IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/04250/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 17 March 2015	**On 17 April 2015**
Delivered orally	

Before

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

AR
(ANONYMITY DIRECTION PRESERVED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr C Sultan, Legal Representative of Hamlet Solicitors LLP
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by the Appellant, a citizen of Bangladesh born on 10 May 1972, against the decision of First-tier Tribunal Judge Fitzgibbons QC, who sitting at Taylor House on 12 December 2014 and in a determination promulgated on 29 December 2014 dismissed his appeal on asylum, humanitarian protection and Articles 2 and 3 of the ECHR.

2. At paragraphs 1 and 2 of his determination the First-tier Judge succinctly summarised the Appellant's immigration history as follows:

> "1. The Appellant was born on 10 May 1972 and is a citizen of Bangladesh. Between 1991 and 2002 he lived in Abu Dhabi where he was employed as a domestic worker. He arrived in the United Kingdom on 13 October 2002 from Abu Dhabi, with a domestic worker (visitor) visa that was valid until 19 April 2003. By his own admission he overstayed. On 16 August 2008 he applied for further leave to remain outside the Immigration Rules relying on Articles 2 and 3 of the European Convention of Human Rights (ECHR). He maintained that his employers had tortured him and he could not return to Bangladesh. The Secretary of State refused his application and he lost an appeal against the decision in April 2010.
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> 2. On 9 April 2013 the Appellant was found working illegally at a restaurant. He was arrested and held in detention. He claimed asylum on 9 April 2013 and had a screening interview that day and a full asylum interview on 28 May 2013. On 12 June 2014 the Secretary of State issued a notice of her decision to remove him to Bangladesh and a refusal letter (RL). The Appellant appeals under Section 82(1) of the Immigration, Nationality and Asylum Act 2002."

3. It was noted that the Appellant claimed that he would "face persecution and/or grave breaches of human rights" due to his support for the banned Jamaat-i-Islam party (JI), and/or because his political opponents were involved in a dispute about the ownership of his family land. The Judge noted that alternatively, the Appellant claimed an entitlement to humanitarian protection and that his "removal would place the United Kingdom in breach of its obligations under Articles 2 and 3 of the European Convention on Human Rights" (paragraph 3).

4. Having heard the Appellant give oral evidence and having considered that evidence both oral and documentary in its totality the Judge concluded that the Appellant's claim was a fabrication. It was not credible and that he only made it:

> "... with the intention solely of defeating the Respondent's intention to remove him as an overstayer and not because he fears persecution or breaches of human rights on return. As he said in 2010 and repeated at the hearing on 12 December 2014, he prefers life in the UK."

5. It would be as well for the purpose of this determination to set out in full the First-tier Judge's comprehensive reasons for so finding. They are set out at paragraphs 8 to 15 of his determination as follows:

> "8. The Appellant has given two dates for joining the student wing of JI: at Q3–4 of his asylum interview he said he joined in 1984 when he was 12 and at Q7-8 he said he was 17 or 18. His membership caused no problems while he was in Bangladesh, before he went to Abu Dhabi. He maintains that the banning of JI in 2013 and a subsequent violent and persecutory crackdown by the authorities puts him at risk if he returns.
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> 9. In his evidence he was unable to indicate why he thought that his membership of JI's student wing twenty years ago when it was a legal party would place him in danger today. He said his activities consisted in organising speeches and lectures by party figures in his home area.

He said that his skull-cap and his beard marked him out as a devout Muslim and this was enough to put him at risk, but he accepted that very large numbers of religious Bangladeshi men have beards and wear skull-caps and are not persecuted. Mr Kannagara [the Counsel who appeared before the First-tier Judge on behalf of the Appellant] relied on the generalised risk from the authorities that he said attached to those associated with JI.

10. The Appellant had no documentary evidence of his membership or association with JI. When asked about any continuing involvement during his time in the UK, he first said that he had had none because he has never had enough money to travel to events; but later he claimed he had gone to a meeting in Cardiff in the summer of 2014 and had dealings with a man called Khaled Ali. He did not ask Mr Ali to support his appeal as he did not think it would be necessary. It is clear that his JI activity since he left Bangladesh in 1994 has been minimal.

11. I am not satisfied that he has ever had a high enough political profile to be of interest to the Bangladeshi authorities. There is no evidence to suggest that a member of the student wing of JI twenty years ago is at risk of persecution or human rights breaches in Bangladesh today. I note that in his 2010 appeal he said nothing about his political activities and views as the basis for his human rights claim. At that time, JI leaders were on trial for their part in war crime committed in the 1971 Pakistan civil war that led to the founding of Bangladesh as a separate state and there was much violence directed by and towards JI (as reported in the latest Country of Origin Information Report in August 2013, which was not referred to at the appeal). He gave evidence about the date he joined the student wing and whether he had continued his activities in the UK. If his political activities had been a matter of potential concern to him, I would expect him to have mentioned them in his human rights appeal in 2010. I conclude that they were not and that the fears he now says he has are exaggerated and are not well-founded.

12. The second limb of his appeal is his fear of persecution as a result of a land dispute. He asserts that his father and his uncle are in dispute with other family members. The dispute had been going on since 2008. Those on the other side of the dispute are members of the Awami League, the party in power in Bangladesh and opponents of JI. He fears that his past JI involvement will create a specific risk because the Awami members will use it against him in the land dispute and either kill or injure him with impunity or expose him to risk of ill-treatment by the authorities for political reasons.

13. In my view, the credibility of this part of his claim was very low. The determination of his 2010 appeal makes no reference to evidence about land dispute even though he now claims it began in 2008. His evidence to me was that he did mention it in the previous appeal. The Immigration Judge wrote at paragraph 10 ‘I enquired of the Appellant why he could not return to Bangladesh. He told me he had no family and preferred to live in the UK’. He now says that he and his father and uncle are there (and the family members on the other side of the dispute). He said that what he meant in 2010 was that there was no-one there capable of supporting him. I reject his explanation for the change of his account. I follow the guidance in Devaseelan [2002]

UKIAT 00702 by taking previous findings of fact as my starting point, subject to revision in the light of further credible evidence or a change of circumstances. I am satisfied that the Immigration Judge correctly recorded his evidence and that he asserted he had no family in Bangladesh. If he had meant that he had no-one who could support him, he would have said it. This evidence, together with his failure to mention the land dispute, give a clear indication that he has fabricated this part of his claim recently. He has failed to produce any documentary evidence about the dispute or any witness statements from family members engaged in it.

14. I also bear in mind that he only made the present asylum application after he was found working illegally as an overstayer. His immigration history is poor as he has overstayed since 2003. He was unable to give a good reason for not attempting to regularise his status during the five year period between 2003 and 2008 or the three years between the dismissal of his human rights appeal and the present claim. Having considered his evidence in the round I am satisfied that he has made this claim with the intention solely of defeating the Respondent's intention to remove him as an overstayer and not because he fears persecution or breaches of his human rights on return. As he said in 2010 and repeated at the hearing on 12 December 2014, he prefers life in the UK.

15. I therefore find that this part of his account is not credible, even on the low standard of proof that applies in this case. It follows that I am not satisfied that the Appellant has discharged the burden of proving he is in need of international protection."

6. The Appellant made a successful application for permission to appeal that decision, claiming that the Judge had "failed to consider the Appellant's Article 3 claim properly", and that he had "not evaluated the current circumstances of the Appellant". Further the Judge had failed to consider the Appellant's private life, given that he had been in the United Kingdom since October 2002. In addition, that the Judge had made an earlier finding that the Appellant was not credible and finally the Judge in finding that the Appellant had "little claim with Article 8 and therefore can be deported" had "wrongfully given extra weight on the Appellant's credibility".

7. In granting permission First-tier Judge Osborne appears to have wholly rejected the Appellant's challenge to the Judge's adverse credibility findings but continued:

> "Nonetheless the Judge failed in the Decision and Reasons to mention Articles 2 and 3 of the ECHR and further failed to mention the Appellant's appeal in relation to private life which although not particularised in the grounds as relying upon Article 8 is nonetheless mentioned in terms of the Appellant's record during his stay in the United Kingdom and his medical problems which he claims should be taken into consideration in the interests of justice."

8. Although not the subject of challenge in the grounds in support of the Appellant's application for permission to appeal, FtJ Osborne noted that in

the original grounds the Appellant had made a brief reference to Article 15C of the EU Qualification Directive that the Judge had failed to consider.

9. Thus the appeal came before me on 17 March 2015, when my first task was to decide whether the determination of the First-tier Judge was such as may have materially affected the outcome of the appeal.

10. At the outset of the hearing, Mr Sultan made an application for an adjournment. He explained that he was instructed to do so by the Appellant and was thus simply following instructions. He produced medical evidence that Mr Sultan maintained showed that the Appellant could not attend the hearing before me although I must say that the records that I am looking at talk about X-rays on some specified date. Notably and realistically and indeed most fairly Mr Sultan continued:

> "I accept there is nothing in that evidence to suggest that he would be unable to attend today and be fit to give oral evidence if required. In any event I recognise this is an error of law hearing and that unless a material error of law is found the Appellant would not be required to give such evidence today. I am simply following my client's instructions."

11. Not surprisingly in such circumstances Mr Avery raised a strong objection to this adjournment request maintaining that there was nothing within it that would warrant an adjournment. I informed the parties that for the reasons not least most fairly and realistically acknowledged by Mr Sultan, with which I entirely agreed, that there was indeed nothing in this request to suggest that it would be unfair not to grant it and that the request to adjourn was therefore refused.

12. Further at the outset of the hearing, Mr Avery produced a document that being a typed copy of the notes of the Presenting Officer, Ms N Ibe, taken contemporaneously at the hearing before the First-tier Judge and within which the following was stated:

> "The Appellant clearly admitted that he had lied in the previous appeal. The Appellant confirmed to the Judge that he had no family when the Appellant clearly does. The Appellant is a 42 year old man who is able to live an independent life in the UK and therefore can live in Bangladesh independently."

13. At the top of the notes under the subheading "Preliminaries" the following is stated:

> "HOPO had not received the Appellant's bundle. IJ provided the HOPO with the bundle and provided the HOPO time to read the documents. **The Appellant would no longer seek to rely upon Article 8 as there was a previous determination**" (Emphasis added).

14. In response to that matter Mr Sultan clarified to me as follows:

> "I cannot comment on the HOPO's note because there is nothing before me from the Counsel who appeared on behalf of the Appellant before the First-tier Tribunal and I am therefore not in a position to say that Article 8 was as recorded by the HOPO not to be proceeded with."

15. Mr Sultan continued, however, that the grounds of permission to appeal raised a challenge to the First-tier Judge's adverse credibility findings but he acknowledged that First-tier Tribunal Judge Osborne had not granted permission to challenge those findings. This of course placed him in a difficult situation in terms of arguing that the Judge materially erred in law in what he put was an absence of consideration of issues relating to Articles 2 and 3. He nonetheless relied on the grounds, at least to the extent upon which permission to appeal was granted.

16. Mr Avery in response referred me to the Rule 24 response of the Secretary of State in her letter of 3 February 2015 where the Respondent did not accept that the Appellant demonstrated any freestanding risk of a breach of Article 2 or 3 of the ECHR and that in respect of Article 8 the Judge would have in any event been bound to follow Section 117B of the 2014 Act and placed little weight on a private life built up by the Appellant whilst his stay was precarious. It followed, said Mr Avery, that even if the contention that the Judge failed to consider Article 8 was made out, there would still be a failure to establish an error of law material to the outcome, in that had he done so, he would have been bound to follow the provisions of 117B when, in the light of the Appellant's precarious immigration history, such a claim would have failed in any event.

Assessment

17. I have had no difficulty in concluding that the determination of the First-tier Judge fails to disclose even an arguable error of law, let alone an error material to the outcome of this appeal.

18. With great respect to the Judge who granted permission to appeal, it was not the Appellant's contention that the Judge failed to consider the Appellant's Article 3 claim but that he did not do so 'properly'. Further the grounds seeking permission to appeal made no mention or raised any challenge to the determination of the First-tier Judge in terms of Article 2 and the original grounds raised no issue under Article 8. In addition there is nothing within the Judge's determination to suggest that an Article 8 issue was raised before him at the hearing in circumstances where I note that the Appellant was represented by Counsel. I am reinforced in that conclusion by the production by Mr Avery of the Presenting Officer's notes of the hearing which included, and it is worth repeating, the following: "The Appellant would no longer seek to rely upon Article 8 as there was a previous determination". In fairness to Mr Sultan he felt himself unable to comment upon the Presenting Officer's recording of that matter. It is in any event not in such circumstances an appropriate challenge to the Judge's findings to seek to raise such issues after the appeal has been heard. For the sake of completeness, I would add that I find myself in accord with Mr Avery in his submission, that even if the Judge had considered Article 8 it would have failed, not least because he would have been bound to follow the provisions of Section 117B of the 2014 Act and placed little weight on the Appellant's private life built up whilst his stay was precarious.

19. It is also apparent from reading the determination, that (notwithstanding the brief reference that was developed no further in the original grounds and, I would repeat, to which no challenge was raised in the grounds in support of the application for permission to appeal) issues relating to Article 15C were not raised before the First-tier Judge at the hearing.

20. It is absolutely clear that the Judge's comprehensive adverse credibility findings were amply supported by and open to him on the evidence and thus sustainable in law. I have reminded the parties of the guidance of the Supreme Court in MA (Somalia) [2010] UKSC 49 that held *inter alia*, that where a person tells lies about issues which that person thinks are important to their claim which because of the passage of time otherwise are not, it is open to the Tribunal given the earlier lies to approach with caution that person's evidence regarding matters that are essential to the current claim.

21. Mindful that the Appellant at ground 1 contended there had been a failure to consider his Article 3 claim 'properly' the challenge continued:

> "The Appellant says that he fears the prosecution (sic) if deported as the local police is easily influenced by the local party leader. He says that it is not necessary that he must hold a higher position to be prosecuted, but the likelihood of being referred to the police, showed the FtT should have considered the Article 3 claim and would have found that the Appellant fears the risk of going into prison or prosecuted or be tortured by the police in Bangladesh."

22. Further at ground 4 it is said that:

> "The FtT erred in finding that the Appellant has no credibility. The Appellant always provided credible evidence issued from a competent authority. The fact is that the Appellant did not claim asylum at his earliest opportunity and has a very credible explanation. The Appellant was scared of being deported and apprehended by the Home Office in any event. Not only, any refusal of his claim would require him contacting a private solicitor, which is very expensive. Therefore he would not be able to afford to conduct his case."

23. The grounds continued that had the Judge considered the Article 8 claim

> "… he would have found that the Appellant has a valid Article 3 claim and therefore cannot be deported to Bangladesh and any attempt to remove him from the United Kingdom would lead to the violation of his human rights."

24. Ground 6 contends that the Judge had "wrongfully given extra weight on the Appellant's credibility".

25. As I reminded Mr Sultan at the hearing, and with which he did not disagree, the grounds of permission excluded any challenge to the Judge's adverse credibility findings.

26. In EN v SSHD [2014] ScotCS CSIH 47 it was noted in MA (Somalia) that the court should not be astute to characterise as an error of law what in truth

is no more than a disagreement with the Tribunal's assessment of facts, and it would appear that is the approach that First-tier Judge Osborne took in not granting permission in respect of grounds that challenged the First-tier Judge's adverse credibility findings.

27. I am entirely satisfied that the First-tier Tribunal were entitled to reject the substance of the claim. In light of the First-tier Judge's adverse credibility findings I find it cannot even arguably be said that the Judge in inter alia dismissing the Appellant's appeal under Articles 2 and 3 of the ECHR without further reference to thus materially erred in law. It could not have been more self-evident from the Judge's reasoning, that the Appellant had failed even to the lower standard of proof to establish that he would be at real risk to his life and/or Article 3 ill-treatment if now returned to Bangladesh.

28. Mindful of the guidance of the Court of Appeal in R (Iran) [2005] EWCA Civ 982 I find that it cannot be said that the First-tier Tribunal Judge's findings were irrational and/or Wednesbury unreasonable such as to amount to perversity. It cannot be said that they were inadequate. It is not a case where the First-tier Judge's reasoning was such that the Tribunal was unable to understand the thought processes that he employed in reaching his decision.

29. I find that the Judge properly identified and recorded the matters that he considered to be critical to his decision on the material issues raised before him in this appeal. The findings that he made were clearly open to him on the evidence and thus sustainable in law.

Decision

30. The making of the previous decision involved the making of no error on a point of law and I order that it shall stand.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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 both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 9 April 2015

Upper Tribunal Judge Goldstein