



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: PA/04130/2018

**THE IMMIGRATION ACTS**

**Heard at Cardiff Civil Justice Centre  
On 26 April 2019**

**Decision &  
Promulgated  
On 29 May 2019**

**Reasons**

**Before**

**MR C M G OCKELTON, VICE PRESIDENT  
UPPER TRIBUNAL JUDGE GRUBB**

**Between**

**S U  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr M Puar instructed by Qualified Legal Solicitors

For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) we make an anonymity order prohibiting the disclosure or publication of any matter likely to lead to members of the public identifying the appellant. A failure to comply with this direction could lead to Contempt of Court proceedings.
2. The appellant claims to be a national of Myanmar, born on 15 May 1986, and to be of Rohingya ethnicity. He claims that in 1992, together with his

family, he fled Myanmar and went to Bangladesh where he lived in a refugee camp until 1998. He claims that he left Bangladesh in May 2016, with the assistance of an agent, travelling to Russia and from there entering the UK clandestinely in a lorry in June 2016. He claimed asylum on 12 December 2016. That application, together with his humanitarian protection and human rights claims, were refused on 9 March 2017. Principally, the Secretary of State did not accept that he was of Rohingya ethnicity and from Myanmar.

3. The appellant appealed against that decision to the First-tier Tribunal. In a determination promulgated on 27 June 2018, Judge Clemes dismissed the appellant's appeal on all grounds. Like the Secretary of State, he did not accept that the appellant was from Myanmar and of Rohingya ethnicity but that he was, rather, from Bangladesh.
4. The appellant sought permission to appeal against that decision on a number of grounds, in particular that in reaching his adverse finding Judge Clemes had failed properly to take into account the expert evidence of Mr Joshua Kurintzick in his report dated 20 May 2018 which supported the appellant's claim, in particular his claimed ethnicity, based upon, for example, his language and the authenticity of a "family book" upon which he relied.
5. On 7 August 2018, the First-tier Tribunal (Judge Haria) granted the appellant permission to appeal on the ground that the judge had failed to give due consideration to that expert report. The respondent did not file a rule 24 response.
6. Before us, Mr Mills, who represented the Secretary of State, accepted that the judge had erred in law by failing to give proper consideration to the expert report, in particular in relation to the appellant's language (and its relevance to his ethnicity) and in relation to the authenticity of the relied upon "family book". Mr Mills accepted that the judge had fallen into the so-called Mibanga ([2005] EWCA Civ 367) error, in that he had only made reference to the expert report having already concluded that the appellant's account was not credible. Mr Mills invited us to set aside the judge's decision and to remit it to the First-tier Tribunal for a rehearing.
7. Whilst Mr Puar, who represented the appellant, did not seek to oppose Mr Mills' concession that the judge's decision could not stand due to his failure to properly consider the expert report, he invited us to remake the decision on the papers and to find in the appellant's favour.
8. We are satisfied that Mr Mills' concession is properly made and consider that the proper disposal of the appeal, having set aside the judge's decision, is to remit it for a *de novo* rehearing.
9. We are satisfied that in reaching an adverse conclusion in relation to the appellant's spoken language (at para 22) and as to the authenticity of the "family book" (at para 23), the judge failed properly or at all to consider

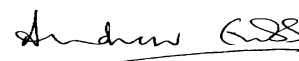
the expert evidence which supported the appellant's claim in respect of the language he spoke and the authenticity of the "family book". The judge fails to refer to the evidence in regard to the language issue in para 22 and, in respect of the "family book", fails properly to have regard to the expert's view that it is authentic in para 23 of his determination. Those errors are, in our judgment, compounded by the judge's treatment of the expert evidence at para 28 where, having already found the appellant not to be credible, he characterised the expert report as only being concerned with "the plight of Rohingya refugees ejected by Myanmar" and the "state of living conditions in the camps". The expert report was, as Mr Mills conceded, of much wider scope and support to the appellant.

10. We do not, however, consider it appropriate to remake the decision, including reaching a finding in respect of the appellant's credibility, on the basis only of submissions. We note that the appellant has, since the First-tier Tribunal's hearing, submitted a substantial "supplementary bundle" on 10 April 2019. As far as we can tell, these documents were never considered by the First-tier Tribunal. In addition, we have not had the opportunity to hear the appellant give oral evidence and given that his credibility is in issue, we do not consider it appropriate to remake the decision *de novo* on the papers.

### **Decision**

11. For the above reasons, the decision of the First-tier Tribunal to dismiss the appellant's appeal involved the making of an error of law. We set aside that decision.
12. In the light of the nature and extent of fact-finding required, and in the light of para 7.2 of the Senior President's Practice Statement, the proper disposal of this appeal is to remit it for a *de novo* rehearing in the First-tier Tribunal to be heard by a judge other than Judge Clemes.

Signed



A Grubb  
Judge of the Upper Tribunal

29 May 2019