



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: PA/12724/2016

THE IMMIGRATION ACTS

Heard at Manchester, Piccadilly  
On the 29<sup>th</sup> September 2017  
October 2017

Decision & Reasons Promulgated  
On the 3<sup>rd</sup>

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MR RAHUL AMIN  
(Anonymity Direction not made)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Khan (Counsel)

For the Respondent: Mr Bates (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Sharkett promulgated on the 13<sup>th</sup> March 2017, in which she dismissed the Appellant's asylum appeal.

2. The Appellant is a citizen of Bangladesh who was born on the 3<sup>rd</sup> September 1989. He claimed asylum on the basis of his political opinion. The Appellant's case is that he was actively involved with the Islami Chhatrashibir, whilst at university, which is the student wing of the leading opposition party in Bangladesh Jaamat-e-Islami. He claimed that he was at a real risk of persecution upon return to Bangladesh on account of his political opinion from the Awami League. Judge Sharkett did not accept the Appellant's account was credible, for the reasons set out within her decision, and therefore dismissed his asylum appeal.
3. The Appellant has now sought to appeal against that decision, for the reasons set out within the Grounds of Appeal. In the ground of appeals it was argued, inter-alia, that the Judge had applied the wrong standard of proof in asylum appeals and that she had referred to "the balance of probabilities" when making her findings.
4. Permission to appeal has been granted by Upper Tribunal Judge Plimmer on the 8<sup>th</sup> May 2017 who found, having considered the Grounds of Appeal, that it was arguable that although the First-tier Tribunal Judge had directed herself appropriately regarding the lower standard of proof applicable in the asylum claim she had not applied it, when making her findings.
5. In the appeal hearing before the Upper Tribunal, Mr Bates on behalf of the Respondent conceded that regrettably the Learned First-tier Tribunal Judge had materially erred, when making her findings, in that at paragraphs 81, 88 and 102 she had referred to making her findings on the "balance of probabilities". He conceded that this was the wrong standard of proof to be applied within an asylum claim and that this did amount to a material error of law, such that the decision of First-tier Tribunal Judge Sharkett should be set aside. He conceded that credibility would have to be assessed again in its entirety, and there should be no preserved findings of fact and argued that the case should be remitted

back to the First-tier Tribunal for rehearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge Sharkett.

6. Regrettably, having carefully considered the decision of First-tier Tribunal Judge Sharkett, it is clear that although at [21] she did properly set out that the burden of proof lies on the Appellant to substantiate the asylum claim and that the applicable standard of proof is a “reasonable degree of likelihood”, when actually making her findings regarding the factual basis which is said to have given rise to the risk of persecution upon return, at [81] she stated *“For the above reasons I find, on the balance of probabilities, the Appellant was not being pursued by the Awami League, that they did not come to his house looking for him and that he was not in hiding between the end of July 2010 until March 2011 when he left Bangladesh”*. At [88], although accepting the Appellant had been physically attacked she went on to find that *“I find on the balance of probabilities the attack was not for a reason in connection to any political affiliation of the Appellant”*. Further, at [102] she found that *“I am not satisfied on the balance of probabilities that the messages produced from the WhatsApp group show evidence of political involvement with either Islami Chhatrashibir or Jaamat-e-Islami”*.
  
7. It was only thereafter she went on at [109] to find that *“I find for the reasons stated above, the Appellant has been unable to discharge the low burden of proof on his to show that there is a reasonable degree of likelihood that, should the Appellant be returned to Bangladesh, he would come within the Geneva Convention, in so much as he is a person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside of the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country.”*

8. In the Court of Appeal case of Karanakaran v Secretary of State for the Home Department [2000] 3 ALL ER 449, Lord Justice Brooke, who gave the lead judgment with whom Lord Justice Robert Walker and Lord Justice Sedley agreed, stated that although in the House of Lords decision of Sivakumaran [1988] 1 AC 958 it was held that when deciding whether an applicant's fear of persecution was well-founded it was sufficient for a decision-maker to be satisfied that there was a reasonable degree of likelihood that the applicant would be persecuted for a convention reason if returned to his home country, that decision did not resolve the different but related question as to the standard of proof a decision-maker should apply when considering evidence of past or present facts, before he or she goes on to make the necessary assessment of future risk.
9. At page 20 of the judgment, Lord Justice Brooke endorsed the comment from Mr Justice Sackville in the case of Rajalingam [1999] FCA 719 that *"There may be circumstances in which a decision-maker must take into account the possibility that alleged past events occurred even though it finds that these events probably did not occur. The reason for this is that the ultimate question is whether the Appellant has a real and substantial basis for his fear of future persecution. The decision-maker must not foreclose reasonable speculation about the chances of the future hypothetical event occurring."*
10. As Lord Justice Sedley in his judgment warned *"The decision-maker must not, by a process of factual findings on particular elements of the material which is provided, foreclose reasonable speculation of the chances of persecution emerging and make consideration of the whole of the material. Everything capable of having a bearing has to be given the weight, great or little, due to it... the facts, so far as they can be established, are signposted on the road to a conclusion."*
11. In such circumstances, although clearly it is for judges to determine the extent to which reliance can be placed upon past events which was

said to have occurred, which then have to be considered against the ultimate question as to whether or not an Appellant has a real and substantial basis was fear of future persecution. To apply a “balance of probabilities” test to past events, is to apply the wrong standard of proof. I do find that First-tier Tribunal Judge Sharkett she has required elements of the factual background of the Appellant’s to be proved “on the balance of probabilities”, and has therefore foreclosed reasonable speculation on the chance of persecution emerging from the consideration of the whole of the material. I therefore do accept that she has in effect applied the wrong standard of proof to the factual background surrounding the asylum claim. This clearly is a material error of law, given that I cannot say that the decision would necessarily have been the same, had the Judge approached the factual background in the correct manner. I therefore do find that the decision of First-tier Tribunal Judge Sharkett does contain a material error of law and that in such circumstances her decision should be set aside in its entirety, with no preserved findings of fact.

12. Given that as both parties agreed that the case will have to be heard again *ne novo* and the entirety the appellant’s credibility reassessed, I find that the amount of fact finding that is now required is such that the matter should be remitted back to the First-tier Tribunal for rehearing. I direct that the matter is remitted by the First-tier Tribunal for rehearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge Sharkett.

### Notice of Decision

The decision of First-tier Tribunal Judge Sharkett does contain a material error of law and is set aside;

The appeal is remitted back to the First-tier Tribunal for rehearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge Sharkett;

I make no order in respect of anonymity, no such order having been sought before me and no such order having been made by the First-tier Tribunal.

Signed

Handwritten signature in black ink, appearing to read 'RF McGinty'.

Deputy Upper Tribunal Judge McGinty

Dated 30<sup>th</sup> September 2017