



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000908
First-tier Tribunal Nos: PA/53414/2021
LP/00425/2022

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On the 04 July 2023**

Before

UPPER TRIBUNAL JUDGE KEITH

Between

**'SM' (BANGLADESH
(ANONYMITY ORDER MADE))**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Karim, Counsel, instructed by Shahid Rahman Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

Heard at Field House on 1st June 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. These written reasons reflect the oral reasons which I gave to the parties at the end of the hearing.
2. The appeal concerns the appellant's claim to fear persecution in his country of origin, Bangladesh, as a member of the Jatiota Bhadi Chatra Dal, or 'JCD', and as a supporter of the Bangladesh Nationalist Party, 'BNP', opposition groups to the current Awami League government. A previous Judge of the First-tier Tribunal, Judge Khawar, had rejected the appellant's earlier appeal in 2017. However, the appellant then relied upon further evidence including what is sometimes referred

to as a 'First Information Report' or "FIR" or a prosecution in Bangladesh in 2018 of whom he was one of a number of defendants including somebody who provided letters of support; and also his 'sur place' activities in the UK, including his attendance at a demonstration outside the Bangladesh High Commission.

The Judge's decision under appeal

3. Judge Cary rejected the appellant's fresh appeal in a decision promulgated on 27th February 2023. He had considered country evidence including a Country Policy and Information Note or 'CPIN' of 2020 which suggested that low level members of the BNP would not be at risk, (see §5.3.2 of the CPIN). Judge Cary went on to consider Judge Khawar's previous decision taking that as his starting point, which included a finding that the appellant did not have a significant profile in the UK or in Bangladesh, (§60 of Judge Cary's decision). The Judge rejected the appellant's claims of his family home in Bangladesh being raided, and went on to consider the new evidence of the FIR, which the appellant says amounts to a politically motivated prosecution, and evidence of the appellant's attendance at the demonstration and other sur place activities. The Judge noted the appellant's claim of increased security monitoring of the internet as a result of the Bangladesh Digital Security Act 2018, which it is said has a global application. At §70, the Judge did not accept as reliable the evidence in relation to the FIR and noted, in particular, the appellant's willingness to apply for a travel document to return to Bangladesh in 2018. The Judge went on to consider expert evidence at §72, relating to the genuineness of the FIR but did not accept that it meant that the contents were likely to be correct. At §74, the Judge concluded that he was not prepared to attach much weight to the FIR and related documents as it made no sense in view of his other findings that the Bangladeshi authorities would not take any action against the appellant.
4. The Judge was conscious that even opportunistic or contrived sur place activities could present a risk but concluded at §79 that he would not be at risk because of his attendance at a demonstration. The Judge also considered the appellant's Facebook posts, which in light of the authority of XX (PJAK - sur place activities - Facebook) Iran CG [2022] UKUT 00023 (IAC) had limited evidential value. In the Judge's view, (at §84), there was little evidence that action had been taken against members of the Bangladesh diaspora community on account of political activity outside Bangladesh.
5. The Judge also did not accept that the appellant's health would worsen on his return to Bangladesh (§99).
6. In conclusion, the Judge rejected the appellant's protection and also human rights claims.

The appellant's appeal and the grant of permission

7. In terms of the grounds of appeal and grant of permission I do no more than summarise the eight grounds of appeal, in light of Mr Avery's concession, which I come on to discuss later.
8. **Ground (1)** was that the Judge had erred in his assessment of the appellant's friend, who I do not name, who had provided witness evidence at the Tribunal hearing, and who was a prominent member of the BNP and more importantly had claimed to have been tortured. The Judge had erroneously stated that the friend

had not given details of the torture and had failed to consider that it was consistent with the evidence on the frequent occurrence of torture as stated in the CPIN. The Judge had also not explained why in this case the witness would make up such claims.

9. **Ground (2)** was that the Judge had erred in rejecting the account of a second friend who had advised the appellant of proceedings taken against him in Bangladesh, in circumstances where the credibility of that friend was not challenged and where contrary, to the Judge's record that the friend had merely advised the appellant not to travel to Bangladesh, the evidence was that the friend had told him that the FIR placed him at risk. The Judge had failed to consider the prevalence of politically motivated prosecutions prior to the 2018 election in Bangladesh and that also there was no reason for the friend to fabricate evidence.
10. **Ground (3)** was that the Judge had erred in attaching less weight to an expert report, on the basis that the expert was unaware of Judge Khawar's decision which had rejected the appellant's credibility when in fact the report had made extensive reference to Judge Khawar's decision.
11. **Ground (4)** was that the Judge was perverse in concluding that the appellant would not be at risk in circumstances where he had previously placed himself at the centre of the sur place activities and the respondent's own CPIN referred to the Bangladeshi authorities' use of digital technology (§2.4.6 of the September 2020 CPIN).
12. **Ground (5)** was that the Judge had erred in failing to make findings on a number of aspects of evidence which I do not recite in full but included evidence of the appellant's wife which made clear that she was willing to sponsor an application for him to live with her in Canada but was unable to do so because the appellant was not in Bangladesh from which to make the application. This potentially resolved any concern that the appellant's protection claim was in fact a disguised economic migrant claim.
13. **Ground (6)** was that the Judge failed to give adequate reasons for not attaching much weight to the FIR and related documents, in light of not only the expert report but also the evidence of the appellant's supporters and the country evidence. The Judge had also referred at §82 to the lack of any "quantitative" change in the level or frequency of the appellant's activities but had not explained what this meant or why he had reached that decision.
14. **Ground (7)**, was that in accepting that the appellant had been "in the thick of it" in relation to activities as found by Judge Khawar, the Judge had failed to apply the guidance of RT (Zimbabwe) and others v SSHD [2012] UKSC 38 and consider whether the appellant would continue those activities in Bangladesh.
15. **Ground (8)** was that the Judge was irrational in concluding that the appellant's mental health would not worsen on return. The Judge had also failed to consider properly the stigma around mental ill health, the appellant's strong commitment to the BNP and his political activities in the UK and the Judge's Article 8 assessment was therefore flawed.
16. Judge Parkes of the First-tier Tribunal granted permission to appeal on 27th March 2023. The grant of permission was not limited in its scope.

The Hearing

17. Mr Karim made detailed with relevant submissions, which I do not recite in full, in light of Mr Avery's formal concession that the Judge had failed to apply anxious scrutiny to a number of aspects of the evidence, as identified in the appellant's grounds. For the avoidance of doubt Mr Avery did not accept that there was any perversity in the decision but instead that some of the evidence appeared to have not been considered when the Judge reached his findings. The first related to ground (1).
18. **Ground (1)** In relation to the evidence of a prominent UK leader of the BNP who had also given oral evidence, the Judge had referred to the witness not giving details in his witness statement of his torture (§79), in the circumstances where his detention had been accepted. In fact, the witness evidence, in particular at pages 129 to 131 of the appellant's bundle (AB), §§13 and 14, did give particulars of the torture, which I do not recite. Also, the Judge had omitted a reference to oral evidence of the appellant being slapped across the ears and the face. I also accept that there was an error in the Judge failing to reconcile the claims of ill-treatment, with his discussion of the country evidence at §54 which referred to widespread ill-treatment in police detention. I accept that the Judge erred in placing particular weight on the absence of any British Embassy investigation in relation to the friend's ill-treatment where, as here, it has been accepted that the friend and prominent BNP activist had been detained. I accept Mr Karim's submission that this ground alone was sufficient to amount to material error. The importance of the error is that while he was in detention and, he claims, was mistreated, he also claimed that his captors showed footage to him of the appellant, whom he was asked to identify. If, (and I emphasise if because I do not bind any re-making judge to such a finding), that contention is correct, that becomes then directly relevant to the potential future risk in which the appellant is placed.
19. **Ground (2)** Mr Avery's concession also extended to ground (2). This was in relation to another friend who claimed to have been a co-defendant in the criminal prosecutions which are the subject of an FIR. At §70 of his decision, the Judge had referred to the appellant saying in evidence that he had been advised that proceedings had been taken against him and he had been told this by the friend. There was no mention of that, the Judge concluded, in the friend's statement of February 2023 or his undated letter and that the letter had merely advised the appellant not to travel to Bangladesh to participate in the election campaign. However, I also accept that this is only a partial reference to the evidence which goes on specifically to refer to the appellant being prosecuted and that is also in the context of thousands of prosecutions against political opponents. In assessing that evidence and the likelihood of the FIR being genuine, I also accept that this amounts to a material error.
20. **Ground (3)** Mr Avery's concession also extends to this ground. I refer to §90 of the Judge's decision:
- "In assessing the Appellant's claim to international protection I have taken into account what is said by the expert Mr Mahbub in his report. For some reason he does not appear to have been provided with the previous decision of FTTJ Khawar or to have been aware that the Appellant had previously been found to be unreliable in certain aspects of his claim. To that extent I place little weight on his report".

21. On the one hand the expert report, which begins at page 183 AB, does not refer to Judge Khawar's decision. However, it refers to the refusal letter which, if that is read in turn, recites Judge Khawar's decision in extensive detail and specifically in relation to adverse credibility findings. Therefore I accept that the Judge erred when he said that the expert had not been aware that the appellant had previously been found to be unreliable in certain aspects of his claim. The refusal letter which the expert specifically refers to deals with the appellant's unreliability at some length. That, too, amounts to a failure to engage with anxious scrutiny in the evidence.
22. **Grounds (4) and (6)** I come on to the challenge on perversity grounds and inadequate reasoning, in the context of the appellant who has previously been found to be "in the thick of" activities and whether in that context it was open to the Judge to conclude that he would not be at risk, particularly because of digital surveillance of the Bangladeshi diaspora community in the UK. Mr Karim pragmatically accepts that perversity is a high test and this is not an area where Mr Avery has conceded that there was an error. I am also conscious, and once again Mr Karim accepted, that it is unnecessary for a judge to make findings in relation to each and every part of the evidence. I am not prepared to accept that the Judge erred in law to the extent that it was not open to him to conclude that the appellant would not be at risk by virtue of having been a committed supporter in the context of the surveillance by the Bangladesh government. That is an analysis which is intrinsically fact-sensitive. It will depend on somebody's profile including what is sometimes referred to in XX (PJAK) as someone's "social graph" and evidence on the Bangladesh government's capabilities and interest in monitoring, a point something that is touched on in the CPIN but I am not satisfied that it is a conclusion that the Judge could not have concluded on the evidence. Ground (4) is not made out.
23. However, as ground (6) contends, I accept that the Judge failed to explain why somebody who had previously been found to be in the "thick of activities" would not be at risk on return, in the context of the claimed prosecution, which it was argued was consistent with his profile. Ground (6) does disclose a material error of law.
24. **Ground (5)** I do not accept that the Judge's failure to refer to various aspects of the appellant's claim and evidence, including his wife's evidence relating to her circumstances in Canada, amounts to an error of law. It is trite that a Judge does not need to refer to each and every aspect of the evidence, and this ground fails for that reason.
25. **Ground (7)** However, I accept that where, as here, the appellant's activities are genuine, there remains a question of whether he would continue to pursue those activities in Bangladesh or whether, for example, HJ (Iran) & Anor v SSHD [2009] EWCA Civ 172 becomes relevant. In the circumstances, that was an issue incumbent on the Judge to explore and is not one that was sufficiently explained. That too is a material error.
26. **Ground (8)** This is also a perversity challenge, which I do not accept. It relates to the Judge's assessment of medical evidence, which is fact-sensitive. I do not accept that it was not open to the Judge to conclude that the appellant's mental health situation would not worsen such that Article 3 or 8 would not be engaged. That is something that, as with the assessment of the appellant's fear of

persecution (which in turn may impact on his mental health), will need to be assessed in the round.

27. For all of the above reasons, and in light of Mr Avery's pragmatic concession, I accept that the entirety of the Judge's conclusions are not safe and cannot stand. I therefore set aside his decision.

Disposal of the appeal

28. I turn to the question of disposal and how I should re-make matters. I remind myself of the Court of Appeal's decision in AEB v SSHD [2022] EWCA Civ 1512 and also on the one hand Mr Avery's submission that the matter should be remitted given the nature and the extent of the necessary fact-finding, (see §7.2(b) of the Senior President's Practice Statement), but also Mr Karim's submission that notwithstanding those points although he was ultimately in my hands, his preference was the Upper Tribunal to re-make in the light of its greater expertise in these matters in relation to the First-tier Tribunal. Whilst I make no criticism at all of Mr Karim for making this submission that is not, in my view, the correct approach for whether to retain re-making in this Tribunal or re-making below. The expertise of the First-tier Tribunal as a specialist jurisdiction is not one that I should readily interfere with. The facts need to be entirely re-made and they are extensive and complex as reflected in the eight separate grounds. It may well be that there is a further need for additional evidence, as indeed reflected in a Rule 15(2A) application that was made just in relation to this appeal alone. I therefore regard it as appropriate that the matter be remitted back to the First-tier Tribunal at Taylor House to a judge other than Judge Cary.

Notice of Decision

The decision of the First-tier Tribunal contains material errors of law and I set it aside.

I remit this appeal to the First-tier Tribunal for a complete rehearing.

Directions to the First-tier Tribunal

This appeal is remitted to the First-tier Tribunal for a complete rehearing with no preserved findings of fact.

The remitted appeal shall not be heard by First-tier Tribunal Judge Cary.

The anonymity directions continue to apply.

J Keith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

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20th June 2023