Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10912/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House via Skype	**Decision & Reasons Promulgated**
On 15 April 2021	On 8 June 2021

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR K K
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Sanders instructed by Blackstones Solicitors.
For the Respondent: Ms Cuhna, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Thomas promulgated on 2 March 2020 dismissing the appellant's appeal. The background history is that the appellant claimed asylum on 15 August 2017 which was refused. He then applied for leave on human rights grounds on 30 January 2018 which was also refused. His further submissions were refused on 23 October 2019 and formed the basis of the appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002.

2. The appellant came to the UK in 1997 and has lived in the UK for the past 23 years. He feared a return to Bangladesh because of his political opinion as a member of the Bangladeshi National Party, ("the BNP"). Prior to leaving Bangladesh he was an activist in the Jatiotabadi Johbodal Youth Wing of the BNP and attended meetings and demonstrations. He maintained his problems started in 1996 when a local thug Mustafa and his criminal friends who were associated with the Awami League demanded monetary subscriptions from the family clothing shop. As a result the appellant was attacked by Mustafa and two associates, was hospitalised and the appellant's brother filed a complaint against the attackers, but no action was taken. The threats continued and the appellant and his brother fled the country believing the police would not take action. The brother went to Nicaragua, but the appellant came to the UK and subsequently attended BNP demonstrations the last one being a meeting in Luton in December 2019. The appellant believed he was of adverse interest to the Bangladesh authorities who fabricated two cases against him.

3. The grounds for permission to appeal maintained (i) that at paragraph 19 the judge started the determination by considering Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 which was a direct failure to apply case law such that Section 8 findings should not be a starting point but part of the holistic assessment of credibility. The judge fell foul of the practice warned against in **JT (Cameroon) v Secretary of State for the Home Department [2008] Civ 878** and **SM (Section 8: Judge's process) Iran [2005] UKAIT 00116**. It was clear that the judge's starting point was Section 8 rather than part of the holistic assessment required and there was no reference to the relevant case law. That undermined the credibility findings.

4. In terms of ground (ii) at paragraph 20 the judge referred to finding at "paragraph 21 above" that the appellant's oral evidence and the evidence of his family members was insufficient to discharge the burden of proof but it was not clear to what she was referring.

5. At paragraph 21 the Tribunal made a positive finding in the favour of the appellant that the documents provided did evidence that the appellant was attacked. At paragraph 21 the judge also stated that she did not find the attackers were terrorists or politically linked but there is no reasoning to support that finding.

6. At ground (iii) it was advanced that there was a failure to properly assess the evidence. At paragraph 22 the judge found that if the appellant was wanted by the authorities, he through his lawyers could simply challenge the false reports made against him legally but this failed to consider or engage with any of the evidence provided about the situation in Bangladesh or the Home Office policy in relation to Bangladesh included in the appellant's bundle was. There was no reference to any of the country evidence within the determination.

7. The Country Policy Information Note ("the CPIN") stated that the law enforcement agents at a senior level tended to be aligned with the ruling the party and the police and criminal justice system are functioning, but their effectiveness was undermined by poor infrastructure and endemic corruption (paragraph 2.33 of CPIN Bangladesh: Opposition to Government January 2018). Clearly even on the respondent's case the appellant would not be able to challenge those reports through the court. If the appellant was wanted for political reasons the court in Bangladesh would not take action in his favour.

8. At the hearing before me Ms Sanders submitted the skeleton argument. That was composed by Ms Praisoody of Counsel dated 14 August 2020 and a copy was also forwarded to Ms Cunha. This outlined the grounds for permission to appeal save for a further challenge in relation to a failure by the judge to consider Article 2 and Article 3 but Ms Sanders confirmed she would not be pursing that avenue of challenge during the hearing.

9. Ms Sanders briefly expanded upon her grounds for permission to appeal making clear that **SM** identified that making a finding on Section 8 was not the starting point and the findings of the First-tier Tribunal which were considered in **JT (Cameroon)** were strikingly similar to those made by the judge here. The remainder of the decision showed that the judge had distorted the analysis following the initial finding in relation to Section 8. Under ground (ii) it was not clear on what reasoning the judge reached the conclusions and paragraphs 20 and 21 displayed an inadequacy of reasoning. At paragraph 24 the first sentence showed no reasoning at all and no assessment of the evidence.

10. Ms Cunha agreed and conceded that there were in fact inadequate findings in relation to the appellant on risk of return and as to the sufficiency of protection available to him.

Analysis

11. **JT (Cameroon) v Secretary of State for the Home Department [2008] EWCA Civ 878** confirms that it is the duty of the judicial decision maker in every instance to reach his own conclusion upon the credibility of the claimant. In particular Section 8 was analysed at paragraph 21:

> *"21. Section 8 can thus be construed as not offending against constitutional principles. It is no more than a reminder to fact-finding tribunals that conduct coming within the categories stated in section 8 shall be taken into account in assessing credibility. If there was a tendency for tribunals simply to ignore these matters when assessing credibility, they were in error. It is necessary to take account of them. However, at one end of the spectrum, there may, unusually, be cases in which conduct of the kind identified in section 8 is held to carry no weight at all in the overall assessment of credibility on the particular facts. I do not consider the section prevents that finding in an appropriate case. Subject*

> *to that, I respectfully agree with Baroness Scotland's assessment, when introducing the Bill, of the effect of section 8. Where section 8 matters are held to be entitled to some weight, the weight to be given to them is entirely a matter for the fact-finder."*

12. Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, however, should be taken only as part of the global assessment of credibility and it is not the starting point as set out by **SM (Section 8: Judge's process) Iran**

> *"Even where section 8 applies, an Immigration Judge should look at the evidence as a whole and decide which parts are more important and which less. Section 8 does not require the behaviour to which it applies to be treated as the starting-point of the assessment of credibility."*

The Tribunal at paragraph 10 clearly set out the process to be adopted when of making findings of fact

> *"10. In our judgment, although section 8 of the 2004 Act has the undeniably novel feature of requiring the deciding authority to treat certain aspects of the evidence in a particular way, it is not intended to, and does not, otherwise affect the general process of deriving facts from evidence. It is the task of the fact-finder, whether official or judge, to look at all the evidence in the round, to try and grasp it as a whole and to see how it fits together and whether it is sufficient to discharge the burden of proof. Some aspects of the evidence may themselves contain the seeds of doubt. Some aspects of the evidence may cause doubt to be cast on other parts of the evidence. Some aspects of the evidence may be matters to which section 8 applies. Some parts of the evidence may shine with the light of credibility. The fact-finder must consider all these points together; and, despite section 8, and although some matters may go against and some matters count in favour of credibility, it is for the fact-finder to decide which are the important, and which are the less important features of the evidence, and to reach his view as a whole on the evidence as a whole".*

13. At paragraph 19 the judge opened her findings with a reference to Section 8, but made no reference to **SM** nor to **JT (Cameroon).** She found that because the appellant entered the UK in 1997 and did not seek asylum until 2017, when he was arrested in illegal employment this *"adversely affected his overall credibility in this appeal*".

14. She found his behaviour was not that of a person who had left their home and country in need of international protection and that his explanation that it was ignorant of the law and procedures was not reasonable. The judge found, "*In these circumstances the appellant's failure claim (sic) asylum on arrival, is behaviour that under Section 8 of the 2004 Act,*

adversely affects his overall credibility in this appeal". She made this finding on the appellant's general credibility in the first paragraph of her findings.

15. The judge was entitled to be concerned about the delay in the appellant claiming asylum but failed to approach the evidence in line with the guidance in **SM**. It is correct that the finding "affects" credibility, but the early finding and the use of the word "overall" suggests that further credibility findings would be adverse and further reasoning was distorted by this initial finding. For example, at paragraph 20, the judge stated, "*Given my findings in paragraph 21 above, the appellant's oral evidence and the evidence of his family members largely dependent on information he gave them is not sufficient to discharge the lower burden of proof on this issue* (sic)".

16. It is not clear the judge was aware of the relevant authorities and the approach was an error of law.

17. As asserted in ground (ii), the judge also failed to give adequate reasoning. At paragraphs 20 and 21 when making adverse credibility findings, the judge made no attempt to engage with or analyse the appellant's oral evidence or that of his family members; and when rejecting the evidence with reference to "paragraph 21 above" either obfuscated the meaning because paragraph 21 was clearly below or overly relied on the paragraph above with relation to Section 8 which was flawed.

18. Turning to paragraph 21 the judge accepted that the appellant had been attacked, injured and hospitalised but at the close of that paragraph merely stated in relation to the alleged attackers

> *"On the totality of the evidence, I find to the lower standard of proof, the appellant was attacked in February 1996, by Mustafa and associates and suffered serious harm. I do not find the attackers were terrorists or politically linked to the AL Party or their actions were state sponsored".*

19. There was no explanation of why she rejected the assertion they were politically linked. That was also an error.

20. At paragraph 24 of the decision, the judge merely stated, "*Taking the evidence in the round, I find the appellant was not persecuted in Bangladesh for political reasons and is not subjected to false charges on an arrest warrant*" but as can be seen from the previous ground, the findings in relation to the appellant in Bangladesh, were flawed and not sustainable because of the legal approach.

21. As the headnote of **MK (duty to give reasons) Pakistan** [2013] UKUT 00641 (IAC) explains

> *"(1) It is axiomatic that a determination discloses clearly the reasons for a tribunal's decision.*

> *(2) If a tribunal finds oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it is necessary to say so in the determination and for such findings to be supported by reasons. A bare statement that a witness was not believed or that a document was afforded no weight is unlikely to satisfy the requirement to give reasons".*

22. Without a proper legal approach to credibility, the assessment of the facts, particularly in relation to Bangladesh was flawed and thus the judge was not in a position to assess the risk on return. I shall not delve deeper in the grounds and the lack of reference to country guidance, but note that at the close of the hearing Ms Cuhna agreed and conceded that there was a material error of law in the decision and that the matter should be remitted to the First-tier Tribunal.

Notice of Decision

I set aside the decision and preserve no findings. The matter will be remitted to the First-tier Tribunal for a hearing de novo.

Directions

The appellant should provide a skeleton argument at least fourteen days prior to the hearing and there should be a Bengali interpreter for the appellant and his witnesses.

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

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings. The matter relates to asylum.

Signed Helen Rimington Date 26th April 2021

Upper Tribunal Judge Rimington