



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/01851/2018

THE IMMIGRATION ACTS

Heard at: Bradford
On: 10th December 2018

Decision Promulgated
On: 12th April 2019

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

SU
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I. Khan, Counsel instructed by Westgate Solicitors
For the Respondent: Mrs R. Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant claims to be a national of Burma born in 1988. He appeals with permission the decision of the First-tier Tribunal (Judge Shergill) to dismiss his protection and human rights appeal.

Anonymity

2. Having regard to the fact that this is a protection claim, and the Appellant has been found to be a victim of trafficking, I am prepared to make the following direction for anonymity, pursuant to Rule 14 of the Tribunal Procedure (Upper

Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders.

“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”.

Background and Decision of the First-tier Tribunal

3. The basis of the Appellant’s linked protection and human rights claims is that he faced a well-founded fear of persecution in Burma because of his ethnicity/membership of a particular social group: he claims to be a Rohingya Muslim. He claims that he was brought to Bangladesh by his parents when he was approximately three years old. They lived in a refugee camp. When the Appellant was about six years old his parents sent him out of the camp in the care of another man. The Appellant thereafter lived in Bangladesh, outside of the Rohingya camps, until he was about 28 years old. During those years he worked in various capacities, running chores, pulling rickshaws, and latterly as a shop assistant. The Appellant further claimed to have been a victim of trafficking: this element of his claim was accepted by the Competent Authority in its ‘Conclusive Grounds’ decision of the 9th July 2016.
4. The Respondent accepts that the Appellant would face persecution in Burma/Myanmar if he is Rohingya; the Respondent would not in those circumstances expect the Appellant to turn to Bangladesh for protection. The Respondent does not however accept the Appellant’s claimed ethnicity. As to the trafficking aspect of the claim the Respondent, by his letter dated the 20th January 2018, notes and accepts the Conclusive Grounds decision of the Competent Authority but makes no further comment upon it.
5. When the matter came before the First-tier Tribunal the Appellant relied on his own evidence, and a document which he said was a registration paper given to his family upon their arrival in the refugee camp in Bangladesh. The Appellant is named on that paper as part of his father’s household and this, he states, establishes that he is in fact Rohingya.
6. The First-tier Tribunal rejected the Appellant’s evidence about his claimed ethnicity. The determination is long and detailed but the reasons given can be summarised as follows:
 - i) The Appellant has given a detailed account of why his family fled Burma, and a description of where they lived. He states that he has this information because his parents used to tell him

about it when they lived in the camp. The Tribunal does not accept that a child of six would retain such information and be able to recall it, over 20 years later, with such “crystal clear” clarity. It is not plausible that the Appellant would be able to remember this information. It does not fit in with what can be considered as “ordinary human experience”;

- ii) It was curious that he was able to give information about some matters, yet on other matters he was unable to do so;
- iii) The refugee registration document is not reliable. The colour is too vivid for it to have been issued in 1991, and given the evidence that the Appellant has lived destitute and in very difficult circumstances for many years it is not plausible that the document would have remained in “near pristine” condition. Taking into account the prevalence of forged documents in Bangladesh the Tribunal concludes that the paper is of dubious provenance and attaches no weight to it;
- iv) Whilst the Tribunal notes the evidence that the Appellant can speak some Rohingya, it found that if he were actually Rohingya he would be able to speak that language fluently, given that he would have spoken nothing else until the age of six;
- v) It was implausible that after many years the Appellant would tell his employer in Bangladesh that he was Rohingya rather than just telling him that he was an orphan or abandoned as a child;
- vi) The Appellant failed to claim asylum in France and this diminishes the weight to be attached to his testimony

7. As to the Competent Authority’s finding that the Appellant was a victim of trafficking the First-tier Tribunal was apparently not minded to accept it. It is repeatedly described as “odd” [see §6, 27 and 34]. The Respondent’s position at the hearing was that this had been the decision of the Competent Authority, reached applying the civil standard of proof, and the Respondent did not intend to go behind it. Although the positive finding had been made, no grant of discretionary leave had ensued. The Tribunal considered that this did not “fit into what would be expected in these sorts of cases”. At paragraph 27 the Tribunal concludes:

“the account he has given about his journey and time in the United Kingdom is not consistent with being trafficked. It is therefore somewhat odd that there is no NRM letter, no discretionary leave was granted and yet the refusal conceded this point – a curious concession but I conclude there are no hallmarks of persecution”

8. The appeal was therefore dismissed on all grounds.

The Appeal

9. The parties before me were in agreement that the First-tier Tribunal's findings on the trafficking issue were not sustainable. Although the Tribunal had not had sight of any correspondence from the Competent Authority (the Respondent having failed to comply with a direction to produce it), there was no dispute that the Appellant had been recognised as a victim of trafficking. Mrs Pettersen conceded that in those circumstances the Tribunal's disparaging of the Competent Authority amounted to an error of law. As the Court of Appeal have made clear, the Tribunal may only supplant the decision of the Competent Authority with a view of its own where the original decision has been found to be irrational: *Secretary of State for the Home Department v MS (Pakistan)* [2018] EWCA Civ 594. Persistently describing the decision as "odd" does not amount to a reasoned finding of irrationality. Neither party was able to shed any light on Judge Shergill's comment that the outcome of the trafficking enquiry did not fit in with his experience of these "sorts of cases". As Mrs Pettersen pointed out, it is frequently the case that leave will be refused even where a positive Conclusive Grounds decision is reached.
10. The parties were further in agreement that the error in approach to the trafficking decision was material. The Tribunal conducts no reasoned analysis of whether, as a victim of trafficking, the Appellant would be at risk upon return to Bangladesh (for that is where he will be removed if his claim is not made out), either because of circumstances connected to his historical experiences or because he would be more vulnerable in the future. Nor, might I add, does the Tribunal weigh the positive Conclusive Grounds decision in the round when considering the overall credibility of the claim.
11. Were that not enough I am further satisfied that the findings on the 'ethnicity' aspect of the claim are contradictory and irrational. The Judge appears to reject the Appellant's childhood memories on the grounds that he would not be able to recall them, whilst at the same time weighing against him the fact that he is no longer fluent in a language that he last spoke as a six-year-old. Nowhere does the Tribunal weigh in the Appellant's favour the evidence that he can speak some Rohingya; nor does it consider how that might be so if the Appellant is not, in fact, from that ethnic group.
12. I reject the Appellant's third ground, which is that the Tribunal erred in failing to weigh in the balance the Respondent's "failure" to verify the camp registration document. The Respondent is under no obligation to prove the Appellant's case for him. The burden lies on the Appellant and this document was not of the species considered in *MA(Bangladesh) v Secretary of State for the Home Department* [2016] EWCA Civ 175.

13. That finding notwithstanding I am satisfied that there are sufficient grounds to set the decision of the First-tier Tribunal aside in its entirety. I note that in granting permission First-tier Tribunal Gibb expressed some ambivalence about whether there was any merit in the challenge to the Article 8 findings and I share that ambivalence. Certainly on the facts as found by the Tribunal there was nothing wrong with that element of the final decision. I am however mindful that the consequences of the Appellant's trafficking experience have not been explored and in those circumstances it would not be appropriate to fetter his case going forward. I therefore direct that the matter is to be determined *de novo*. Given the extent of the fact finding required the most appropriate forum for that would be in the First-tier Tribunal, where the matter must be listed before a Judge other than Judge Shergill.

Decisions

14. The determination of the First-tier Tribunal is flawed for material error of law and it is set aside.
15. The matter is to be determined *de novo* by the First-tier Tribunal.
16. There is an order for anonymity.

Upper Tribunal Judge Bruce
18th December 2018