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

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 29 November 2021	**On the 22 December 2021**

Before

UPPER TRIBUNAL JUDGE BLUNDELL
DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MOHAMMED KARIM CHOWDHURY
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr L Youssefian of Counsel instructed by St Martin Solicitors

DECISION AND REASONS

Background

1. This appeal comes back before the Upper Tribunal to consider 'error of law'

following the setting aside under rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008 of an earlier decision on error of law made without a hearing.

2. Although before the Upper Tribunal the Secretary of State is the appellant and Mr Chowdhury is the respondents, for the sake of consistency with the proceedings before the First- tier Tribunal we shall hereafter refer to Mr Chowdhury as the Appellant and the Secretary of State as the Respondent.

3. The Appellant is a citizen of Bangladesh born on 10 November 1991. He arrived in the United Kingdom on 30 May 2007 as a minor. He is recorded as having made an application for asylum on 15 June 2007. At this time - and ever since - he has lived with Mr Nizam Uddin, a friend of his father's, who has consistently been described as an 'uncle', albeit there is no blood relationship.

4. The application for asylum was refused, but the Appellant was granted discretionary leave to remain with effect from 16 August 2007 to 16 August 2008.

5. On 4 September 2008 an application was made for further leave to remain on asylum grounds. The application was refused on 18 June 2011. The Appellant appealed to the IAC (ref. AA/07748/2011). The appeal was heard on 1 August 2011 by First-tier Tribunal Judge Beg, and refused by way of a Determination and Reasons signed on 3 August 2011.

6. Judge Beg found the Appellant's asylum claim to lack credibility. In particular, the following passages are noted from the Determination:

> "*In considering the evidence as a whole and on the lower standard of proof I do not find that there is any credible evidence that the appellants father was a local leader with the Jatia Party who was threatened by opposition party figures. I find that the appellant's parents and sister remain living in Bangladesh. I do not find that they have relocated to another part of Bangladesh. For the reasons I have already given I find that most of the appellant's claim for asylum is fabricated. I do not find that there was ever an attempt to kidnap him.*" (paragraph 22);
>
> "*… I do not find that there is credible evidence that the appellant will be at risk of serious harm on return. … I find that the appellant can go back to his home area to live with his family or move elsewhere in Bangladesh. I do not find that he could be found by anyone adversely targeting him in other parts of Bangladesh. He is a fit and able young man who speaks some English and would be able to re-establish his life in Bangladesh and seek employment.*" (paragraph 25).

7. Judge Beg, in addition to the Appellant's protection claim, also gave consideration to Article 8 of the ECHR: see paragraph 26 *et seq.*. In

particular, the following is to be noted in this regard:

> "*The appellant has no family members in the United Kingdom. Although he referred in his first witness statement to a paternal uncle in the United Kingdom he clarified in oral evidence when questioned... that uncle in fact is not an uncle but his father's friend. He said he had no family members in the United Kingdom. I therefore find that the appellant does not have family life in the United Kingdom. His family members all live in Bangladesh.*" (paragraph 28)

8. Judge Beg went on to accept that the Appellant had established a private life in the United Kingdom, but ultimately determined that the Respondent's decision did not constitute a disproportionate interference with his private life.

9. Notwithstanding the dismissal of the Appellant's appeal, and him becoming 'appeal rights exhausted' on 31 January 2012, he remained in the United Kingdom.

10. On 22 September 2017 the Appellant made an application for leave as a stateless person. The application was refused with no right of appeal on 18 December 2018. The decision was subsequently maintained on administrative review on 6 February 2019. There is no suggestion of 'statelessness' in the current proceedings.

11. On 19 February 2019 the Appellant made an application for leave to remain, the refusal of which is the subject of these proceedings. The application was made by way of form SET(O) and supported by representations made in a representatives' letter dated 11 March 2019. The representatives' letter makes it clear that the application was based on Article 8:

> "*The Applicant makes this Human Rights application leading to indefinite leave to remain under Appendix FM and paragraph 276ADE as well as outside the rules and under the original jurisprudence of Article 8 ECHR.*
>
> *The Applicant therefore formally makes a human rights claim to the SSHD as per section 113 of the Nationality, Immigration and Asylum Act 2002.*"

12. The representatives' letter referred to aspects of the Appellant's claimed political background that had informed his earlier asylum claim and appeal, including his claim that his parents had been involved in politics in Bangladesh and that he was an active member of the Bangladesh Nationalist Party in the United Kingdom. However, no protection claim was expressly articulated.

13. The application was refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 21 June 2019.

14. The RFRL, amongst other things, acknowledges that the Appellant had referenced his asylum claim: see e.g. "*You state you cannot return to Bangladesh due to the threat to your life and that you are an active member of the Bangladesh National Party*". However, the Respondent's decision-maker did not consider that an asylum claim had been formally made, instead indicating the means by which such a claim could be made.

15. The Appellant appealed to the IAC.

16. The appeal was heard by First-tier Tribunal Judge Ross on 22 January 2020 and allowed on human rights grounds in a Determination and Reasons promulgated on 5 February 2020.

17. The Respondent applied for permission to appeal. Permission to appeal was granted by First-tier Tribunal Judge Ford on 9 April 2020. In material part, the grant of permission to appeal is in these terms:

> "*It is arguable that the Tribunal erred in;*
>
> (a) *Failing to factor the adverse credibility assessment from the Appellant's earlier asylum appeal into the Tribunal's own credibility assessment…*
>
> (b) *Failing to give sufficiently clear and cogent reasons for finding that the Appellant faced insurmountable obstacles to the continuation of his private and family life in Bangladesh.*"

18. The grant of permission to appeal took place during the Covid pandemic. Directions were issued by the Upper Tribunal in respect of case management on 23 June 2020, which included inviting representations as to whether or not the issue of error of law could be determined without a hearing. Both parties submitted written representations to the Tribunal addressing both the issues in the appeal and the nature of the hearing. The Appellant submitted that an oral hearing was required.

19. The case was then considered by Upper Tribunal Judge Kekic. Judge Kekic decided that it was appropriate to proceed without a hearing; she then proceeded to consider the substantive issues raised in the Respondent's challenge to Judge Ross's Decision. Judge Kekic concluded that the decision of the First-tier Tribunal contained errors of law and set the decision aside.

20. Judge Kekic's decision introduced a matter that was not expressly pleaded in the Respondent's grounds of appeal, and which did not obviously relate to the grounds said to be arguable in the grant of permission to appeal:

> "*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 the consideration of the claim had not caused consequences which warranted a grant of leave, that he could maintain 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.*" (paragraph 24)

21. It is plain that the "*first and most glaring error*" significantly informed the overall consideration of Judge Kekic, and thereby her decision.

22. The next matter of significance was the litigation in the 'JCWI case - **JCWI v President Upper Tribunal (Immigration and Asylum Chamber) [2020] EWHC 3103 (Admin)** - wherein it was concluded that a Presidential Guidance Note dated 23 March 2020 was unlawful. This led to consideration of a number of cases linked for the purpose in **EP (Albania) and others (rule 34 decisions; setting aside) [2021] UKUT 233 (IAC)**, in which the Appellant was involved as the Second Applicant.

23. It is unnecessary to rehearse the details of that litigation. Suffice to say: that it was determined that in the Appellant's case the decision of the Upper Tribunal on error of law should be set aside; however, it was not to be set aside by reason of any particular difficulty with regard to the decision to proceed without a hearing, but on the basis of Judge Kekic's introduction of a matter that was not pleaded in the grounds. See **EP (Albania)** at paragraph 80:

> "*The Tribunal's reasons at paragraph 24 and 25, the primary basis on which the Tribunal concluded that the First-tier Tribunal decision should be set aside, rest on a point that did not form part of the Secretary of State's Grounds of Appeal or her further written submissions made in response to the Tribunals Directions.*"

24. The Tribunal in **EP (Albania)** determined that the absence of the Appellant having an opportunity to address this matter constituted a procedural irregularity – "*the appeal was decided based on a submission which had been neither advanced by the appellant nor addressed by the respondent*" (paragraph 80). The decision of Judge Kekic was therefore set aside.

25. Thus the 'error of law' returns to the Upper Tribunal for consideration at an oral hearing.

Consideration of 'Error of Law' challenge

26. In our judgement, the second ground identified as arguable in the grant of permission to appeal is made out. We are satisfied that the decision of Judge Ross contained a material error of law in that there was an insufficiency of reasoning for the finding that the Appellant faced insurmountable obstacles to the continuation of his private and family life in Bangladesh.

27. Judge Ross correctly identified the 'real issue' in the appeal at paragraph 22: "*The real issue which I have to decide in respect of the human rights claim under the Immigration Rules is whether there are very significant obstacles to the appellant's integration into Bangladesh*". This, of course, is a reflection of the requirements of paragraph 276ADE(1)(vi).

28. The Judge went on to set out primary findings on the Appellant's circumstances in the United Kingdom (paragraph 23). Such findings were essentially based on matters that did not appear to be in dispute. On the basis of those findings, Judge Ross reached this conclusion in respect of family life:

> "*I am satisfied that family life does exist between the Appellant and his uncle and cousin which engages Article 8 ECHR.*" (paragraph 24)

This conclusion was further explained adequately in these terms:

> "*The reason I so find, is that the appellant was still a child when he started to live with his uncle in the UK. He has never lived anywhere else and has not formed an independent adult life away from the family to whom he came as long ago as May 2007. The appellant remains financially and otherwise dependent on his uncle and his uncle's family, which includes his cousin/brother, and nephew.*" (paragraph 24).

29. It is appropriate to pause at this point to recall that the 'uncle' and 'cousin' were not blood relatives of the Appellant. There was some discussion before us as to whether Judge Ross was clear as to this in his own mind - and some further discussion as to whether such relationships could be said to constitute family life rather than being an aspect of private life.

30. We have not found it necessary or appropriate to reach any conclusion in this regard. It was not a matter raised in the Grounds of Appeal and we are cautious not to repeat the same error of determining the challenge by reference to matters not raised in the pleadings. For completeness however, we note that Mr Youssefian advanced cogent submissions encompassing: that it might reasonably be inferred from Judge Ross's references to "*the appeallant's uncle (who is a friend of the appellant's father)*" (paragraph 17) and "*has lived with his uncle/family friend*" (paragraph 23) that he was cognisant of the exact nature of the relationships; that the case of **Lama [2017] UKUT 16** confirmed that in principle family life could exist without a biological relationship; in any event the relationship with Mr Uddin and Mr Uddin's son was of such a

strength that nothing of substance turned on whether it should be labelled ‘family’ or ‘private’ life.

31. Judge Ross, having set out his conclusion in respect of the engagement of Article 8 continued in these terms:

> “*25. I also find that because the appellant left Bangladesh when he was 15 and is now aged 28, he would have been absent from Bangladesh during the critical years when a young person would normally either go into higher education or embark upon a career / employment. Because the appellant was brought to the UK in 2007 was only granted discretionary leave to remain for one year, he has not been able to establish himself in higher education and/or a career which he could resume and continue in Bangladesh. His family life has been confined to living with his Uncle’s family here in the UK and he has not been able to start his own family as he would probably have been able to do had he not been brought to the UK in 2007.*
>
> *26. I am satisfied that the appellant’s circumstances taken as a whole are such that there would be very significant obstacles to his integration into Bangladesh. Whilst he chose to remain in the UK after his asylum claim was dismissed, my task is simply to assess the obstacles to integration relied on and decide whether they are very significant, which I have decided they are.*”

32. There is no further analysis on the point. The remaining paragraphs of the Decision are essentially concluding paragraphs that add nothing further by way of reasons.

33. In our judgement, these passages contain none of the analysis required further to the guidance to be gleaned from case law such as **Kamara [2016] EWCA Civ 813** and **Parveen [2018] EWCA Civ 932**. In particular the fact finding and reasoning of the First- tier Tribunal is deficient in that there is no reference to the Appellant’s understanding of the language of the country to which he is likely to be returned, and there is no adequate finding in respect of the presence of family members in Bangladesh or any analysis of the extent to which such family members might be able to assist the Appellant in reintegration.

34. Mr Youssefian very fairly and properly acknowledged that overt consideration should have been given to the issue of language, but that this was not manifest on the face of the Determination and Reasons.

35. As regards family members, whilst there is a reference in the Determination and Reasons to the Appellant’s sister and an uncle being in Bangladesh, the decision of the First-tier tribunal is silent on the extent of any support that might be available from them. The Determination is also silent on the whereabouts of the Appellant’s parents. Mr Youseffian was able to direct us to the Appellant’s witness statement before the First-tier

Tribunal in which he had asserted that the whereabouts of his father were unknown and that he had in effect disappeared (witness statement at paragraph 6). However, this of course is in contrast to the conclusion of Judge Beg in the earlier asylum appeal that the Appellant's parents had not relocated, his claim was in the main part fabricated, and he could return to his family. It is also to be noted that the Respondent's position set out in the RFRL was that the Appellant had available in Bangladesh "*the support of your family*". Plainly there were matters of controversy and dispute in this regard: it was incumbent upon the Judge to analyse the evidence and make findings with reasons; he did not do so.

36. In careful and measured submissions Mr Youseffian argued that the available evidence before the First-tier Tribunal was sufficient to demonstrate that very significant obstacles to integration existed on the basis that the Appellant had an emotional and practical reliance upon Mr Uddin and his family in the UK; to be separated from such persons and his life in the UK would result in such an emotional impact that it would cause emotional and practical obstacles to integration. He invited us to infer that in substance this was the conclusion that Judge Ross had reached - emphasising the findings at paragraphs 23 and 24.

37. We are not persuaded that the factual foundation which might theoretically support the submission Mr Youssefian advances did in fact do so in the mind of Judge Ross. Had that been the case it was incumbent upon the Judge to set it out with adequate clarity and with adequate reasons. This is not apparent on the face of the Determination. We reject Mr. Youssefian's submission in this regard.

38. The failure to make clear findings and/or set out adequate reasons with regard to the circumstances that the Appellant might face upon return to Bangladesh is a fundamental error which requires that the Decision of the First- tier Tribunal be set aside. We were able to indicate at the hearing that we had reached that decision.

39. It seems to us - and indeed it was common ground between the parties once we had indicated that the decision would be set aside - that a *de novo* hearing is required, bearing in mind that there are credibility issues.

40. In this context, although we have not reached our conclusion based on the lack of any specific analysis of Judge Beg's earlier decision, necessarily the conclusions in the earlier appeal, both as to credibility and the presence of family members in Bangladesh, will constitute a 'starting point' in remaking the decision in the appeal.

41. In all the circumstances the appropriate forum is the First-tier Tribunal.

42. We do not propose to make any specific Directions for future conduct of the appeal, and no special Directions were sought by the parties. It is anticipated that standard directions will suffice, which may be issued in due course by the First-tier Tribunal.

One further matter

43. It is unnecessary for us to give any consideration to the further grounds of challenge, or any of the other issues that were canvassed during the hearing before us, save in one regard - the issue of a 'new matter' within the contemplation of section 85(5) of the Nationality, Immigration and Asylum Act 2002.

44. The Appellant claimed asylum unsuccessfully, and his appeal was dismissed in 2011. The application of 19 February 2019 was made on Article 8 grounds as a human rights application, and the RFRL was a rejection of a human rights claim. The Appellant did not formally claim asylum in the course of his 2019 application, albeit that he made reference to the circumstances of his asylum claim. The RFRL acknowledged this, and indicated that if the Appellant wished to make a protection claim he should do so through the appropriate application.

45. It was a matter of dispute between the parties before First-tier Tribunal as to whether reliance on matters relating to political activity and its consequences constituted a 'new matter' that could only be considered with the Respondent's consent: see at paragraphs 10-12 of the Determination of the First-tier Tribunal. The dispute in this regard continued into the Respondent's grounds of appeal to the Upper Tribunal.

46. In the circumstances, we are grateful to the indications given by both representatives before us. Mr. Youssefian indicated that the Appellant did not seek to raise the factual matrix of his asylum claim as a freestanding 'protection' ground of appeal, but rather as an aspect of his Article 8 case, including as potential 'obstacles' to reintegration in particular. He referred us in this context to the decision of **JA (human rights claim; serious harm) Nigeria [2021] UKUT 97 (IAC)**. In such circumstances, Mr. Tufan indicated that if the Appellant was not raising such matters in the context of Article 3 grounds or Refugee Convention grounds, it was not a 'new matter', and so did not require any consent from the Respondent. It is permissible that such matters may be considered by the First-tier Tribunal when re-making the decision in the appeal, at least insofar as the Appellant's claimed political activities, and/or those of family members, inform the Article 8 case and/or the issue of obstacles to reintegration.

Notice of Decision

47. The decision of the First-tier Tribunal contained a material error of law and is set aside.

48. The decision in the appeal is to be remade before the First-tier Tribunal by any Judge other than First-tier Tribunal Judge Ross, with all issues at large.

49. No anonymity direction is sought or made.

Signed:

Date: **14 December 2021**
Deputy Upper Tribunal Judge I A Lewis