Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2023-005223
First-tier Case No: PA/01078/2022

THE IMMIGRATION ACTS

Decision & Reasons Promulgated

On 23rd of January 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

SK
(Anonymity order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M West, Counsel
For the Respondent: Mr N Wain, Home Office Presenting Officer

DECISION AND REASONS

Heard at Field House on 15 January 2024

The Appellant

1. The appellant is a citizen of Bangladesh born on 12 January 1980. He appeals against a decision of Judge of the First-tier Tribunal Atkins dated 15 September 2023. That decision was to dismiss the appellant's appeal against a decision of the respondent's dated 14 December 2021 which in turn refused the appellant's application for international protection.

2. The appellant entered the United Kingdom in March 2004 on a work permit visa but has had no leave to be here since 2007. In February 2017 he applied for asylum on the grounds of his sexual orientation, this was refused by the respondent and an appeal to the First-tier Tribunal (Judge Mill) was dismissed on 12 February 2018. The appellant made further representations in November 2018 and January 2019 and it was the refusal of those further submissions which gave rise to the present proceedings. The appellant received a reasonable grounds decision from the National Referral Mechanism (NRM) on 25 July 2022. A final decision on this issue appears to remain outstanding.

The Appellant's Case

3. Although the appellant's claim for international protection based on sexual orientation was dismissed by the First-tier Tribunal in 2018, the appellant argued that he now had further information which supported his claim to be gay and that he would be at risk upon return to Bangladesh. The appellant called two witnesses Mr Ali who said that the appellant had told him Mr Ali about the appellant's sexuality five years earlier and Ms Kawsar who is the chair of an organisation called Apanjon which works with Bangladeshis in the United Kingdom in the LGBT community. There were photographs of the appellant at PRIDE events. The appellant had received threats on his Facebook page which he had now closed. The appellant produced a psychiatric report indicating that he was suffering from PTSD and severe depression. He was a vulnerable witness.

The Decision at First Instance

4. The judge directed himself in line with the authority of Devaseelan taking the earlier 2018 decision of the FTT as his starting point noting the reasons why Judge Mills had not found the appellant to be gay in particular the adverse credibility findings made in the earlier determination. At [44] of Judge Atkins' determination the judge explained that there was insufficient new material to enable him to depart from the earlier findings. He analysed the evidence of both witnesses and the photographs produced by the appellant and found they did not assist him in determining the issue.

5. At [49] the judge found there was no valid reason for the appellant's delay in claiming asylum. The medical evidence pointed to the appellant's health deteriorating since the dismissal in 2018 indicating that it had not affected the appellant's ability to give evidence at that time. Treatment for the appellant's condition was available in Bangladesh. At [61] the judge gave his reasons why there were no significant obstacles to the appellant's return to Bangladesh and why the appellant could not succeed under paragraph 276ADE (1)(vi) of the immigration rules. He dismissed the appeal.

The Onward Appeal

6. The appellant appealed against this decision in lengthy grounds which ran to nine pages and contained a number of generic statements of the law. The grounds were settled by Counsel who had not appeared at first instance but who appeared before me. They made four main points. The first was that the judge had failed to deal adequately with the question of internal relocation in the light of the threats received by the appellant over the Internet. The appellant could not reasonably be expected to relocate if he did not know where the threats came from.

7. Secondly the judge had directed himself wrongly in law when stating that the test for the appellant if he could not succeed under the rules was that he had to show that the consequences of a return to Bangladesh would be unduly harsh. That was the test to be applied in deportation appeals, in administrative appeals such as this one the test was whether the consequences would be unjustifiably harsh.

8. The third ground was that the judge had erred in his article 8 assessment when stating that article 8 did not confer a right to a private life in the United Kingdom. Although the judge had performed the balancing exercise when assessing article 8, he had omitted four important factors which should have gone onto the appellant's side of the balance sheet. These were: (i) that the appellant had been in the United Kingdom for 19 years; (ii) that he had a positive reasonable grounds decision from the NRM; (iii) that he suffered with mental health issues and (iv) there had been delay by the respondent in refusing the appellant's claim for international protection.

9. Permission to appeal was granted by the First-tier on 16 November 2023 for two main reasons. It was arguable that the judge had given insufficient reasons for his findings in relation to the appellant's vulnerability and the impact of the appellant's mental health on return. Secondly it was said to be unclear whether the judge treated the appellant as a vulnerable witness during the hearing. The other grounds were said to be less persuasive.

The Hearing Before Me

10. In consequence of the grant of permission the matter came before me to determine in the first place where there was a material error of law in the decision of the First-tier Tribunal such that it fell to be set aside. If there was then I would make directions on the rehearing of the appeal. If there was not the decision at first instance would stand.

11. There was no consolidated bundle before me in respect of this appeal. The appellant's solicitors had requested an extension of time to file an appeal bundle which I granted on 8 January 2024 extending time until 10 January 2024. Notwithstanding this extension, no bundle was supplied. I raised with Counsel at the outset of the hearing that I had the

determination, the grounds of onward appeal, the grant of permission to appeal and the respondent's bundle (prepared for the FTT hearing). Counsel indicated that he wished the tribunal to have sight of a skeleton argument prepared for the hearing in the First-tier. This was not available and I put the matter back for counsel to take instructions. When the hearing resumed counsel indicated that he was content for the matter to proceed without the skeleton argument. He would refer in oral submissions to any relevant passages in the skeleton argument upon which he wished to rely. The matter therefore proceeded without the need for an adjournment.

12. In oral submissions counsel relied on copies of Facebook posts threatening the appellant which were exhibited to the respondent's bundle. The judge had said at [47] that taking the appellant's case at its highest the appellant could avoid a risk from persons intending him harm by internally relocating but if the appellant could not identify who the people were who made these comments he would not know where it would be safe to relocate to. It was not therefore open to the judge to find that the appellant could relocate. The use of the expression "taking the appellant's case at its highest" indicated that the judge was taking these threats into account. The respondent had not disputed the validity of the threatening posts and the judge had not made a finding that the posts were inauthentic. The judge appeared at [47] to accept that the appellant was at risk from some individuals in Bangladesh.

13. In relation to the second ground the judge's self-direction was wrong in law. This ground was tied to ground three that the judge had not included in the balance sheet certain factors which were in favour of the appellant. The judge had only considered the availability of treatment for the appellant in Bangladesh he had not considered the stigma which those suffering from mental health had placed upon them in Bangladesh. The fourth ground was parasitic on grounds one and three. There was a failure to follow the Joint Presidential Guidance Note number two of 2010 which was a material error of law. That point had been taken in the FTT skeleton argument.

14. The respondent opposed the onward appeal submitting that one had to read the decision as a whole. The judge had found that the appellant could not satisfy the first question in HJ Iran as the judge did not accept that the appellant was a gay man. That was a finding which had not been challenged on appeal. The judge's use of the expression "to put the appellant's case at its highest" at [47] was hypothetical one. The Facebook posts were in relation to the core of the appellant's claim that he was gay and as he was found not to be the risk was not accepted. The judge also noted at [47] that the appellant had stopped using Facebook and that the appellant could delete Facebook accounts. The appellant had blocked those threatening him which confirmed the judge's consideration of risk. For the appellant to need to consider relocation the judge would have had to have found that the appellant was gay but the case did not get that far.

15. In relation to ground to one it was an error to refer to the unduly harsh test but it was not a material one. At [18] of the determination the judge had referred to the test set out in the case of **TZ [2019] EWCA Civ 1109** that the appellant had to show that there were exceptional circumstances which meant that the consequences would be unjustifiably harsh. It was clear the judge had weighed the circumstances and found for the respondent.

16. As to the third ground the judge did not have sight of a bundle in relation to the claim of modern slavery. The judge (and the parties) were content to proceed on the basis that there was a positive reasonable grounds decision which begged the question how far forward did that take the appellant's case. The judge had referred at [36] to the reasonable grounds decision and the judge had applied the relevant factors at [64]. The mental health of the appellant was factored into the 276 ADE assessment. The judge was aware it was not just a question of treatment being available but there was also the claim that there was a stigma in Bangladesh attached to those with mental health difficulties, see [43]. The submissions in relation to mental health made by counsel at the FTT hearing had relied on article 3 rather than 276. The judge had referred at [39] to the claim that people were shunned due to the stigma attached to mental health issues and had weighed these issues.

17. Although the Presidential Guidance was not referred to by name in the determination the judge was aware of the mental health issues. The substance of the guidance was about making adjustments and whether vulnerabilities would affect the evidence given by the appellant. It was not an issue in this appeal and not recorded as a preliminary issue there was any discussion about applying the Presidential Guidance. It could not be said that the appellant had been deprived of fair hearing. The appellant had given his evidence without an interpreter. No request for adjustments to be made such as a preview of likely cross examination or the need for regular breaks had been made at first instance.

18. In conclusion counsel argued that the judge was correct to consider whether the Facebook posts created a risk which he did at 47. It was the wrong approach to say the appellant is not gay and therefore the Facebook entries do not create risk. The appellant is entitled to protection if the posts created a risk. Although the judge had set out at [39] the appellant's claim about the effects of his mental health condition, that of itself did not mean that the judge had imported that review of the evidence into his own findings. Paragraphs 14 and 15 of the guidance directed the tribunal where there were discrepancies in the evidence to consider what effect that would have made on an assessment of the evidence. It was a qualitative issue not just a procedural one. If a material error of law was found it would then be a matter for the Tribunal whether the appeal should be remitted or remain in the Upper Tribunal.

Discussion and Findings

19. There were four grounds of appeal advanced by the appellant against the determination of judge Atkins. These did not include a submission that the judge had materially erred in law in finding that the appellant was not gay. Permission to appeal was granted on two main bases which concerned the assessment by the judge of very significant obstacles to the appellant's return to Bangladesh and the question of to what extent the appellant's vulnerability was taken into account in the proceedings. Although permission to appeal was not refused on any of the grounds it is clear from the grant of permission that the first ground of the onward appeal, namely the way the judge dealt with the issue of internal relocation was less persuasive than other grounds.

20. This first ground relies on a very technical interpretation of [47] in the determination where the judge assessing the appellant's evidence that he had been threatened on his Facebook page said that even taking the appellant's case at its highest there would be no risk to the appellant because he could internally relocate and take the steps (which he had already taken) to delete posts and stop his Facebook account. The argument being made is that by using the expression "taking the appellant's case at its highest" the judge was accepting the appellant's account that he had received posts and those threatened him.

21. That is an over technical interpretation of [47]. I do not read [47] as stating that the judge accepts that the appellant is at risk because of Facebook threats but rather the judge says explicitly that the social media posts do not show any risk to the appellant on return. The profile was being followed by a limited number of people and the judge bore in mind the possibility that the posts had been fabricated to bolster the appellant's asylum claim. When the judge went on to say at the end of the paragraph "taking the appellant's case at its highest" the judge was indicating that even if matters in favour of the appellant were accepted, which the judge did not accept, that would still not create a risk because the appellant could take measures which on his evidence he had already taken. This ground does not demonstrate a material error of law.

22. The second ground sought to argue that the judge had applied the wrong test when considering whether the appellant could succeed outside the rules. The first issue however was whether the appellant could succeed under the rules under paragraph 276 ADE. The judge was aware of the test which that paragraph required, the appellant had to show on the balance of probabilities that there were very significant obstacles to his return to Bangladesh. It was unhelpful for the judge to blur the distinction between "unduly harsh" and "unjustifiably harsh" but I agree with the submission of the respondent that that did not amount to a material error of law on the judge's part. This was because the judge was aware of the test in **TZ** that the appellant would have to show unjustifiably harsh consequences if he were to succeed outside the immigration rules.

23. The judge correctly analysed whether the appellant could satisfy the rules and was correct in his assessment of whether the appellant could

succeed outside the rules. What both the 276 ADE test and test outside the rules under article 8 came down to was an assessment of the factors to be weighed in the balance. There was no criticism of the judge that he used a balancing exercise. The criticism is that he did not show in his balancing exercise certain factors which it was argued added weight on the appellant's side of the argument, or at least weighed more heavily than the public interest in the enforcement of immigration control.

24. Looking at those factors it is difficult to see what material difference they would have made to the outcome of the appeal. Firstly it is argued that the judge failed to weigh in the balance that the appellant had been in the United Kingdom for 19 years. The judge was aware of how long the appellant had been in the United Kingdom and indeed how long he had been here without any form of leave, almost 16 years. That period of time was not enough for the appellant to succeed under the provisions of the long residence requirements and there is no such thing as a near miss in such cases. It is difficult to see how the appellant could profit from his unlawful status in this country when by reason of section 117B of the 2002 Act little weight can be given to a private life built up while presence here is unlawful as was the appellant's.

25. The second factor said to be relevant is that the appellant was diagnosed as suffering from PTSD and had other mental health difficulties. The judge held that these would not be obstacles for the appellant since the appellant could obtain medication and treatment in Bangladesh. It was not therefore a relevant factor to be put in the balancing exercise. The appellant also claims that because of his mental health conditions he would find it difficult to reintegrate into Bangladesh. This does not appear to have been argued with any force at first instance, what was the focus then was whether the appellant should be treated as a vulnerable witness and what effect that might have on his testimony. I deal with that aspect of the case below at paragraph 28 et seq. At [61] the judge indicated that the appellant's family could assist the appellant in reintegrating into Bangladesh. This family support undercuts the argument that the appellant would experience difficulties whether from stigma or otherwise.

26. The third factor put forward in argument to me was that the appellant had received a positive reasonable grounds decision from the NRM. No final decision had been made by the authorities at the time of the hearing at first instance and indeed one does not still appear to have been made. The NRM issue was undecided in circumstances where the judge had not been shown any relevant papers in relation to the appellant's claim to be a victim of trafficking. It is difficult to see in those circumstances how far the judge could have taken that matter or how it could be afforded significant weight.

27. The fourth factor which the judges was criticised for not putting into the balancing exercise was the delay between the appellant's second claim for asylum and the eventual decision by the respondent to refuse it. This

factor has no merit. The appellant's claim at the second time was essentially the same as his claim at the first time and had been dismissed by the Judge Mill in February 2018. The appellant had thus made a further claim on more or less the same basis which was equally without merit. That it took the respondent some time to decide has to be balanced by the fact that as a result the appellant gained extra time to live unlawfully in the United Kingdom, time to which he was not entitled. I do not find that the criticism of the balancing exercise carried out by the judge has any merit, rather it is merely a disagreement with the result that the judge came to.

28. The fourth ground is that the judge did not deal with the appellant as a vulnerable adult. The judge was aware that it was said the appellant had vulnerabilities indeed the judge used that very word as a sub-heading in his determination. The issue primarily focused at first instance on whether the appellant's vulnerabilities had contributed to the inconsistencies in his account which led to the adverse findings on credibility made against the appellant by Judge Mill and subsequently Judge Atkins. The judge dealt with this at [50] of the determination where he pointed out that the medical evidence supplied by the appellant showing mental health difficulties only arose after the hearing before Judge Mill not before or at the time of that hearing. As a result there was no indication in the 2018 proceedings that the credibility issues in the appellant's evidence could have arisen from any mental health difficulties. Judge Mill's adverse credibility findings could properly be relied upon by Judge Atkins and there was no breach of the Joint Presidential Guidelines.

29. As was submitted by the respondent to me there is no indication that at the hearing before Judge Atkins any request was made by counsel for the appellant for special measures to be taken to ensure access to justice by the appellant. The burden was on the appellant's representatives to indicate what measures if any were needed but it appears that no such request for measures was put forward. The judge also noted that the appellant gave evidence in English a further indication that the appellant was able to understand and fully participate in the proceedings. I do not find there is any merit in this ground of appeal.

30. The core issue in the case was whether the appellant was gay as he claimed to be. The judge found that the appellant was not and that finding has not been challenged in the onward appeal. Overall the grounds of onward appeal amount to no more than a disagreement with the result. They do not show any material errors of law in the determination and I uphold the decision to dismiss the appellant's appeal against the respondent's decision refusing international protection.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal.

Appellant's appeal dismissed

I continue the anonymity order.

Signed this 18th day of January 2024

.....
Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

As the appeal was dismissed there can be no fee award.

Signed this 18th day of January 2024

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Judge Woodcraft
Deputy Upper Tribunal Judge