Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/12111/2017

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
On 26 April 2019	**On 30 May 2019**

Before

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

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RA
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr D Mills, Senior Home Office Presenting Officer
For the Respondent: Mr A Maqsood, instructed by Shah Jalal Solicitors

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 of any matter likely to lead members of the public to identify the respondent (RA). A failure to comply with this direction could lead to contempt of court proceedings.

2. Although this is an appeal by the Secretary of State, we shall for convenience refer to the parties as they appeared before the First-tier Tribunal.

Introduction

3. The appellant is a citizen of Bangladesh who was born on 14 November 1979.

4. On 23 July 2016, he was encountered by an Immigration Officer and was detained and served with Immigration Notice IS.91.

5. On 28 July 2016, whilst in detention awaiting removal, the appellant claimed asylum. There followed a Statement of Evidence Form (SEF) on 5 January 2017 and an asylum interview on 5 January 2017.

6. The appellant's claim was that he had entered the United Kingdom in March 2005 as a result of problems he faced in Bangladesh because of his political opinion. He claimed to be an active member of the BNP and also to be involved in a land dispute with members of the Awami League. He claimed that as a result of an incident in February 2004, he left Bangladesh. He claimed that after he had left Bangladesh, his house was attacked and his family were advised that if he was caught he would be killed. He claimed that a false case was lodged against his brother. He feared that if he returned to Bangladesh he would be killed by the Awami League.

7. On 18 August 2017, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and on human rights grounds.

8. The appellant appealed to the First-tier Tribunal. In a determination sent on 18 January 2018, Judge J Eames allowed the appellant's appeal on asylum grounds. He found the appellant's account to be credible and he accepted that he was an active and prominent member of the BNP who had been arrested and detained on a politically motivated basis and that, as a perceived political opponent, he would be at risk from the Awami League on return to Bangladesh.

9. On 24 January 2018, the Secretary of State sought permission to appeal challenging the judge's positive credibility finding and also his acceptance that the appellant was at risk on return to Bangladesh, thirteen years after he claimed to have left Bangladesh.

10. On 6 February 2018, the First-tier Tribunal (Judge Pedro) granted the appellant permission to appeal. The appellant did not file a rule 24 response.

Submissions

11. On behalf of the Secretary of State, Mr Mills sought to focus the points raised in the Secretary of State's grounds of appeal. He focussed upon paras 70(a) – (f) and the judge's reasoning that led him in para 71 to make his positive credibility finding and at para 72 to find, in the appellant's favour, that the basis of his claim arising from his political opinion was established. In addition, Mr Mills submitted that, in any event, the judge had failed properly to consider whether the appellant was currently at risk, and of interest to the Awami League, given that he had, in his claim, said that he had

left Bangladesh in 2005 and had at best a mid-ranking local role between 2002 and 2005.

12. Mr Maqsood submitted that the judge's reasons at paras 70(a) – (f) were legally sustainable. Further, on the judge's findings, the judge was entitled to find that the appellant would be a "perceived political opponent" and at risk on return to Bangladesh and since his fear arose from state actors, internal relocation and sufficiency of protection was not available.

13. We will deal with the detail of the submission shortly.

14. We begin, however, with the judge's reasons.

Discussion

15. As we have indicated, the judge's reasons for making a positive credibility finding (at [71}) and accepting the appellant's account which put him at risk (at [72}) are set out in the six paras at paras 70(a) – (f).

16. In considering those reasons, it is important to note the context of the appellant's asylum claim made on 28 July 2016. As we have already identified, in that claim the appellant claimed to have entered the UK in March 2005 using his own passport. In the course of his claim, the appellant accepted that he had previously made an Art 8 claim on 14 November 2017 in a different and false name, namely Poblu Miah. In that earlier claim, he had said that he had entered the United Kingdom in January 2001 using that alias or false name. That, of course, differed from his account in his present application which was that he had not left Bangladesh and come to the UK until March 2005. His earlier claim had been refused (with a right of appeal) on 29 April 2008 and he was served, in the alias name with notice of removal (IS.151A) on 19 May 2008.

17. Not unsurprisingly, this accepted deceptive conduct by the appellant featured in the Secretary of State's case that the appellant's credibility was not to be accepted in respect of his claim as now put in his 2016 application for asylum.

18. Judge Eames dealt with the relevance of this matter both in para 70(a) and para 70(f).

19. At para 70(a) the judge said this:

> "Ms Curran [the Presenting Officer] reasonably enough points to the appellant's use of an alias name in his previous application. He has explained this by saying this was name he was also called by in Bangladesh. That particular explanation has not been addressed by the respondent. But the burden, low though it is, lies on the appellant. I take into account the fact that as Mr Raza [Counsel for the appellant] rightly says it is the appellant himself who drew attention to the fact that he had used an alias. Perhaps there is only a fine difference between the notion of an alias and that of a false name. In my view it is likely that the appellant had good reason to use a name which on his own oral evidence was one that he was already called in the alternative. As a person allegedly being trafficked into the country by an agent (although one also loosely described as a

> friend) it is not unlikely he would be under the instruction of that agent and would have done what he was told. None of that is honest or honourable behaviour. On the contrary. But it is reasonably consistent with how asylum seekers may have to behave. So when assessing the impact of the alias story on his overall credibility I am willing to believe that the use of an alias does not negate or invalidate the core of his asylum claim. It is not to be condoned, but does not mean that he is overall dishonest."

20. At 70(f) the judge said this in relation to s.8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004:

> "Underlying the respondent's overall view of credibility are her two section 8 points (of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004), the delay in claiming asylum and use of a false name. In my view the reasoning behind using an alias adequately explains it in a way that does not impugn the appellant's overall honesty. I addressed this above. His delay in claiming asylum after arriving in the UK was again not particularly honourable or attractive behaviour, once his leave had expired. But until his leave expired, I do not consider there was any pressing duty or requirement on the appellant to put forward his alternative reason for being in the UK, given that he had leave on a genuine and bona fide basis, and that sufficed during its currency. But once it had run out, a genuine question arises as to how far his credibility is undermined by his continuing failure to claim asylum. In my view the explanation for what he did was simply that he was in the UK, life for him in the UK continued to be possible without status, and he took a dishonourable gamble on that being a sustainable position, balanced against the risk that if he did make his asylum claim there was the chance it would be turned down. People sometimes make those calculations about lodging an asylum claim, and whilst it does not enhance their compliance with Immigration Rules, it certainly does not always mean they are dishonest. That I take to be the position here with this appellant. It is unworthy, and discredits him to a degree, but it does not overall mean that I find him lacking credibility."

21. Mr Mills submitted that the judge had failed in para 70(a) to explain why the appellant's use of a false name in his 2007 human rights application was explicable on the basis that he had been under the influence of an agent who had trafficked him into the UK. On his account in the present application, that was some two to three years after he had entered the UK in 2005. Mr Mills submitted that, without further reasoning, the judge had failed properly to explain why this past deception was not relevant to the appellant's credibility in respect of his present application.

22. Further, as regards para 70(f), Mr Mills submitted that the judge was simply wrong to state that the appellant's delay in claiming asylum was not a relevant matter damaging of his credibility under s.8 of the 2004 Act.

23. Mr Maqsood submitted that it was clear that in para 70(a) the judge was fully alive to the appellant's previous conduct which he accepted was not honest or honourable behaviour. Nevertheless, he had given sufficient reasons for finding that this earlier deception did not affect the appellant's credibility or go to the "core" of his claim.

24. In respect of para 70(f), Mr Maqsood submitted that the judge had dealt with the delay in the appellant claiming asylum and, therefore, that s.8 of the 2004 Act did not apply to damage his credibility.

25. In substance, we accept Mr Mills' submissions. In respect of para 70(a), before the judge the appellant accepted, in essence, that he had previously used deception in making his human rights application in 2007. He had used an alias or false name and, at least contrary to his account in the present application, he had claimed to enter the UK in 2001. His present application claimed that he had entered the UK in 2005. Indeed, he relied upon adverse events in Bangladesh prior to 2005 when, in his earlier application, he had claimed to be in the UK. Whilst an individual's previous dishonest or deceptive conduct does not, in itself, mean that he or she has necessarily been dishonest in relation to the matters raised in their more recent claim, if not adequately explained, that is a relevant matter in assessing their general credibility and honesty. A person who has been shown previously to be dishonest, or as in this case effectively accepted themselves that they were dishonest, necessarily calls into question their general truthfulness and whether they should be believed in what they say is now the true circumstances.

26. Further, in para 70(a), the judge explained away the appellant's dishonesty or deceptive behaviour in 2008 as a person who had been "trafficked into the country by an agent…it is not unlikely he would be under the instruction of that agent and would have done what he was told." Whilst that *might* explain the use of an alias or false name (including it would seem a false passport) being used on entry (which the appellant claimed in his earlier application was in 2001), the judge gave inadequate reasons for considering that that explanation carried on until 2007 when the appellant made his human rights application in the false name or alias. Even if the appellant were to be accepted (as is his current claim) to have entered the UK in 2005, that would be between 2 and 3 years before his 2007 human rights application. The absence of any adequate explanation as to why he continued to use a false name or alias provided no basis for ignoring, and failing to properly take into account, his earlier dishonesty or deceptive behaviour as relevant to his general credibility and, therefore, the veracity of his current account.

27. As regards para 70(f), the appellant undoubtedly delayed in claiming asylum until 2016 from 2005 (when on his current application he claimed to enter) or 2001 (when on his previous application he claimed to have entered). He had also previously used a false name or alias. Both of these matters fell within s.8 of the 2004 Act. His previous deceptive behaviour was "designed or likely to conceal information" or "designed or likely to mislead" (s.8(2)). Likewise, his delay in claiming asylum fell within s.8(5) as it was a failure by him "to make an asylum claim…before being notified of an immigration decision, unless the claim relies wholly on matters arising after the notification."

28. In regard to both of those matters, at least without reasonable explanation, they were potentially "damaging" of the appellant's credibility. Any explanation for his previous dishonest or deceptive behaviour, to the extent that the judge relied on the

reason he had already given in para 70(a), could not as we have already noted suffice as a matter of law to explain away that dishonest or deceptive behaviour.

29. In relation to the delay in claiming asylum, the judge's reasoning is, to say the least, little more than saying that the appellant simply took a "gamble" that, in effect, he would not be apprehended or was to avoid the risk of having his claim turned down. We find that reasoning difficult, in principle, to found a reasonable excuse so as to negate the underlying policy in s.8 that a delay in claiming asylum is "damaging" of a claimant's credibility.

30. In any event, as we pointed out at the hearing, the judge's reasoning ignores the fact that the appellant did in fact make a claim, a human rights claim, in 2007. Further, on 29 April 2008, the appellant was given notice that that claim was refused and the appellant was invited under s.120 to make any further representation as to why he should be permitted to remain in the UK. The appellant did not then raise his asylum claim. He delayed doing so, for no explicable reason, until 2016, some eight years later. The judge's explanation that the appellant took a "dishonourable gamble" cannot bear the weight he gives it in the light of the full opportunity that the appellant was given in 2007/08 to make an asylum claim when he was both making a human rights' claim and had been invited to raise any other grounds on which he wished to claim that he was entitled to remain in the UK.

31. In our judgment, the appellant's conduct plainly fell within s.8, in particular within s.8(5), in that he failed to make his asylum claim before being notified of an immigration decision, most recently the IS.91 on 23 July 2006 and, more generally, in response to the refusal of his human rights claim on 29 April 2008.

32. We have concluded that the judge's reasoning in paras 70(a) and (f) cannot be sustained. The judge was not entitled to reach the views he did on these matters as not damaging the appellant's credibility and he was not entitled to discount the requirements of s.8 of the 2004 Act in the way or for the reasons he did.

33. Mr Mills also challenged the judge's reasoning in para 70(b) in which the judge made, in effect, a positive identification of the appellant based upon a number of photocopies of photographs which it was said showed him in close proximity to a high profile BNP politician. The judge's reasoning was as follows:

> "A central feature of the appellant's alleged poor credibility, according to the respondent, is his claimed membership of BNP. Ms Curran premised this view chiefly on the inadequacy of the photos at pp87-90. I remind myself that just because I refused Mr Raza's adjournment application on this very point, this does not mean that I am bound to give him the benefit of any doubt about the photos. It is true that quality is poor and I some of them faces cannot be adequately made out. However I have scrutinised the top picture on page 87 and the bottom pictures on pages 88 and 89. The person the appellant points out as being himself in those three photos does indeed bear a decent resemblance to him, taking into account he passage of time and his ageing over some years. The face of the person he points out as himself, especially in the first on page 87, is clearly visible. The appellant identifies the person to his left – the main speaker

> in the picture, with a microphone – as the then BNP-affiliated finance minister. That particular fact has not been disputed by the respondent. The appellant answered that question readily and promptly in oral evidence. I find to the lower standard of proof that he is right about the speaker being the finance minister and right about himself being on the minister's right-hand side. In terms of position within the hierarchy, I'm not persuaded that this must mean the appellant had a named position relation to the finance minister, but he is plainly prominent in the photo, trusted enough by the party to stand right next to a minister, and evidently enjoys at least some status within the ranks. Turning to the second picture on page 88, once again the appellant here is in a prominent position, this time more persuasively as part of a panel at a desk on a stage. Again I think it reasonably likely that that event is a party BNP event involving important members. There can be no doubting the appellant's prominence at this event or his importance within the party hierarchy at that event. The third photo I highlight, the lower one on page 89, tells me a little less, in that it is plainly a demo which would perhaps have been less exclusive in terms of who was able to attend and get photographed. Nevertheless, the person the appellant identifies as himself in this picture is certainly right at the front of the demo or that part of the demo. His attendance at this event does not look casual or contrived. Applying the lower standard of proof, I find it reasonably likely that the appellant was attending all these events, and was in a position of some importance vis-à-vis the BNP structure."

34. Mr Mills submitted that these photographs were largely from the mid-1990s when the appellant was 16 or 17 years old. He is now 39 years old. Mr Maqsood, in his submissions, accepted that some of the photographs did, in fact, relate to when the appellant was some 16 to 17 years old but some were more recent dating to 1996 and 2001.

35. Whilst clear and unequivocal photographs of an individual linking him with a particular political event may have some evidential value in supporting his claimed political involvement, a judge should generally be cautious in relying upon visual identity – comparing a photograph with an appellant at a hearing – when the photographic evidence is not challenged in any way. Judges are not experts, in general, in matters of visual identity. Of course, common sense may drive a judge to accept or reject a claimed visual correlation between a photograph and an appellant where there is an unmistakable similarity. But even then, caution needs to be exercised as photographs can be doctored and doppelgangers are not unknown.

36. Here, the judge concluded that there was "decent resemblance" between the individual in the photographs (said to be the appellant) and with the appellant at the hearing. However, in the photographs the individual was clean shaven whilst the appellant at the hearing had a beard. Further, many of the photographs were said to be of the appellant taken when he was 16 – 17 but at the time of the hearing he was 39 years old. In our judgment, the judge placed an impermissible weight upon the photographic evidence in the light of these matters. We would also add that the copies of the photographs which the judge consulted were, very largely, poorly reproduced. At the conclusion of the hearing, we invited Mr Maqsood to provide the originals. We have assumed those would be available, as it had been claimed before

Judge Eames that they could be obtained but, in the event, he refused an adjournment to do so. In the result, we were not provided with any of the photographs which, in fact, in copy form were before the judge.

37. In our judgment, the judge was not entitled to conclude on the basis of the copy photographs, based upon his assessment that the individual in the photographs bears a "decent resemblance" to the appellant, that, in fact, those are photographs showing the appellant.

38. In our judgment, these flaws in the judge's reasoning are significant and materially undermine his positive credibility finding.

39. Mr Mills also raised points in relation to paras 70 (c), (d) and (e) of the judge's determination. It is not necessary to deal with these points in detail as we take the view that, for the reasons we have already given, the judge's positive credibility finding is flawed and his decision must, as a result, be set aside.

40. Suffice it to say that Mr Mills did not actively pursue the challenge to para 70(d) where the judge noted that, although the appellant had not referred to his arrest in his asylum interview, as he had done so in his earlier screening interview. Mr Mills accepted that the appellant had not been directly asked in his asylum interview whether he had been arrested.

41. As regard para 70(c), having explained an apparent inconsistency in the evidence of a UK based witness, it does not appear that the witness had any personal knowledge of the appellant claimed political activities in Bangladesh and, as Mr Maqsood submitted, the judge had simply noted that his evidence "does not advance the appellant's case all that much".

42. Finally in relation to para 70(e), there was an apparent discrepancy in the appellant's evidence as to whether or not his brother had been falsely accused of murder or (as he now claimed) of an incident involving a burning car. The judge accepted the appellant's explanation that this inconsistency or discrepancy was due to a misunderstanding between him and his representatives. However, we note as Mr Mills submitted, that as this incident was central to the appellant's claim, the judge nowhere explicitly made any finding as to which version was, as a matter of fact, correct. It may be, however, that in accepting the appellant's credibility in respect of his account at the hearing, the judge implicitly accepted the 'car burning' incident had occurred.

43. Given our clear view that the judge's reasoning in paras 70(a), (b) and (f) cannot stand and that these were significant and material to his positive credibility finding, it is unnecessary to consider Mr Mills' submission in relation to whether, if believed, the appellant was properly found to be at risk on return to Bangladesh thirteen years after he left.

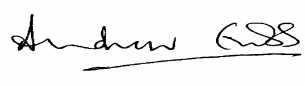
44. The judge's findings, flowing from his positive credibility finding, are legally flawed and cannot be sustained. Consequently, his decision to allow the appellant's appeal on asylum grounds cannot stand and a fresh assessment of his claim must be made.

Decision

45. For the above reasons, the decision of the First-tier Tribunal to allow the appellant's appeal involved the making of an error of law. That decision is set aside.

46. Having regard to the nature and extent of fact-finding required and to para 7.2 of the Senior President Practice's Statement, the proper disposal of this appeal is to remit it to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judge Eames.

Signed



A Grubb
Judge of the Upper Tribunal

29 May 2019