Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/14036/2018**

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 29 May 2019	**On 05 June 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

AKTAR HUSSAIN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:	Mr H B Semega-Janneh (counsel) instructed by Shah Jalal Solicitors
For the Respondent:	Mr A McVetty, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Garratt promulgated on 11 February 2019, which dismissed the Appellant's appeal.

Background

3. The Appellant was born on 4 May 1974 and is a national of Bangladesh. On 20 April 2017 the Appellant applied for leave to remain in the UK. On 13 June 2018 the Secretary of State refused the Appellant's application.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Garratt ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 19 March 2019 Judge Keith granted permission to appeal stating

> "2. The grounds assert that the Judge erred in applying the wrong standard of proof - while the Judge considered the appellant's appeal, including by reference to articles 2 and 3 of the European Convention on Human Rights ("ECHR"), as well as article 8, the Judge referred, at [29] to the standard of proof being the "balance of probabilities", which was inconsistent with the authority of HKK (article 3: burden and standard of proof) Afghanistan [2018] UKUT 386 (IAC)
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> 3. In an otherwise well-reasoned determination, it appears that the Judge assessed the appellant's appeal, including by reference to articles 2 and 3 of the ECHR, when he referred to both of those articles at [36] of the reasons; and to "serious harm" at [40]. However, it is potentially unclear what standard of proof the Judge applied in assessing the appeals under articles 2 and 3, so that the Judge arguably erred in applying too high a standard."

The Hearing

5. (a) For the appellant, Mr Semega-Janneh moved the grounds of appeal. He told me that the Judge applied the wrong standard of proof in considering articles 2 and 3 ECHR grounds of appeal. He took me to [29] of the decision where the Judge identifies the standard of proof as the balance of probabilities. He relied on Kacaj (Article 3 – Standard of Proof – Non-State Actors) Albania [2001] UKIAT 00018 and HKK (Article 3: burden/standard of proof) Afghanistan [2018] UKUT 00386(IAC).

(b) I drew Mr Semega-Janneh's attention to the grounds of appeal to the First tier Tribunal, and asked if he could identify whether any grounds of appeal were pled other than article 8. He told me that paragraph 21 of the grounds of appeal raise (at least implicitly) articles 2 and 3 ECHR grounds and that, in any event, at [36] the Judge finds that the grounds of appeal encompass articles 2 and 3 of the 1950 convention.

(c) Counsel for the appellant told me that the correct standard is *a real risk* or *substantial grounds for believing* that article 3 would be breached, and that the Judge applied a higher standard of proof. He asked me to set the decision aside.

6. For the respondent, Mr McVetty told me that the decision does not contain errors of law, material or otherwise. He told me that the original application proceeded on article 8 ECHR grounds only, and that the grounds of appeal to the First-tier tribunal raises only article 8 grounds. He reminded me that after the grounds of appeal were lodged the appellant could only amend the grounds of appeal and introduce new matters with the consent of the respondent. He told me that no attempt had been made to either amend the grounds of appeal or to seek the respondent's consent to extending the grounds of appeal to a new matter. Mr McVetty told me that [29] of the decision is correct and that the Judge has applied the correct standard of proof because the only matter competently before the Judge was an appeal on article 8 ECHR grounds.

Analysis

7. In HKK (Article 3: burden/standard of proof) Afghanistan [2018] UKUT 386 (IAC) it was held that (1) It has long been a requirement, found in the case law of the European Court of Human Rights ("ECtHR"), for the government of a signatory state to dispel any doubts regarding a person's claim to be at real risk of Article 3 harm, if that person adduces evidence capable of proving that there are substantial grounds for believing that expulsion from the state would violate Article 3 of the ECHR; (2) This requirement does not mean the burden of dispelling such doubts shifts to the government in every case where such evidence is adduced, save only where the claim is so lacking in substance as to be clearly unfounded; (3) Article 4.5 of the Qualification Directive (Council Directive 2004/83/EC) provides that, where certain specified conditions are met, aspects of the statements of an applicant for international protection that are not supported by documentary or other evidence shall not need confirmation;(4) The effect of Article 4.5 is that a person who has otherwise put forward a cogent case should not fail, merely because he or she does not have supporting documentation. Nowhere in the Directive is it said that a person who has documentation which, on its face, may be said to be supportive of the claim (e.g. an arrest warrant or witness summons), but whose claim is found to be problematic in other respects, has nevertheless made out their case, so that the burden of disproving it shifts to the government.

8. In Naz (subsisting marriage – standard of proof) Pakistan [2012] UKUT 00040 (IAC) the Tribunal held that it is for a claimant to establish that the requirements of the Immigration Rules are met or that an immigration decision would be an interference with established family life. In both cases, the relevant standard for establishing the facts is the balance of probabilities.

9. In Lamichhane v Secretary of State for the Home Department [2012] EWCA Civ 260 the Court of Appeal held that a failure of the respondent to serve a section 120 did not render a decision unlawful. An appellant on whom no section 120 notice has been served may not raise before the Tribunal any ground for the grant of leave to remain different from that which was the subject of the decision of the Secretary of State appealed against.

10. In FG v Sweden App No 43611/11 ECtHR Grand Chamber the Appellant did not pursue a claim that he was at risk because of converting to Christianity before the Migration Board, but later sought to rely on Articles 2 and 3. It was held that (in the case of Articles 2 and 3 at least) national courts must be alive to obvious human rights points even when they are not adverted to or relied on by a claimant. The Swedish court should have known it was required to carry out an assessment of all potential ECHR arguments, analogous to the Robinson obvious test.

11. Section 85 of the 2002 Act prevents the Tribunal considering a "new matter" unless the respondent gives consent. In Mahmud (S85 NIAA 2002 – "new matters") [2017] UKUT 488 (IAC) it was held that (i) Whether something is or is not a 'new matter' goes to the jurisdiction of the First-tier Tribunal in the appeal and the First-tier Tribunal must therefore determine for itself the issue; (ii) A 'new matter' is a matter which constitutes a ground of appeal of a kind listed in section 84, as required by section 85(6)(a) of the 2002 Act. Constituting a ground of appeal means that it must contain a matter which could raise or establish a listed ground of appeal. A matter is the factual substance of a claim. A ground of appeal is the legal basis on which the facts in any given matter could form the basis of a challenge to the decision under appeal; (iii) In practice, a new matter is a factual matrix which has not previously been considered by the Secretary of State in the context of the decision in section 82(1) or a statement made by the appellant under section 120. This requires the matter to be factually distinct from that previously raised by an appellant, as opposed to further or better evidence of an existing matter. The assessment will always be fact sensitive. Examples were given. Where a relationship had previously been relied on and considered by the SSHD then the fact the couple had married would be new evidence but not a new matter. Conversely the fact the couple had a child was likely to be a new matter. Actual consideration in a decision letter of the new factual matrix relied upon is required for a matter not to be a "new matter".

12. In AK and IK (S.85 NIAA 2002 - new matters) Turkey [2019] UKUT 67 it was held that if an appellant relies upon criteria that relate to a different category of the Immigration Rules to make good his Article 8 claim from that relied upon in his application for LTR on human rights grounds or in his s.120 statement such that a new judgment falls to be made as to whether or not he satisfies the Immigration Rules, this constitutes a "new matter" within the meaning of s.85(6) of the Nationality, Immigration and Asylum Act 2002 which requires the Secretary of State's consent even if the facts specific to his own case (for example, as to accommodation, maintenance etc) remain the same.

13. The appellant's application was submitted under cover of his solicitors' letter dated 20 April 2017. In the second paragraph of the covering letter the appellant's solicitors identified to bases for the application,

(i) Article 8 ECHR.

(ii) compassionate grounds.

Neither the application nor the covering letter mentioned articles 2 and 3 ECHR, however in the last sentences at the end of the second page & the start of the third page of that covering letter, the appellant's solicitors say that the appellant fears persecution because of his membership of the BNP and that he has received threats from his estranged wife's family.

14. Grounds of appeal to the First-tier Tribunal were framed by the appellant's solicitors. The form IAFT-5 (the notice of appeal) says that supporting documents vouching a fear of persecution will be produced. The grounds of appeal do not mention articles 2 and 3 ECHR, but at paragraph 21 say that the appellant has a fear of persecution because of a poor relationship with his estranged wife's family and because of his political opinion.

15. Both the letter submitting the application and in the grounds of appeal to the First-tier tribunal the reference to persecution and ill-treatment is pled on the basis that there are insurmountable obstacles in terms of paragraph EX.1 and that there are significant obstacles to integration in terms of paragraph 276 ADE(1)(vi) of the rules.

16. In the appellant's witness statement, the appellant says that he was an active BNP supporter in Bangladesh, and he fears of persecution because his estranged wife's brother is a local Awami league leader. The appellant produces documents said to be an FIR and a false charge of illegal possession of a firearm and ammunition.

17. What is beyond dispute is that the appellant has not made a protection claim. At [26] & [27] the Judge correctly records that the appellant has not claimed international protection and that his appeal is limited to human rights grounds. At [29] the Judge correctly identifies the standard of proof for article 8 ECHR grounds of appeal. Between [29] and [32] the Judge correctly directs himself in law. At [34] the Judge gives clear (& sustainable) reasons for finding that the appellant cannot meet the requirements of appendix FM and that paragraph EX.1 is not engaged. The Judge then turns to consideration of the appellants article 8 private life claim.

18. The Judge then refers to the appellant's claim that articles 2 and 3 of the 1950 convention are engaged & the Judge correctly considers each part of the appellant's evidence, and gives good reasons for rejecting the evidence. The Judge manifestly considered whether or not the appellant discharges the burden of proving that there are very significant obstacles to reintegration. The Judge gives reasons for rejecting the appellant's evidence and finding that such obstacles do not to exist.

19. The Judge's decision is a decision on article 8 ECHR grounds of appeal only. It was only article 8 ECHR which was argued before the Judge. Although the appellant uses the language of persecution and ill-treatment, he did so in the context of trying to establish either insurmountable obstacles are very significant obstacles. The correct standard of proof for such cases is a balance of probabilities. The Judge correctly directed himself at [29] of the decision.

20. At [36] the Judge records that the appellant introduces an argument that articles 2 or 3 of the 1950 convention are engaged, but in the next sentence the Judge identifies the correct standard of proof for article 2 or 3 grounds of appeal. The Judge succinctly says that the appellant fails to produce sufficient evidence to establish a real risk of either article 2 article 3 harm.

21. The Judge deals with articles 2 and 3 in two short, but correct, sentences, which is just a reflection of the paucity of evidence produced by the appellant to the First-tier Tribunal. The was no need for the Judge to say more.

22. The application made by the appellant was not a protection claim. The application was made on article 8 ECHR grounds. The appellant argued that there are insurmountable obstacles to family life continuing and very significant obstacles to integration. It is likely that the appellant solicitor's focused on the words *insurmountable* and *obstacles*, and took those words out of context, but the truth is that the application was submitted on article 8 ECHR grounds, the respondent's decision reflects the reasons given for the application. The grounds of appeal to the First-tier Tribunal plead article 8 ECHR only.

23. It is to the Judge's credit that he succinctly dealt with articles 2 and 3 before focusing on the only matter that was competently pled. This appeal is not directed against the Judge's article 8 decision. The appellant has not yet made a protection claim.

24. In any event, in the third sentence of [36] the Judge correctly identifies the standard of proof in cases involving articles 2 and 3 ECHR grounds of appeal.

25. **The decision does not contain a material error of law. The Judge's decision stands.**

DECISION

The appeal is dismissed. The decision of the First-tier Tribunal, promulgated on 11 February 2019, stands.

Signed

Date 3 June 2019

Deputy Upper Tribunal Judge Doyle