodge a protection claim if he wanted to rely on that claim and the matter was not considered any further in the decision letter. He did not do so and the respondent was entitled to object to the claim being raised at the hearing. However, as both parties accept, the argument is academic because the judge only ruled on the article 8 claim and did not consider protection matters.

27. The complaint about the judge's credibility assessment is made out. The judge failed to have regard to the earlier findings made by Judge Beg which should have factored into his assessment on the current article 8 claim. It is correct as pointed out by the respondent that the judge simply accepted all the oral evidence. Had he considered the claim in the context of the earlier determination, he may have reached a different conclusion.

28. The judge based his findings on family life on the premise that the appellant lived with relatives. The evidence is, however, that the "*uncle*" is not a relative at all but a family friend and so the references to cousins and niece and nephew are erroneous (at 23 and 24). The judge did not carry out his assessment on the correct factual basis; that is, that the appellant has been living with a friend of his father and not with family members. His findings on the appellant being confined to the home with no opportunity to follow an education or a career were made against the weight of evidence before him which included a number of documents to show that the appellant attended college and obtained various qualifications including certificates in employment skills. The evidence further suggests that all the appellant's activities and friendships have been within the Bangladeshi community and in that context the finding that he would have problems in re-integrating have not been adequate reasoned. The reference to financial and "*other*" support is not explained (at 24). Further, and contrary to what the appellant maintains in submissions, there was no consideration whatsoever by the judge of any of the binding authorities referred to by the parties. Mr Youssefian argues that there "*plainly*" was but does not point to any part of the determination to support that contention. He may well have mentioned this in his skeleton argument but the judge does not refer to that or indeed to having considered any of the documentary evidence before him. The judge has not considered whether the fact of having all his family in Bangladesh and having retained familiarity with the culture and the language would be enough to make him an "insider" for the purposes of re-integration. Nor is there any consideration of the public interest factors which are relevant where almost all the time the appellant has spent here (and largely as an adult) has been without leave. For all these reasons, the judge's decision is unsustainable and it is set aside.

Decision

29. The decision of the First-tier Tribunal contains errors of law and it is set aside. A fresh decision shall be made by another judge of the First-tier Tribunal at a date to be arranged. Directions shall be forwarded by that Tribunal in due course.

Anonymity

30. There as been no request for an anonymity order and I see no reason to make one.

Signed

R. Kekić
Upper Tribunal Judge

Date: 10 September 2020