



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number:
PA/04593/2018

THE IMMIGRATION ACTS

Heard at: Field House
On: 17th January 2020

Decision & Reasons Promulgated
On: 30th January 2020

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

MAR
(anonymity direction made)

Appellant

And

Secretary of State for the Home Department

Respondent

For the Appellant: Mr E. Waheed, City Heights Solicitors
For the Respondent: Mr T. Melvin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Bangladesh born in 1975. He appeals with permission against the decision of the First-tier Tribunal (Judge Malcolm) to dismiss his protection appeal.

2. The crux of the Appellant's claim was that he is a member of the BNP who faces a real risk of persecution for reasons of his political opinion. The crux of the Respondent's case was that this was a claim devoid of credibility, not least because the Appellant had spent five years in the United Kingdom before deciding he needed international protection. The First-tier Tribunal preferred the latter submission and dismissed the appeal.
3. On the 17th September 2019 Upper Tribunal Judge Sheridan granted permission to appeal to this Tribunal, finding it arguable that the First-tier Tribunal had erred in placing the 'section 8' credibility factors at the heart of its assessment. Before me the Appellant relies on this limb of his challenge, as well as a number of other criticisms that appear under the heading 'reasoning/perversity'.

Section 8

4. Section 8 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 (insofar as it is material to this appeal) reads:

8 Claimant's credibility

(1) In determining whether to believe a statement made by or on behalf of a person who makes an asylum claim or a human rights claim, a deciding authority shall take account, as damaging the claimant's credibility, of any behaviour to which this section applies.

(2) This section applies to any behaviour by the claimant that the deciding authority thinks –

(a) is designed or likely to conceal information,

(b) is designed or likely to mislead, or

(c) is designed or likely to obstruct or delay the handling or resolution of the claim or the taking of a decision in relation to the claimant.

(3) Without prejudice to the generality of subsection (2) the following kinds of behaviour shall be treated as designed or likely to conceal information or to mislead –

(a) failure without reasonable explanation to produce a passport on request to an immigration officer or to the Secretary of State,

(b) the production of a document which is not a valid passport as if it were,

(c) the destruction, alteration or disposal, in each case without reasonable explanation, of a passport,

(d) the destruction, alteration or disposal, in each case without reasonable explanation, of a ticket or other document connected with travel, and

(e) failure without reasonable explanation to answer a question asked by a deciding authority.

(4) This section also applies to failure by the claimant to take advantage of a reasonable opportunity to make an asylum claim or human rights claim while in a safe country.

(5) This section also applies to failure by the claimant to make an asylum claim or human rights claim before being notified of an immigration decision, unless the claim relies wholly on matters arising after the notification.

5. In IT (Cameroon) v Secretary of State for the Home Department [2008] EWCA Civ 878 the Court of Appeal gave the following guidance on the interpretation of that provision:

19. Section 8 can, in my judgment, be construed in a way which does not offend against constitutional principles. It plainly has its dangers, first, if it is read as a direction as to how fact-finding should be conducted, which in my judgment it is not, and, in any event, in distorting the fact-finding exercise by an undue concentration on minutiae which may arise under the section at the expense of, and as a distraction from, an overall assessment. Decision-makers should guard against that. A global assessment of credibility is required (R (Sivakumar) v Secretary of State for the Home Department 2003 UKHL 14, [2003] 1 WLR 840).

20. I am not prepared to read the word "shall" as meaning "may". The section 8 factors shall be taken into account in assessing credibility, and are capable of damaging it, but the section does not dictate that relevant damage to credibility inevitably results. Telling lies does damage credibility and the wording was adopted, probably with that in mind, by way of explanation. However, it is the

“behaviour” of which “account” shall be taken and, in context, the qualifying word “potentially” can be read into an explanatory clause which reads: “as damaging the claimant’s credibility”. Alternatively, the explanatory clause may be read as: “when assessing any damage to the claimant’s credibility”. The form of the sub-section and Parliament’s assumed regard for the principle of legality permit that construction.

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.

6. In this case the behaviour which the Respondent replied upon as engaging section 8 was as follows:
 - i) The failure to claim asylum on arrival in 2010 (despite now claiming that in the year before he left Bangladesh his home was attacked and was subject to a botched kidnapping);
 - ii) Failure to mention in his 2012 application for human rights leave that he had any political problems in Bangladesh;
 - iii) Ditto in his evidence for his 2014 human rights appeal in which he simply said that his family had been the victim of criminal extortion by ‘miscreant hooligans’;
 - iv) Ditto in his April 2015 human rights application.
7. From these facts the First-tier Tribunal drew negative inference. As the legislation and jurisprudence make clear, it was plainly entitled, indeed obliged, to do so. The question is whether that negative inference in effect determined the appeal.

8. It is right to say that the 'section 8 issues' did attract significant weight in the balancing exercise. As Mr Waheed points out the reasoning starts with the delay in claiming asylum [from §101 on], dwells on it [at §102-110], and finishes by returning to the issue [at §117-119]. I am not however satisfied that this was an error of law.
9. The duty upon the First-tier Tribunal is to assess the evidence in the round. Even before parliament approved the legislation in 2004 it was of course incumbent on decision makers to look at all of the relevant circumstances. If a claim for asylum was made late in the day, when all other avenues were closed, that would plainly be relevant. If a claimant failed to take a number of opportunities to advance the claim, that too could legitimately be weighed in the balance. If a claimant said one thing in one context, and another in the asylum claim, the discrepancy would be worthy of note. If we set the statutory obligation to one side, and simply read the reasoning in this determination without reference to s8 or the jurisprudence on it, the judge's decision would be perfectly legitimate.
10. Furthermore it is clear that the 'section 8 issues' were not the only matters taken into account by the Tribunal: other matters that weighed against the Appellant were the concerns about the credibility of the FIRs, the timing and nature of the emails from his wife, the discrepancies in the evidence about when he joined the BNP, and the timing and circumstances of his re-ignited political activity.
11. Taking all of that together the Judge was entitled to reason that this was a man who had failed to seek international protection over a five year period, despite now claiming to have been targeted before and after his arrival here, whose documentary evidence and sur place activity all curiously coincided with the end of the road in terms of his repeated human rights claims, and whose evidence was inconsistent. Even applying the lower standard of proof the Judge was entitled to find that these factors prevented the Appellant from discharging the lower standard of proof.

The Other Grounds: 'Reasons/Perversity'

12. The grounds submit that there is no inconsistency in the Appellant having told Judge Blake in 2014 that his wife in Bangladesh was the subject of extortion demands by 'miscreants' and these 'miscreants' now being recast as Awami league activists on a politically-motivated campaign of harassment and intimidation. I reject that. There is plainly an inconsistency. The Appellant was in 2014 pursuing a human rights claim to be able to remain in the United Kingdom, and part of that case was that he has problems in Bangladesh. It was

his opportunity to articulate his evidence on that point and this is how he did that:

“The Appellant claimed that he could not make an application for asylum as he was receiving threats not from the State authority but from private miscreants who had no power and money to control everything. He claimed that the police were mere spectators”.

Now the Appellant asserts that the miscreants were acting at the behest of the government, and that the police are complicit in their campaign of persecution. That is a discrepancy that the Tribunal was entitled to weigh against him.

13. The next point raised in the grounds concerns the email from his wife which allegedly prompted the Appellant to claim asylum. The Tribunal clearly considered it peculiar that the Appellant’s wife had chosen to communicate urgent information to him (that he was now wanted by the Dhaka police) by way of email rather than a telephone call; it was peculiar because up until that point they had regularly communicated by phone. The Tribunal concluded that this ‘self-serving’ email had been produced simply to bolster the claim. Whilst there is obvious scope for criticism of the term ‘self-serving’ in this instance it may in fact be apposite. The point the judge makes is that there was no good reason for that information to be relayed by email other than the fact that it could later be produced in an asylum appeal. That was an entirely reasonable conclusion for him to have drawn.
14. Next the grounds address the matter of the FIRs. The Appellant had produced a series of documents purportedly issued by the authorities in Bangladesh showing him to be wanted for various crimes. The Secretary of State had subjected these documents to verification checks and found them to be forged. The Appellant had responded by submitting more documents from Bangladesh, namely correspondence from a lawyer who questioned the methodology employed by the Secretary of State and maintained that *his* checks had shown the documents to be genuine. The First-tier Tribunal, perhaps wisely, sidestepped this entire issue by simply saying this: “I find that the timing of the provision of the First Information Reports calls into question the validity of these reports”. Mr Waheen complains that as this was a whole new reason for doubting the veracity of the documents the Appellant should have been given an opportunity to respond to it. I reject that. The point is that the Secretary of State squarely submitted that these documents had been faked in order to support an entirely bogus asylum claim. The Appellant was well aware that this was the position, and that the Secretary of State was further submitting that the timing of the entire claim was highly suspect. No issue of unfairness arises, since the Appellant understood that this was the challenge, and that it was for him to prove his case.

15. For those reasons I am not satisfied that any error arises in the First-tier Tribunal disposal of this appeal and the Appellant's appeal is dismissed.

Decisions

16. I find no error of law and the decision of the First-tier Tribunal is upheld.
17. This appeal concerns a claim for protection. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

“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 his family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”

Upper Tribunal Judge Bruce
21st January 2020