



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/07569/2017

THE IMMIGRATION ACTS

Heard at Field House London

**Decision & Reasons
Promulgated**

On 6 March 2018

On 22 March 2018

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL McCARTHY

Between

**RM
(ANONYMITY DIRECTION CONTINUED)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Razzaq-Siddiq, instructed by Universal Solicitors

For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant was born on 2 February 1983 and is a citizen of Bangladesh.

Immigration and appeal history

2. The First-tier Tribunal directed that the appeal proceedings and decision should be anonymised. Given the nature of the appeal, it is appropriate to continue that direction and I make the relevant Upper Tribunal order at the end of this decision and reasons statement.

3. The appellant arrived in the UK as a working holidaymaker valid between 29 July 2009 and 29 July 2011. He did not leave the UK at the end of his working holiday. In fact, he did not seek to contact the respondent until 30 January 2017, when he made a protection claim. That claim was refused on 31 July 2017.
4. The appellant appealed against that refusal. His appeal was heard by First-tier Tribunal Judge Birk on 7 September 2017, and in her decision and reasons statement issued on 27 September 2017, she gave her reasons for dismissing the appeal. The appellant was not content with the outcome and through different solicitors applied for permission to appeal. His application to the First-tier Tribunal was refused but was granted on renewal to the Upper Tribunal by Upper Tribunal Judge Plimmer on 17 January 2018.
5. When granting permission to appeal, Judge Plimmer identified a preliminary issue.
 - “1. Although the First-tier Tribunal decision is carefully drafted, there has been an arguable failure to take into account relevant country background material in the Home Office’s fact finding report published in September 2017 (attached to the grounds). The grounds do not make it clear that this report or evidence similar to it was available to the First-tier Tribunal and the appellant shall need to address this issue.”

It was obvious that I should start the Upper Tribunal hearing by considering this issue.

Preliminary issue: request to admit evidence not before the First-tier Tribunal

6. Mr Razzaq-Siddiq admitted that the relevant report (the full title of which is: Report of a Home Office Fact-Finding Mission: Bangladesh, conducted 14-26 May 2017, published September 2017) was not before the First-tier Tribunal when it heard the appeal on 7 September 2017. This is uncontroversial given that the .GOV website reveals the report was only publicly available from 19 September 2017. I confirmed this during the hearing with both representatives, after examining the .GOV website with them.
7. Because the appellant wished the Upper Tribunal to consider evidence that was not before the First-tier Tribunal, Mr Razzaq-Siddiq applied for the September 2017 report to be admitted. Such requests are subject to rule 15(2A) of the 2008 Procedure Rules.
8. Mr Razzaq-Siddiq reminded me that the relevant report had only become publicly available on 19 September 2017. The appellant instructed his current solicitors on 6 October 2017. The relevance of the report was not identified until after Judge Birks’s decision and reasons statement had been received and analysed, which was done within the period available for applying for permission to appeal. The report raised serious concerns

about the negative inferences drawn by Judge Birk in relation to the reliability of the legal documents provided by the appellant. The report was provided with the application for permission to appeal made on 10 October 2017.

9. Mr Kotas reminded me that an application to admit evidence that was not before the First-tier Tribunal should be made by sending notice to the Tribunal and the other party. The appellant has not complied with this requirement. Mr Kotas submitted that there was no explanation why the appellant's previous solicitors had not sent a copy of the report to the Tribunal between 19 and 26 September 2017, which could have been done if the report was as significant as claimed. There is no allegation or indication the previous solicitors acted negligently. Mr Kotas also argued that there was no duty on the respondent to produce the report to the Tribunal because it was not a policy document.
10. I decided I would admit the September 2017 report for the following reasons. The chronology provides a reasonable explanation why it was not provided to the First-tier Tribunal Judge. It contains evidence relevant to the case which was in the public domain prior to the date of promulgation. If the report had been provided prior to promulgation, Judge Birk was bound to consider it, given she was hearing a protection claim. The content of the report may have changed her analysis. Bearing in mind the need for "anxious scrutiny" and the overriding objective, these factors make it appropriate to admit the evidence.
11. In reaching this conclusion, I have applied rule 7(2) of the Procedure Rules and waived the requirement for the request to admit late evidence to be made on notice. The reliance on the report in the grounds of application was a strong indication there would be an application for it to be admitted in the Upper Tribunal proceedings, particularly given the observations of Judge Plimmer as to its potential relevance. Both representatives were able to deal constructively and competently with the issues at the hearing and there was no disadvantage to either party by proceeding on that basis.
12. Of course, no criticism can be levelled at Judge Birk for not considering the report. It was not provided to her and she would have been in error if she had undertaken her own research. My decision is made in hindsight, on information available now but was not available to Judge Birk when she was determining the issues.
13. I move on to consider the competing cases.

The appellant's case

14. Mr Razzaq-Siddiq relied on the grounds of application made to both the First-tier and Upper Tribunals.

15. Mr Razzaq-Siddiq reminded me of the positive factual findings made by Judge Birk at paragraph 24 of her decision and reasons statement. Judge Birk accepted the appellant had been a member of BNP and that he had the role of Joint Secretary. Judge Birk came to this decision based on the newspaper report at pages 14 and 15 of the appellant's original bundle of documents. The appellant is named in the newspaper report in the second line from the bottom. Judge Birk found that newspaper report was sufficiently strong evidence to dispel the concerns that arose from the appellant's own evidence recorded at paragraph 23.
16. Mr Razzaq-Siddiq took me to paragraph 34 of Judge Birk's decision and reasons statement, where she accepted the reliability of another newspaper article that the appellant had been involved in a violent incident on 15 August 2009. He took me to the newspaper article at page 34 of the appellant's original bundle, published on 17 August 2009, which describes the appellant as a leader. The same article refers to a case being filed against the appellant under reference "65". Mr Razzaq-Siddiq argues that this corroborates the First Information Report, which is under reference "65/280". He also argues that the First Information Report is corroborated insofar as the newspaper report confirms the name and address of the informer.
17. Mr Razzaq-Siddiq submitted that it was unclear why Judge Birk accepted some parts of the newspaper articles as being reliable but did not rely on other parts of the same articles. This undermined the soundness of her findings because there was a lack of reasoning in that there was no explanation why some parts of the evidence were ignored.
18. Turning to the September 2017 Fact Finding Mission report, Mr Razzaq-Siddiq submitted that Judge Birk's findings at paragraph 35 of her decision and reasons statement are not sustainable in light of the evidence recorded at paragraph 4.6.1 of the report.
19. At paragraph 35, Judge Birk gave the following reason for rejecting the reliability of the court and police documents relied on by the appellant.

"The court and police documents which [the appellant] has produced do correspond to his account but due to the general lack of credibility that the Appellant has demonstrated as set out in my findings I take into account that it is possible for such documents to be unreliable and produced on demand. ... I find that if documents such as passports, marriage certificates and bank documents can be reproduced then there is no reason why court and police documents can also not be so produced. I do not find it credible that there would be now some 9 years after the even such warrants only just being issued for his arrest."
20. Paragraph 4.6.1 of the September 2017 report contains the following evidence.

"The BHC [British High Commission] noted that forged and fraudulently obtained documents were easily obtainable. TI

[Transparency International] noted that there were significant incidents of forged documents, particularly in relation to land matters, but it is not a general problem. Several sources commented that it was hard to fake news, such as posting and arrest warrant in a paper, in the mainstream media. One source noted that forged or fraudulent police or court documents are not easily obtainable because of counter-signature processes and the fact that all documents can be checked against a database.”

21. Mr Razzaq-Siddiq also submitted that it was not open to Judge Birk to find at paragraph 31 that the ease with which the appellant was able to leave Bangladesh on his own passport was evidence that the authorities had no interests in him. Mr Razzaq-Siddiq took me to paragraph 3.1.5 of the September 2017 report, which recorded the following.

“An official at the BHC noted that Immigration Police deal with immigration issues. They are not always linked up with other law enforcement agencies. The Government can sometimes issue a ‘blacklist’ of ‘no-fly list’ of names to the Immigration Police, but these are not comprehensive and can be politically selective. 99 per cent of people attempting to leave the country, even if charged with a crim, would not normally face difficulties. However, one source observed that if any person was wanted for a crime the police would alert immigration and other stations nationally.”

22. Mr Razzaq-Siddiq’s final submissions related to whether the appellant would be free from the risks of harm by relocation. If his account is credible, then the appellant would be a person facing a pending criminal case that is politically motivated. This fear is objectively supported by the contents of the Home Office’s Country Policy and Information Report February 2015 (actual and perceived political activists), and is updated in the Home Office’s report published in January 2018.

The respondent’s case

23. Mr Kotas reminded me that the appellant’s general credibility was undermined by the lengthy delay in claiming international protection. Judge Birk made this finding at paragraph 22 and kept it in mind throughout the remainder of the decision and reasons statement. This is the context in which all other findings and conclusions had to be examined.
24. Mr Kotas accepted Judge Birk’s finding at paragraph 31, relating to the ease with which the appellant was able to leave Bangladesh, were questionable given the evidence contained in paragraph 3.1.5 of the September 2017 report, but argued that this was a discrete finding and did not infect the other negative findings made.
25. Mr Kotas took me to the negative findings made by Judge Birk. At paragraph 24 she found the appellant had not been as actively involved in

politics as claimed, and gave clear and cogent reasons for so finding in the next four paragraphs. Those findings are not challenged. At paragraph 29, Judge Birk identified the seven-month delay in action being taken against the appellant in Bangladesh and noted the appellant had not provided a reasonable explanation for that delay. It was open to Judge Birk to find, therefore, that the appellant had not been attacked for political reasons in January 2009.

26. Mr Kotas disputed the weight to be given to paragraph 4.6.1 of the September 2017 report because the part on which the appellant sought to rely was based on one unnamed source. It was doubtful the source was reliable. Mr Kotas submitted it was open to Judge Birk to find at paragraph 35 that the appellant had failed to provide a reasonable explanation why the arrest warrants had only been procured in 2017.
27. Mr Kotas also submitted that Judge Birk had given clear and cogent reasons for rejecting the evidence of the appellant's witness and the evidence from the appellant's Bangladeshi lawyer.
28. Looked at overall, therefore, although there was one finding that was questionable (relating to the appellant's ease of departure), all the other findings were soundly made for the reasons given by Judge Birk.
29. Although Mr Razzaq-Siddiq responded to a number of these points, the only additional argument he presented was in relation to the delay in action being taken against the appellant in 2009. Mr Razzaq-Siddiq reminded me that the Home Office's Country Information and Guidance Bangladesh Opposition to the government report published in February 2015 was before Judge Birk. She refers to that report in paragraph 35 of her decision and reasons statement. Section 2.6 of that report contained evidence in relation to politically motivated cases. Judge Birk should have had regard to the evidence. If he had, she would have realised that delay in bringing proceedings can be politically motivated.

Discussion and conclusions

30. Because of the detailed arguments presented by both parties and the issues arising, it was not appropriate to determine this appeal immediately. I reserved my decision and reasons, which I now give.
31. Having reviewed all the arguments and evidence, I am satisfied there are material errors in Judge Birk's decision and reasons statement that require it to be set aside.
32. The errors relate to the assessment of the appellant's claim because Judge Birk did not have available to her relevant and up to date background country information.
33. The proper approach to the assessment of protection claims is set out in paragraphs 339HA to 339N of the Immigration Rules, which transpose

article 4 of the Qualification Directive (2004/83/EC). It is trite law that an assessment requires all the evidence to be considered in the round (as recently confirmed by the Upper Tribunal in *KB & AH (credibility-structured approach: Pakistan)* [2017] UKUT 491). At paragraphs 339J(i) and 339JA, the requirement to make an assessment considering up to date information is clear. The preamble to paragraph 339L also makes clear that the personal credibility of an appellant will not be particularly relevant to the overall assessment where their personal statements are supported by documentary or other evidence.

34. In this context, the submissions of Mr Razzaq-Siddiq are very persuasive. Many of the negative findings made by Judge Birk fall away if the police and court documents were found to be reliable and if the ease with which the appellant left Bangladesh was not a significant factor. The reasons given by Judge Birk for rejecting the reliability of the police and court documents and for relying on the ease of departure as an indicator the appellant was not of interests to the Bangladeshi authorities are undermined by the September 2017 report. Irrespective of their cogency, the fact the reasons are based on questionable premises, undermines the quality of the reasoning.
35. I add that I find Judge Birk was selective in what she accepted from the newspaper articles as being reliable and failed to explain why she was selective in the ways claimed. The newspaper articles would appear to give support to the police and other legal documents, which needed to be addressed by the Judge. That failure amounts to a further legal error but is in fact rolled up in the principle error identified. This is because the error might not have been material were it not for the up to date country information contained in the September 2017 report.
36. Having decided that the assessment carried out by Judge Birk contains legal error and her decision must be set aside, I have considered whether I can remake the decision in the Upper Tribunal. I have decided, in light of the Senior President of Tribunal's Practice Statements that the appeal should be remitted to the First-tier Tribunal for a further hearing so that a proper assessment can be carried out. This is necessary not only because of the extent of what needs to be undertaken but also because of the need to consider the Home Office's Country Policy and Information Note, Bangladesh; Opposition to the government, Version 2.0 of January 2018.

Notice of Decision

The First-tier Tribunal's decision and reasons statement contains an error on a point of law and is set aside.

The appeal is remitted to the First-tier Tribunal for a fresh hearing, with the following directions.

Signed Date 21 March 2018

Judge McCarthy
Deputy Judge of the Upper Tribunal

Directions

1. The remitted appeal can be heard by any First-tier Tribunal judge other than Judge Birk.
2. It may be appropriate for the remitted appeal to be allocated to Designated Judge McCarthy, which will enable continuity, but this is a matter for the First-tier Tribunal. If either party has concerns about the appeal being allocated to Designated Judge McCarthy, they should as soon as possible make representations to the First-tier Tribunal.
3. The scope of the remitted hearing is limited to protection issues (including asylum, humanitarian protection and/or article 3 ECHR).
4. The following findings are preserved when the remitted hearing begins.
 - a. Paragraph 24 (appellant's membership and role as Joint Secretary in the BNP),
 - b. Paragraph 34 (the appellant was involved in a violent incident on 15 August 2009).

The parties should remember that the first does not establish the appellant's level of political activity, particularly in relation to his claims to be politically active in the UK. The parties should also remember that the second does not establish a nexus between the violent incident and the appellant's claim that the allegations against him were politically motivated.

Signed Date 21 March 2018

Judge McCarthy
Deputy Judge of the Upper Tribunal

Anonymity

I make the following order. I prohibit the parties or any other person from disclosing or publishing any matter likely to lead members of the public to identify the appellant. The appellant can be referred to as "RM".

Signed Date 21 March 2018

Judge McCarthy

Deputy Judge of the Upper Tribunal