Upper Tribunal
(Immigration and Asylum Chamber) (V)

Appeal Number: PA/02246/2018
PA/02247/2018 (V)

<u>THE IMMIGRATION ACTS</u>

Heard by a remote hearing	**Decision & Reasons Promulgated**
On the 10 September 2021	**On the 04 October 2021**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

MB and MMB
(ANONYMITY DIRECTION MADE)

<u>Appellants</u>

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

<u>Respondent</u>

<u>Representation</u>:
For the Appellant: Ms J. Bond, Counsel instructed on behalf of the appellant
For the Respondent: Mr C. Bates, Senior Presenting Officer

<u>DECISION AND REASONS</u>

<u>Introduction</u>**:**

1. The appellants, who are citizen of Bangladesh, appeal with permission against the decision of the First-tier Tribunal (Judge Alis) who dismissed their protection and human rights appeals in a decision promulgated on the 16 February 2021.

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2. The First-tier Tribunal made a direction regarding anonymity and neither party sought for it be set aside. I therefore confirm that order at the conclusion of the decision and do so as it is presently in the interests of justice that the appellants are not publicly recognised as those seeking international protection: paragraph 13 of the Upper Tribunal Immigration and Asylum Chamber Guidance 2013: Anonymity Orders.

3. The hearing took place on 10 September 2021, by means of *teams* which has been consented to and not objected to by the parties. A face-to-face hearing was not held because it was not practicable, and both parties agreed that all issues could be determined in a remote hearing. The advocates attended remotely via video as did both appellants so that they could listen and observe the hearing. There were no issues regarding sound, and no technical problems were encountered during the hearing, and I am satisfied both advocates were able to make their respective cases by the chosen means. Missing documentation was identified at the outset of the hearing which was subsequently provided so that the tribunal and the advocates were able to have sight of all relevant documentation.

Background:

4. The history of the appeals is set out in the decision of the FtTJ, the decision letters and the evidence contained in the bundles.

5. The appellants are brothers and are citizens of Bangladesh. The 1st appellant (referred to as "MB") arrived in the United Kingdom in 2009 with leave to remain as a student until 2011. His leave was extended until May 2012 and whilst he sought to extend his stay further both as a student and on family and private life grounds the applications were refused. MB lodged a protection claim on 29 September 2016.

6. The 2nd appellant (referred to as "MMB"), also entered the United Kingdom in 2009 as a student and although his leave was subsequently extended it was curtailed in March 2015 because he was in breach of the work restrictions placed on his Visa. Applications to extend his stay were subsequently refused in 2015 and 2016. He also lodged a protection claim on 29 September 2016.

7. The Secretary of State refused their protection claims in a decision letter dated 1 December 2018.

8. Both appellants appealed those decisions on 14 February 2018 under section 82 (1) of the NIAA 2002 on the basis that their return to Bangladesh would lead to a real risk of persecution and would also breach their rights under Articles 2, 3 and 8 of the ECHR.

9. Their appeals were subsequently listed together before FtTJ Pickup (as he then was) who dismissed both appeals in a decision promulgated on 20 March 2018.

10. On 18 September 2018 Deputy Upper Tribunal Judge Harris found there had been an error in law because a fax transmission sent to the tribunal prior to the date of promulgation of Judge Pickup's decision had not been placed before the judge. The appeal was remitted back to Judge Pickup for him to consider the additional evidence. However in the light of his appointment to the Upper Tribunal it was directed at the appeal be heard de novo by a different judge.

11. As a result of the Covid-19 pandemic the hearing date which was previously listed on the 20 March 2020 was adjourned. The appeals came before the FtTJ on 4 January and 3 February 2021.

12. In a decision promulgated on the 16 February 2021 the FtTJ dismissed both appeals. At paragraphs [7]-[112] the FtTJ set out his analysis of the evidence and his findings of fact. In summary, whilst the judge found that it was reasonably likely that they may have been involved in student politics and that one or both of them may have been arrested following what appears to have been a brawl between 2 opposing groups, any detention between 2003 – 2006 was not a cause of them having to seek asylum in September 2016. The judge was also not satisfied that either appellant held the positions they claimed as the evidence was inconsistent and that he found that both appellants chose to come to United Kingdom to study rather than through fear of persecution.

13. As to the documents that the appellants had provided in support of their appeals, the judge found that he was not satisfied that any weight could be placed on the FIR's contained in the bundle and found that there was no obligation on the respondent to verify the documents.

14. In respect of Mr M, the judge was not satisfied that the appellants were close relatives of this man and whilst he had a high profile in Bangladesh politics, the appellants problems or those that they claimed to have could not be compared to his. The judge finally found that he was not satisfied that the family were under house arrest or experiencing problems of the authorities and further was not satisfied that either appellant had any political profile in Bangladesh or in the United Kingdom. Consequently he reached the conclusion that neither appellant had discharged the burden of proof to show that on their return they would face persecution or a real risk of suffering "serious harm" and thus dismissed both appeals.

15. Permission to appeal was sought and permission was refused by the FTT but granted by Upper Tribunal Judge Norton-Taylor on 6 May 2021.

The hearing before the Upper Tribunal:

16. In the light of the COVID-19 pandemic the Upper Tribunal issued directions on the 6 May 2021 inter alia, indicating that it was provisionally of the view that the error of law issue could be determined without a face-to-face hearing and directions were given for a remote hearing.

17. Both parties have indicated that they were content for the hearing to proceed by this method. Therefore, the Tribunal listed the hearing to enable oral submissions to be given by each of the parties. I am grateful for their assistance and their clear oral submissions.

18. Ms Bond appeared on behalf of the appellants and relied upon the written grounds of appeal and her previous written submissions which were provided to the First-tier Tribunal and provided a copy to the Tribunal and to Mr Bates.

19. There was no rule 24 response on behalf of the respondent. However after Mr Bates had the opportunity to consider the material and in the context of the grounds he accepted that the grounds 2 and 3 were made out and that for the reasons set out in th grounds the FtTJ's decision involved the making of an error on a point of law and that the errors were material to the outcome as they materially affected the credibility issues and the fact finding process. As a result he invited the Tribunal to set aside the decision of the FtTJ and to remit thee appeal to the FtT for a rehearing.

20. The respondent concedes that the grounds of challenge are made out (grounds 2 and 3) and as such the decision should be set aside. In the light of that concession and for the reasons set out in the grounds which the respondent accepts is made out, I am satisfied that as this was a protection claim and thus the requirement of anxious scrutiny applied, the findings of fact are unsafe and therefore cannot stand.

21. In the light of that concession made on behalf of the respondent I shall set out a brief summary as to why that concession was properly made.

22. The basis of the appellants' claim is that they are members of a politically active family in Bangladesh and were student activists on behalf of the BNP. One of the family relatives is a former MP of the BNP. They claimed that following the 2008 elections they were targeted by members and activists of the opposition party which is now in power. The appellant therefore feared the authorities in Bangladesh. In the alternative it was argued that they would be at risk in Bangladesh due to imputed political opinion based on their political support for the BNP (see ground 1).

23. As part of their claim the appellants provided a number of documents they claimed had emanated from Bangladesh including FIR's and newspaper reports. In his decision the FtTJ referred to the FIR's at paragraphs [87] and [92].

24. In the written submissions provided for the FtTJ both parties are set out their respective arguments concerning the issue of prevalence of forged documentation in Bangladesh. The respondent had provided a short summary relying on the CPIN Bangladesh; documentation dated March 2020 and expressly stated, "indicates systemic corruption in Bangladesh, in particular to fake or altered documentation, 5.2.1 prevalence and procurement of fraudulent documents. Corruption widespread in the courts and police. 5.36 call to police documents can easily be obtained and 5.2.4 easy to obtain genuine documents containing false information."

25. By way of response Ms Bond provided written submissions in detail setting out that there was a conflict in the background evidence as to the ease with which forged documentation can be obtained from Bangladesh.

26. Both parties before the FtTJ accepted that this was a "central issue" to both appeals. In particular the appellant had also obtained a report from an advocate of the Supreme Court of Bangladesh and pages of Bangladesh Supreme Court procedure rules (known as the Bangladesh Gazette).

27. It is therefore plain that a central issue before the tribunal related to the documents and the reliability of those documents set out in the context of the background country materials and the report commissioned on behalf of the appellant.

28. The FtTJ considered the documents and found that fraudulent political letters and documents are "freely available" (at [91]) and at [93] referred to the CPIN March 2020 stating the report "details problems with documents originating from Bangladesh". His assessment was set out at paragraphs [107 – 111]. At paragraph [107] the judge stated "the background evidence makes clear that forged documents are significantly prevalent and easily obtainable in Bangladesh. Some of the documents from different official sources have the same type of heading which undermines the reliability. There is a well-developed market for obtaining fabricated documents including fabricated documents of official documents. The FIR's are on the same heading as the court records of hearing, summons and warrants." At [108] in respect of the newspaper reports relied upon, the judge stated, "they have to be considered in the round against the background that fabrication of news report is prevalent in Bangladesh." At [109] the judge referred to the inconsistencies in the documents of the BNP is to their level of involvement and then concluded at [110] that no

reliance could be placed in any of the documents as confirmation support for their claims.

29. Grounds 2 and 3 taken together seek to challenge that assessment. In essence it is argued that the judge failed to resolve the conflict in the evidence relating to the prevalence of forged documentation in Bangladesh. Ms Bond on behalf of the appellant relied upon paragraph 7 – 19 of the grounds which were also summarised in the "core grounds" at paragraphs 6 and 7.

30. In the FtTJ's assessment of the issue it is accepted on behalf of the respondent that the FtTJ did not engage with the submissions advanced on behalf of the appellant as to the conflicting country evidence and did not undertake any analysis of that conflicting evidence. The FtTJ had only considered one view that there was evidence of corruption. However the FFM report May 2017 conducted with the assistance of the BHC had different evidence. The BHC and DFAT held the view that corruption was a widespread problem due to various issues whereas the Transparency International and the lawyers and other sources consulted by the FFM said that it was not a general problem, and it was not the case with every type of document. It also highlighted the point made at 5.2.3 that forged or fraudulent police and court documents are not easily obtainable.

31. In this context Ms Bond sought to rely upon an unreported decision of Laws LJ in ex parte Demisa. Ms Bond was unable to provide a copy of any transcript and one does not exist, so far as I can tell on any online legal forum. In my view it is not necessary to consider any argument based on this authority as it is agreed by Mr Bates in behalf of the respondent that the FtTJ erred in law in failing to resolve the conflict in the evidence concerning the prevalence of false documentation in Bangladesh. Both parties are in agreement that the assessment that was undertaken and highlighted at paragraphs [107]-[111] did not resolve that conflict and one which the parties had agreed was a "central issue".

32. This leads to ground 3 which again refers to the assessment at paragraphs [107]-[108]. At [107] the FtTJ again refers to the prevalence of false documentation and that the documents that the appellants had relied upon were said to be from different sources had the same type of heading which undermined their reliability. It is submitted on behalf of the appellants that this finding was undermined by the issues as set out above in the context of ground 2 (the failure to resolve the conflict of the country material in this issue) but also that the issue of the format of documentation was set out in the appellant's evidence in the bundles including the relevant pages of the Bangladesh Gazette (Bangladesh Supreme Court procedure rules; pages 327 – 345) and that the Supreme Court advocate and also provided evidence in support of the appellant's claim and in

respect of the certified copy documents and their provision by the court (see page 318 dated 21/3/18).

33. As the ground submit and Mr Bates accepts, there has been no engagement with that evidence in reaching any assessment on the documents provided in support of their claims. The assessment at paragraph [107] failed to take this evidence into account. Whether the evidence from the advocate could be properly regarded as "expert evidence" has not been one either considered by the judge or by the advocates. Nonetheless there was material of relevance which had not been engaged with and thus undermined the factual conclusions reached.

34. I would accept that the FtTJ did make a number of factual findings by reference to inconsistent evidence given by both appellants and therefore the judge would have been entitled to consider the documents and their reliability in the light of those inconsistencies. However, that still required an assessment of the other supporting evidence before reaching a conclusion as to the documents and their reliability and thus the overall factual claims advanced.

35. In the light of the errors set out in grounds 2 and 3 which are made out and which Mr Bates accepts goes to the core of the credibility assessment of their accounts, it is not necessary to consider the remaining grounds of 1 and 4.

36. I should also deal with the point raised referred to in the grounds as "IK Turkey". I have not considered this ground as it was not an argument that was pursued before the FtT. As I understand it, Ms Bond seeks to rely upon it as a result of the factual findings reached by the judge. However as she properly accepted, this ground of challenge was not an argument that was put before the judge and therefore in my view it cannot impugn his decision. However that view does not affect the ability to advance such an argument before the FtT on remittal.

37. Consequently, I am satisfied that as this was a protection claim brought by the appellants and thus the requirement of anxious scrutiny applied, the findings of fact are unsafe and therefore cannot stand. As accepted by both advocates, the errors of law go to the core of the credibility assessment made and therefore the decision should be set aside with no factual findings preserved.

38. For those reasons, and in light of the respondent's concession the decision of the FtTJ involved the making of an error on a point of law, the decision should be set aside.

39. I have therefore considered whether it should be remade in the Upper Tribunal or remitted to the FtT for a further hearing. In reaching that decision I have given careful consideration to the Joint Practice

Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal.

"[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-
(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

40. Both advocates agree that the venue for hearing the appeal should be the FtT. I have carefully considered the submissions of the advocates and have done so in the light of the practice statement recited. It will be necessary for the appellants to give evidence and to deal with the evidential issues, and therefore further fact-finding will be necessary alongside the analysis of risk on return in the light of the relevant country evidence, and the documentation and in my judgement the best course and consistent with the overriding objective is for it to be remitted to the FTT for a hearing. It is not necessary for me to set out any further directions, but it is agreed between the parties that a Case Management Review Hearing should take place before the First-tier Tribunal. I also record that it is not necessary to provide copies of the earlier 2 bundles which remain on the file. Any updating evidence can be placed in a supplementary bundle.

Notice of Decision

The decision of the First-tier Tribunal did involve the making of an error on a point of law and therefore the decision is set aside and remitted to the FtT for a hearing.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them. This direction applies to, amongst others both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Upper Tribunal Judge Reeds

Dated 13 September 2021