



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No.: UI-2024-002912
First-tier Tribunal No:
HU/56527/2023
LH/00373/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 07 October 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MK (BANGLADESH)
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mrs Amrika Nolan, Senior Home Office Presenting Officer
For the Respondent: Mr M Rahman, Counsel

Heard at Field House on 16 September 2024

Although is an appeal brought by the Secretary of State, for convenience I shall hereafter refer to the parties as they were before First-tier Tribunal.

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. The Secretary of State has been granted permission to appeal against the decision of First-tier Tribunal Judge Fox promulgated on 17 May 2024 ("the Decision"). By the Decision, Judge Fox allowed the appellant's appeal against the decision of the respondent made on 20 December 2023 to refuse his human rights claim.

Relevant Background

2. The appellant is a national of Bangladesh, whose date of birth is 1 January 1991. On 7 March 2014 he was granted entry clearance as a Tier 4 (General) student migrant, with leave valid until 30 October 2015. On 28 October 2015 the appellant was granted leave to remain as a student to continue his studies. His leave to remain was valid until 23 December 2019.
3. As appears below, the appellant twice returned to Bangladesh before the expiry of his student visa, and re-entered the UK in 2019 while the student visa was still valid. On 23 December 2019 the appellant applied for leave to remain outside the Rules. This was refused with an out-of-country right of appeal on 25 February 2020. On 31 August 2020 the appellant applied for leave to remain on the basis of his private life.
4. In his application form, he said that he had lived in the UK for a total period of 6 years and 5 months, but had been out of the country on two occasions in 2019. Between 11 January and 10 February 2019 he had been in Bangladesh visiting his family, and similarly he had been visiting his family in Bangladesh between 5 March and 21 March 2019.
5. He was asked on what basis he was applying for his current visa. He said that he was applying for leave outside the Immigration Rules, on the basis of compelling or compassionate circumstances and/or under Article 8 ECHR.
6. In answer to the question of whether there are any factors which would make it difficult or impossible for him to integrate and establish a private life in Bangladesh, he answered 'yes'. He referred the Home Office to a covering letter, and said that he would provide evidence to support his claim that it would be difficult or impossible for him to integrate and establish a private life outside the UK.
7. The Home Office bundle in the First-tier Tribunal did not contain a covering letter as referred to in the application. But it did contain a letter dated 31 May 2022 sent by Hubers Law, which set out the various pieces of evidence which the appellant relied upon in support of his claim. The evidence included a statement from the appellant signed on 31 May 2022, in which he said that he had been involved in political activism since before he came to the UK as a student. He and the rest of his family had

always been supporters of the BNP. Before the election in late 2017, Bangladesh Awami League (“BAL”) supporters had burned down their whole house. He planned to visit his country in January 2019 for two months, but he could not stay for two months due to the safety of his life.

8. He was concerned about human rights violations by the Government, and had been vocal against them in his Facebook posts. As a result of his activities on Facebook, Government supporters and agencies had targeted him and his family members in Bangladesh. He was facing a very crucial time now back home. His whole family was under persecution by the Government due to their political beliefs. Law enforcement agencies such as the police, the Rapid Action Battalion and the DB searched for him “*most of the time*”. His family members were very worried about him, and therefore he could not return to Bangladesh.
9. In the Home Office decision letter (“HODL”) dated 4 May 2023, the Secretary of State noted that the appellant had told them in his application of his involvement in local and college politics historically in Bangladesh, and that this had led to instances of danger and threat to himself. The threat of, or actual injury caused by, political violence was abhorrent. However, this was a matter that ought to have been taken up by him with the authorities in Bangladesh in the first instance; and then, if required, where appropriate, the victim might look at the option of political asylum. In the circumstances, based upon his stated potential fear of reprisals, he had been referred to the Asylum Team. He was contacted by asylum colleagues and invited to an appointment to make an asylum claim in person, and their asylum colleagues had confirmed that he had declined to submit an asylum claim.
10. His credibility was further undermined by the fact that he claimed that his fear existed at the time he entered the UK. However, he had failed to raise these matters at the earliest opportunity. This seriously undermined his claim to be at risk on return to Bangladesh.
11. It was not accepted that he had a genuine fear of return to Bangladesh. However, the Country Information showed that Bangladesh had a functioning police force, and that the state was able and willing to afford protection. He had failed to provide clear evidence to support his claims that the mistreatment by the BAL was current, or would continue if he returned.
12. The decision not to pursue the asylum claim, when given the opportunity to do so, seriously undermined the credibility of his claim. He had provided no explanation or reason why it would be unreasonable for him to submit his claim for scrutiny via the asylum process. As a result, he would not be considered for asylum, but it been considered as to whether there was likely to be a breach of his human rights, including of Articles 2, 3 or 8 of the ECHR.

13. Under the heading of 'Articles 2, 3 and 8 ECHR', the Secretary of State listed the supporting evidence that the appellant had provided. It showed that he had continued to return to Bangladesh to see his close family and friends. They could only conclude that the alleged threats or activities stated in his application did not cause him any fear of return.
14. It was noted that he had provided a medical certificate dated 14 January 2019 highlighting a hospital stay and treatment. They were unaware of the reasons for his hospitalisation other than that there was a diagnosis of '*whole body injury*' for which he received care, medication and then a complete discharge, with a doctor's recommendation to continue with his medication; get bed-rest; and contact a doctor if he had any further problems.
15. The appellant's case on appeal was essentially the same as that which he had advanced in his witness statement of 2022. However, the appeal bundle included an email that the appellant had sent to the Home Office on 9 June 2020 - and hence after he had made his two visits to Bangladesh in 2019 - requesting an extension of leave for six months in order to complete his studies. He said in the email that if he went back to his country without completing his Masters, his dream would be destroyed. Last time he visited his country, he saw that most of the vacancies required a post-graduate degree. If he was given a sixty-day letter, he would be able to ensure a brighter career in Bangladesh.
16. The bundle also contained a letter dated 3 February 2021, addressed 'to whom it may concern'. The letter was from the President and General Secretary of the student wing of the BNP in Comilla. It certified that the appellant was an ex-Organising Secretary of the local branch, having excellent achievement in anti-Government movement in the locality: "*At this stage he has become the victim of different false and baseless political cases initiated by the present ruling party. As such his life in the country now is not safe and secure.*"
17. In his appeal statement, the appellant made no mention of any false cases being filed against him by the BAL.
18. In the Response Review that was uploaded to the CCD file on 20 December 2023, the Pre-Appeal Review Unit noted that the appellant was pursuing a *de facto* protection claim. If this ground was seriously still relied upon, the most appropriate course of action was for the appellant to withdraw his current appeal and make the appropriate asylum claim. If that course of action was not taken, cross-examination might be advanced to allow the Tribunal to consider whether the appellant was a witness of truth. The Secretary of State relied upon the fact that the appellant had not made a claim for asylum; that there had been a significant delay in putting forward a *de facto* protection claim; and the fact that this claim was largely unsupported by documentary evidence. The photographs of a burnt-out house held no weight, as there was no official confirmation/evidence that this was indeed the appellant's house.

The Hearing Before, and the Decision of, the First-Tier Tribunal

19. The appellant's appeal came before Judge Fox sitting in the First-tier Tribunal at Hatton Cross on 9 May 2024. The appeal had previously been adjourned from a float list. There was no appearance on behalf of the respondent, whereas the appellant was represented by Mr Spurling of Counsel who had settled both the original appeal skeleton argument (ASA) and also an amended ASA. The latter was uploaded to the CCD file on 12 March 2024.
20. In the Decision, the Judge addressed procedural matters at paras [7] to [12]. He observed that the appeal had been allocated to the floating list on a previous occasion, and was adjourned due to lack of Court time. The appeal was once again allocated to a float list. He had made enquiries of the Tribunal staff, as the Secretary of State was not expected to attend the hearing. He was advised that the Secretary of State was notified of the appeals that were allocated to the floating list each day. The Secretary of State then decided whether he/she would attend the hearing. The Judge continued:

"In effect the Secretary of State has made an application to be excused from the hearing. His absence is the result of an informed decision. The appeal can proceed fairly and justly in these circumstances. The application is granted."
21. The hearing proceeded on a submissions-only basis. The appellant was not called as a witness.
22. In the Decision, the submissions of Mr Spurling were set out at paras [15] to [20]. The appellant was not obliged to claim asylum. The refusal to claim asylum could not damage the appellant's credibility. The Secretary of State had failed to engage with the evidence. The review accepted that the appellant's representations amounted to a protection claim. An opportunity to cross-examine the appellant was not pursued. A fee award should be made in the appellant's favour. The Secretary of State did not attend the hearing. The hearing was unnecessary in the absence of any effective challenge.
23. The Judge set out his findings at paras [21] onwards. At para [23] he held that the appellant had provided evidence of medical treatment "*as a direct result of his political profile.*" There was no effective challenge to the appellant's representations that the hospital treatment (as corroborated by documentary evidence) arose as a direct result of his political activities which was consistent with his subjective evidence of hospital treatment.
24. At para [24] the Judge held that the Secretary of State's decision had failed to engage with the available evidence and he had dismissed the appellant's representations on the basis that their presentation was procedurally irregular. The Secretary of State's decision to rely upon section 8 was misguided in these circumstances.

25. At para [25] the Judge held that the Secretary of State's decision amounted to confirmation bias. The Secretary of State refused to acknowledge the appellant's political profile to support his claim. However, the same political profile was relied upon by the Secretary of State to support a conclusion that the appellant had access to a support network upon return.
26. At para [26] the Judge held that the Secretary of State's review acknowledged the appellant's representations and he had failed to avail himself of the opportunity to engage in scrutiny, anxious or otherwise. The Secretary of State had made an informed decision for the Tribunal to decide the appeal in his absence. It was reasonable to conclude that the Secretary of State was aware of the procedures and law that applied to unchallenged evidence.
27. At para [28] the Judge held that the subjective evidence was not challenged. The Secretary of State had refused to engage with the evidence as it was not presented in an acceptable format. The review was of limited value in the absence of the Secretary of State at the appeal hearing. At para [29] the Judge said that for all these reasons, there was no reliable evidence upon which to doubt the appellant's credibility. Internal relocation was not relevant to the appeal. The appellant feared state agent persecution and the Secretary of State had failed to propose an alternative location. For the same reasons, it was reasonable to conclude that the appellant was unable or unwilling to avail himself of state protection.
28. At para [30] the Judge said it followed that the appellant had satisfied the burden upon him to the civil standard. The available evidence, as presented by the parties, demonstrated that very significant obstacles to his reintegration existed.

The Grounds of Appeal to the Upper Tribunal

29. The grounds of appeal to the Upper Tribunal were settled by Juliet McNamee of the Specialist Appeals Team. Ground 1 was that the Tribunal had made a misdirection in law at para [26]. The appellant was invited to submit an asylum claim, yet failed to do so. The Secretary of State was clear that an asylum claim needed to be made properly, including having an interview. It was completely inappropriate to make an asylum claim 'off the cuff', failing to engage with the process required.
30. Ground 2 was that the Judge had erred in law in the findings he had made at para [7]. A float list should not include an asylum case. In allocating the appellant's appeal to a float list, the Secretary of State had been disadvantaged by the actions of the Tribunal.

The Reasons for the Grant of Permission to Appeal

31. On 24 June 2024 First-tier Tribunal Judge Lodato granted permission to appeal, as there was force to the argument that the Judge appeared to have adopted the starting point that plainly controversial matters of fact were unchallenged because the Secretary of State did not instruct a Presenting Officer to argue his case. There was an unfortunate reference to the Secretary of State succumbing to “*confirmation bias*” in the decision; repeated references to the appellant’s case being “*unchallenged*” due in part to the Secretary of State’s absence; and accepting “*the appellant’s evidence at its highest.*” It was arguable that the approach adopted to the evidence was legally flawed.

The Hearing in the Upper Tribunal

32. At the hearing before me to determine whether an error of law was made out, Mrs Nolan developed the grounds of appeal. Mr Rahman opposed the appeal on the ground that the Judge had been legally correct in his approach. The absence of a representative for the Secretary of State meant that the appellant’s evidence stood unchallenged. In reply, Mrs Nolan submitted that just because there was no Presenting Officer, this did not mean that the Judge was right to treat the evidence as unchallenged. On the contrary, he was wrong to do so. It was wrong to treat the absence of a representative for the Secretary of State as meaning that the Secretary of State was conceding the facts relied upon by the appellant.

Discussion and Conclusions

33. In evaluating the Secretary of State’s error of law challenge, I have regard to the guidance given by the Upper Tribunal in *JA (Human Rights claim: serious harm) Nigeria* [2021] UKUT 0097 (IAC).
34. In *JA*, the Tribunal held that there was no obligation for a person to make a protection claim, even after it is drawn to his attention that the Secretary of State considers the nature of what has been alleged is such that the claim could also constitute a protection claim, and pointing out that they may wish to make a protection claim. This is not to say, however, that the failure of a person to make a protection claim - when the possibility of doing so has been drawn to their attention by the Secretary of State - will never be relevant to the assessment by the First-tier Tribunal of the “serious harm” element of a purely human rights appeal. Depending on the circumstances, the assessment may well be informed by a person’s refusal to subject themselves to the procedures that are inherent in the consideration of a claim to refugee or humanitarian protection status. Such a person may have to accept that the Secretary of State and the Tribunal are entitled to approach this element of the claim with some scepticism, particularly if it is advanced only late in the day.
35. Taking the points raised in the grounds of appeal chronologically, I consider that the Judge was wrong to assume that the Secretary of State had made an informed decision not to send a representative to the hearing. The decision to place the appeal in the float list was a decision by

the Tribunal, not a decision by the Secretary of State. It is apparent from Case Note 5 that the appeal was placed in the float list on 9 May 2024 in error. In Case Note 5 dated 13 March 2024 (which was the date when it was first placed in a float list, and then had to be adjourned), a Legal Officer said that the appeal was “not suitable to float as previously”.

36. Given that there was a ‘serious harm’ element in the human rights appeal - indeed it was the central element - the appeal was clearly unsuitable for a float list, especially when, due to scarcity of resources, the Secretary of State might well not be able to allocate a representative to a float case. I consider that the Secretary of State was entitled to expect that the float list would not contain a highly contentious case such as this one, and I consider that the Judge was wrong to assume that a relevant decision-maker in the Home Office had reviewed the float list and, despite noting the highly contentious nature of the appellant’s appeal, had decided that it was appropriate that the Secretary of State should not be represented.
37. However, the principal error made by the Judge was to treat the absence of representation on the part of the Secretary of State as meaning that the evidence of the appellant stood unchallenged, and that he was thereby relieved of the obligation to give anxious scrutiny to either the evidence relied on in support of the claim or to the matters relied on by the Secretary of State as rebutting it.
38. Although the absence of a Presenting Officer or Counsel to cross-examine the appellant on his evidence meant that the adverse credibility challenge inherent in the HODL and the Review was considerably weakened, the Judge was wrong to treat it as being extinguished.
39. There were some obvious anomalies in the appellant’s evidence that the Judge could have - and should have - invited Mr Spurling to clarify through supplementary questions to the appellant, such as the fact that, whereas his witness statement evidence only referred to one return visit in January 2019 (at which he said he was attacked and hospitalised due to his activism for the BNP), his application form referred to a further return visit in March 2019.
40. In addition, it was a matter of record that the appellant had made his protection claim very late, only after he had exhausted attempts to remain in the UK as a student, including an unsuccessful attempt in 2020. The Judge misdirected himself at para [24] in holding that section 8 of the 2004 Act was irrelevant because the appellant had declined to make an asylum claim. Section 8 also applies to human rights claims. So, the Judge ought to have held that the appellant’s delay in making his *de facto* protection claim in the guise of a human rights claim was damaging to his credibility.
41. The Judge further misdirected himself at [25] in holding that the Secretary of State’s stance amounted to confirmation bias. The Judge took from *JA* the principle that the appellant was not obliged to make an asylum

claim, but ignored the concomitant principle that, as a result of the appellant's refusal to subject himself to the procedures that are inherent in the consideration of a claim to refugee or humanitarian protection status, the Secretary of State was entitled to view the appellant's *de facto* protection claim with some scepticism.

42. The Judge also misdirected himself at [27] in accepting the appellant's evidence at its highest and in holding at [29] there was no reliable evidence upon which to doubt the appellant's credibility. There were obvious anomalies in the appellant's evidence which, absent clarification, entailed that the Judge's unqualified acceptance of his evidence was not rationally supportable. The evidence relating to delay was incontrovertible, and so it was irrational of the Judge to find that that there was no reliable evidence to doubt the appellant's credibility.
43. For the above reasons, the Decision is vitiated by a material error of law on both procedural and substantive grounds, such that the Decision must be set aside and remade in its entirety.
44. As the Secretary of State has been deprived of a fair hearing in the First-tier Tribunal, the only appropriate course is for the appeal to be remitted to the First-tier Tribunal for a fresh hearing, with none of the findings of fact made by Judge Fox being preserved.

Notice of Decision

The decision of the First-tier Tribunal contains an error of law, and accordingly the decision is set aside in its entirety, with none of the findings of fact being preserved.

This appeal is remitted to the First-tier Tribunal at Hatton Cross for a fresh hearing before any Judge apart from Judge Fox.

Anonymity

The First-tier Tribunal made an anonymity order in favour of the appellant, and I consider that it is appropriate that the appellant continues to be protected by anonymity for the purposes of these proceedings in the Upper Tribunal.

Andrew Monson
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
3 October 2024