Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10190/2018

THE IMMIGRATION ACTS

Heard at Field House **Decision and Reasons promulgated**

On 19 July 2019 **On 09 August 2019**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SHAHJAHAN AHMED
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M West instructed by City Heights Solicitors
For the Respondent: Miss J Isherwood Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals a decision of First-Tier Tribunal Judge Daldrey promulgated on 16 April 2019 in which the Judge dismissed the appellant's appeal on all grounds.

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Discussion

2. The appellant, who was born on 5 September 1974, is a citizen of Bangladesh who entered the United Kingdom lawfully on 28 May 2014 as a Tier 4 Student. The appellant's leave was curtailed on 13 March 2015 as the sponsor's licence for his college was revoked. The appellant applied for leave to remain outside the Immigration Rules on 1 June 2016 which was refused on 24 August 2016 with no right of appeal. The appellant was encountered working in a restaurant by immigration officials on 14 September 2017 and deemed an overstayer and served with removal directions following which he claimed asylum on 10 October 2017.

3. The Judge noted the basis of the appellant's claim and reasons for refusal. The Judge had the benefit of documentary and oral evidence. Findings of fact are set out from [31].

4. The first challenge by Mr West to the decision of the Judge is an assertion the Judge erred in law by failing to set out at all the standard of proof in the appellant's protection claim. At [7] of the application for permission to appeal the appellant notes that whilst it is clear that the FTTJ has, whilst not explicitly doing so, implicitly acknowledged that the burden of proof lies with the appellant to prove his case, evident on a straightforward reading of the determination, the FTJ has failed to refer at all to the standard of proof.

5. As an observation in response to a question "has the Judge set out in the determination the self-direction regarding the correct standard of proof to be applied" such reply would have to be in the negative as there is no specific reference or self-direction of the type seen in some decisions of the First-Tier Tribunal.

6. To find legal error on the basis of the failure to set out such self-direction in writing, without more, will be to find the Judge had erred in law as a matter of form rather than substance. It is not disputed in asylum appeals that the existence of a well-founded fear of persecution required an appellant to establish what was described by Lord Keith of Kinkel in *R v Secretary of State for the Home Department (ex p. Sivakumaran (1998) AC 958* as "a reasonable degree of likelihood", by Lord Templeman as a "a real and substantial danger" and by Lord Goff as a "real and substantial risk". In *PS (Sri Lanka) [2008] EWCA Civ 1213* the Court of Appeal reminded us that the single test of whether a fear of persecution or ill-treatment was well-founded was whether on the evidence there was a real risk of its occurrence or re-occurrence.

7. The appropriate standard is often referred to as the "lower standard" recognising that an individual may have difficulty in providing support

for a claim in relation to events that may have happened some time ago in their home country which could be many thousands of miles away.

8. Mr West was asked during the course of his submissions to identify in the determination any specific examples demonstrating the Judge had applied too high a standard of proof. Mr West was unable to do so, also claiming this was an unrealistic approach. I disagree. If the Judge had, for example, stated that it was found on the balance of probabilities that risk had not been established this will be a clear indication of the wrong standard of proof being applied. Similarly had the Judge referred to risk not being established beyond reasonable doubt that may indicate the highest standard was applied. It is necessary to read the determination as a whole. It is also important to note the Judge is an experienced judge of the First-Tier Tribunal who will have received extensive training in relation to the correct burden and standard of proof applicable.

9. I do not find it made out the Judge applied an incorrect burden and standard of proof. Considering the substance of the determination rather than purely form no arguable legal error is made out.

10. Mr West also asserted the Judge failed to consider the question of subsidiary protection in the appellant's case at all, but the Judge notes at [57]:

> "57. Mr Sperling agreed that the appellant if not successful in his asylum claim then he would not have an Article 2 or 3 route to a grant of leave. Nor would Article 8 be possible to argue other than via the "insurmountable obstacles" route but that could only be on the basis the appellant would be exposed to a real risk of persecution. That having been found to not be the case, the appellant's claim fails on all limbs."

11. The appellant's asylum claim was rejected, and it was not found the appellant will be exposed to a real risk of persecution or any other form of harm. The statement by the Judge that the appellant's claim fails on all limbs is clearly a finding that not only that relating to asylum, but also subsidiary protection and human rights grounds also fails. No arguable legal error is made out on this ground. This finding also undermines Ground 6 relied upon by Mr West in which he pleads an arguable failure to correctly apply the Immigration Rules and Article 8 in the appellant's case. It is not made out on what basis the appellant was able to succeed on either basis.

12. Mr West also asserts the Judge arguably failed to correctly apply section 8 Asylum and Immigration (Treatment of Claimants etc) Act 2004 on the basis the Judge decided the application of section 8 impacts on the credibility of the appellant overall. Under this heading it is asserted the Judge failed to assess the evidence as a whole in finding the section 8 aspects undermined the veracity of the claim and that within the section 8 assessment the Judge fails to afford proper weight to the appellant's explanation as to his late claim for asylum.

13. The Judge clearly considered this aspect, devoting specific consideration to the timing of the appellant's claim for asylum between [44 – 47]. The Judge gives ample reasons for finding why the late timing of the application for asylum damaged the appellant's credibility pursuant to section 8 of the 2004 Act. The Judge concludes [47] with the sentence "if he chose not to make an application for asylum, it is in my finding, more likely to be because he was aware that he did not have a valid claim for leave to remain via this route". The Judge does not consider section 8 as the determinative factor and took into account the explanation provided by the appellant with the required degree of anxious scrutiny, which was rejected. The weight to be given to the evidence was a matter for the Judge and disagreement with the section 8 assessment does not arguably establish legal error, per se.

14. Mr West further asserted the Judge erred in law by failing to properly consider the documentary evidence when dismissing the appellant's case and in failing to give adequate reasons concerning key documents in the protection claim. It was argued in submissions that the Judge failed to consider in the determination the evidence from the appellant's lawyer in Bangladesh and that while citing *Tanveer Ahmed* failed to properly apply the principles of that case. Concern was also expressed in oral submissions in relation to the specific finding of the Judge at [51] in which it is written:

> "51. I do not place a great what deal of weight on these documents as they are self-serving. They were all obtained after the appellant made his claim for asylum. Furthermore, if the appellant had already attracted the level of interest as suggested by these arrest warrants, I would have expected him to have made an earlier claim for asylum. The fact that he did not do so, in my finding, undermines the veracity of his claim."

15. The issue of a finding that statements are self-serving was considered by the Upper Tribunal in *R (on the application of SS) v SSHD ("self-serving" statements) [2017] UKUT 00164* in which it was held (1) the expression "self-serving) is, to a large extent, a protean one. The expression itself tells us little or nothing. What is needed is a reason, however brief, for that designation. For example, a letter written by a third party to an applicant for international protection may be "self-serving" because it bears the hallmarks of being written to order, in circumstances where the appellant's case is that the letter was a spontaneous warning; (2) whilst a statement from a family member is capable of lending weight to a claim, the issue will be whether, looked at in the round, it does so in the particular case in question. Such a statement may, for instance, be incapable of saving a claim which, in all other respects, lacks credibility.

16. It is not disputed that the term, 'self-serving', is one tending or able to change frequently or easily, as found in *SS*. No error is made out on the face of the decision in the Judge using this phrase as that in itself does

not establish arguable legal error. As Ms Isherwood submitted the Judge does give adequate reasons in support of the findings made regarding the lack of credibility in the claim and why little weight was attached by the Judge to the documentary evidence adduced in support. I do not find the Judge failed to take the appellant's evidence into account as is quite clear the appellant's bundle of documents of 178 pages was properly considered. The Judge was not required to set out or make findings on each and every aspect of the evidence. It is also the case that the Judge made a number of findings in the appellant's favour which are not challenged by assertion in incorrect burden and standard of proof was applied or the evidence not properly considered. These are referred to between [53 – 57] in the following terms:

> "53. With regards to the appellant's membership of the JCD and BNP in Bangladesh, I accept Mr Spurling's submission that the appellant could not be expected to have an in-depth knowledge of the policies of the BNP and it is clear from the answers he gave in response to questions put to him at his asylum interview that he did have some knowledge of the party. However, it is my finding, that at the very most his involvement was at a low level. I do not accept that he was arrested and detained as he claimed. It is my finding that if he really had been then he would have likely made an earlier claim for asylum and he would not have denied that he had a political profile when he had the opportunity to provide this at the time he made his human rights claim in 2016. After this was refused, the appellant simply disappeared and did not make any further applications until he was arrested working in a restaurant. This, in my finding, does not suggest that he was genuinely in fear for his life.
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> 54. I accept that the appellant sustained a broken leg at some point whilst he was in Bangladesh and the x-ray and medical reports clearly show this. However, having found the appellant's account lacked credibility I do not accept that this was a result of an attack on the appellant by members of the Awami League.
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> 55. Both representatives agreed that low level party members returned to Bangladesh as failed asylum seekers will not be exposed to a real risk of state or nonstate persecution. This is stated in the Country Policy and Information Note – Bangladesh: Opposition to Government, version 2.0, January 2018.
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> 56. I find that the appellant is at most a low-level supporter of the JCD/BNP in Bangladesh and that his activities are not such as to have brought him to the attention of the authorities. I attach little weight to the documentary evidence adduced in support including the First Information Reports an arrest warrant and also the medical report of Dr Nallet."

17. It is not made out there is any artificial separation in the manner in which the Judge assessed the evidence as a whole and credibility of the

same. It is not made out the weight to be given to the evidence is inappropriate in light of the material considered.

18. Whilst the appellant disagrees with the Judge's findings and clearly seeks a more favourable outcome to enable him to remain in the United Kingdom disagreement with the Judge's finding is not sufficient. Although there are some aspects of the way in which the determination is structured that might be improved upon the grounds fail to establish arguable legal error material to the decision to dismiss the appeal sufficient to warrant a grant of permission to appeal to the Upper Tribunal.

Decision

19. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

20. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……………………………………………….
Upper Tribunal Judge Hanson

Dated the 29 July 2019