Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/52386/2020**

UI-2022-001649; IA/02390/2021

THE IMMIGRATION ACTS

Heard at : Field House	**Decision & Reasons Promulgated**
On the 4 August 2022	**On the 11 October 2022**

Before

UPPER TRIBUNAL JUDGE RIMINGTON
DEPUTY UPPER TRIBUNAL JUDGE BOWLER

Between

A.H.
(Anonymity Direction made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms K McCarthy, counsel, instructed by Hunter Stone Law
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of Judge Bunting of the First-tier Tribunal ("the Judge") dismissing the Appellant's appeal against the Respondent's decision made on 5 November 2020 to refuse his claim for protection.

Immigration History

2. The Appellant came to the UK on 28 May 2009 on a visit visa which expired on 30 September 2009. He overstayed. He made an application for protection on 31 July 2017 based, in essence, on his political activities with the Bangladesh National Party ("BNP"). It is the refusal of that application which was the subject of the Judge's decision dated 15 March 2022.

The Appellant's grounds of appeal

3. The Appellant sought permission to appeal on the following grounds:

   a. the Judge erred in his approach to the evidence by failing to address that which related to: (a) a claim that the Appellant's brother had been attacked by the Awami League; and (b) a claim regarding harassment of his wife by the Awami League and visits by the police. Furthermore, the Judge's finding that there was no suggestion that the Appellant's family were hiding was perverse in light of the Judge's acceptance of evidence that they had moved out of fear;

   b. the Judge's assessment of evidence of the Appellant's scars was flawed; and

   c. the Judge's assessment of the reason the Appellant delayed his claim for asylum was flawed.

4. During the hearing Ms McCarthy confirmed that the principal ground of appeal relied upon by the Appellant was the first.

First-tier grant of permission to appeal

5. Permission to appeal was granted by Judge Dainty of the First-tier Tribunal on 26 April 2022 on the basis of the first part of the first ground that arguably there was a material error of law in failing to make findings regarding the Appellant's case that his brother had been attacked in Bangladesh as a result of the Appellant's activities in the UK. This had arguably affected the view taken of risks associated with the Appellant's sur place activities, particularly as the Judge had not considered the guidance provided in case law regarding social media.

The Respondent's response

6. There is no Rule 24 response. However, at the hearing Ms Cunha submitted that the Judge had appropriately considered the evidence in the round when the decision as a whole is considered. The only evidence relating to the claimed attack on his brother was contained in the Appellant's witness statement to which the Judge had given reduced weight. The Judge took account of the fact that the Appellant's wife had moved to live with her in-laws and specifically considered the lack of interest shown in her by the Awami League given the claimed interest in him. The case of *TK Burundi* v *SSHD* [2009] EWCA Civ 40 makes clear that a judge is entitled to make inferences as a result of the paucity of evidence. The Appellant had had plenty of time to obtain better evidence. In particular, there was a lack of evidence regarding the Appellant's scars; there was no expert report or medical evidence from the NHS. While it was recognised that the Appellant takes antidepressants and has described other medical limitations and issues in his witness statement, there was no evidence before the Judge to show that the Appellant's depression was caused by events in 2008, or to provide some explanation of the Appellant's delay in claiming asylum. It has not been suggested that procedural unfairness arose. In essence, the Appellant's challenge was based on claimed perversity in the Judge's reasoning for which there is a high threshold.

Discussion

7. At the heart of the Judge's decision lie concerns about the Appellant's credibility which derived from the Judge's assessment of the extent of the Appellant's political knowledge, the evidence (or more particularly lack of evidence) regarding scarring, the limited evidence from BNP officials and the application of Section 8 Asylum and Immigration (Treatment of Claimants, etc) Act 2004. However, it was accepted that the Appellant was a member of the BNP in the UK and was posting as such on Facebook.

8. At paragraph 50 of the decision the Judge says that it is accepted that a number of photographs had been provided showing the Appellant's involvement in BNP activities in the UK and that the Appellant had used Facebook in support of the BNP. However, the credibility concerns are specifically stated to lead to the conclusion that the Facebook postings would not have come to the attention of people in Bangladesh.

9. Yet at paragraph 10 of the Judge's decision it is noted that as part of the Appellant's claim was that the Appellant's brother was attacked by the Awami League in response to the Appellant's work for the BNP in the UK, he went into hiding and was then attacked again when he returned to public life in 2020. While specific consideration is given to the Appellant's sur place activities in paragraph 71- 75 and paragraphs 79 – 82, there is no engagement in the decision with one of the key elements of the Appellant's claim; namely, that his brother was attacked as a result of the Appellant's sur place activities. Instead, the Judge says (in paragraph 82):

> *"I do not consider that there is <u>any indication</u> that the appellant's Facebook postings or attendance at demonstrations would be sufficient to put him at risk. There is <u>no evidence</u> to say that these would have come to the attention of the authorities or that anyone who had seen them would have paid any attention to them."* (Underlining added)

10. In fact there is evidence in the Appellant's witness statement and at the end of his asylum interview of the claimed attacks on his brother. We would expect the Judge to have engaged with that evidence. That does not mean that the Judge would necessarily have accepted the evidence; but to say that there was no evidence was clearly an error. Failing to take into account relevant evidence where that evidence goes to the heart of one of the key elements of the Appellant's protection claim is a material error.

11. We note further that the Judge found that a friend of the Appellant was told by the Appellant's wife that she and her children were staying with her in-laws due to fear. The Judge says that this is taken into account as supporting the Appellant's claim, but it is considered there may be many reasons why they would have that arrangement that do not include a well-founded fear. The reasoning at this point is inadequately explanined and somewhat unclear and, in particular, it is unclear whether the Judge considers that there is any relationship between the wife's fear and the Appellant's activities in the UK. Given that the Appellant left Bangladesh in 2009 and given the Judge's other conclusions regarding the extent of the Appellant's involvement in the BNP in Bangladesh, it is difficult to identify anything which the Judge had in mind as the source of the wife's fear other than the Appellant's UK activities. The Judge then proceeds to say that there is no suggestion that the Appellant's wife and family are in hiding, or that it would be difficult for them to be located by the Awami League; and the reader is left uncertain about the implications of the friend's accepted evidence that the wife had described fear. In particular, there is no consideration of whether that fear taken together with the evidence of attacks on the Appellant's brother passes the threshold for protection.

12. We should make clear, lest there is any confusion on the part of the Appellant, in particular, that consideration of the evidence regarding the claimed attack on the Appellant's brother will not necessarily lead to a different result for the Appellant. Notably, the evidence regarding that attack is limited to a description in his witness statement and a reference at the end of his asylum interview to the claimed attack on his brother in 2020. The newspaper article referred to in the interview about the attack does not appear to have been provided and this omission needs to be explained at the next hearing.

13. We note that Judge Dainty referred to an omission in failing to consider the application of the principles set out in *XX (PJAK – sure place activities – Facebook) Iran CG* [2022] UKUT 00023 (IAC). Given the content

of those principles, which include the conclusion that there are several barriers to authorities monitoring Facebook material, we do not consider that in this case there was a further error of law in the Judge's approach to the Facebook evidence.

14. Given the nature of the error of law that is the omission of consideration of relevant evidence which is clearly material, we are satisfied that the appeal will need to be remitted for a rehearing de novo because of the nature and extent of the findings. Consequently, we do not address the grounds relating to the Judge's evidence to the scarring evidence or the Appellant's delay in claiming asylum further.

DECISION

15. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside.

16. The appeal is remitted to the First-tier Tribunal pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), to be heard before any judge aside from Judge Bunting.

Signed: T. Bowler Dated: 9 September 2022

Deputy Upper Tribunal Judge Bowler