Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00183/2020

THE IMMIGRATION ACTS

Heard remotely via video (Skype for Business)	**Decision & Reasons Promulgated**
On 25 March 2021	**On 8 April 2021**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

MD ABDUR RAHIM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Ms S Iqbal, counsel, instructed by Syed Shaheen Solicitors
For the respondent: Ms A Everett, Senior Home Office Presenting Officer

This decision follows a remote hearing in respect of which there has been no objection by the parties. The form of remote hearing was by video (V), the platform was Skype for Business. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

DECISION AND REASONS

Background

1. This is an appeal against the decision of Judge of the First-tier Tribunal McLaren ("the judge") promulgated on 18 September 2020 dismissing the human rights appeal of Mr MD Abdur Rahim ("the appellant") against a decision of the respondent dated 12 December 2019 refusing the appellant's human rights claim.

2. The appellant is a national of Bangladesh who was born on 12 October 1981. He entered the UK on 9 December 2009, and he had valid leave until 9 June 2016. He made an in-time application for further leave to remain outside the Immigration Rules, but this was refused on 24 September 2016. On 15 October 2016, within 28 days of the expiry of his previous leave (which had been extended by virtue of section 3C of the Immigration Act 1971), the appellant made a further application for leave to remain on the 10 year route under Appendix FM. This was refused on 30 March 2017. Within 14 days of that date (but not within 14 days of the appellant's previous leave expiring – see paragraph 39E of the Immigration Rules), on 10 April 2017, the appellant made a further application, this time for Indefinite Leave to Remain ("ILR"). This was refused on 9 November 2017 and an appeal was dismissed by Judge of the First-tier Tribunal Cary on 24 July 2019.

3. Judge Cary noted, by way of a statement stated 13 December 2018, the appellant's assertion that he would face persecution if returned to Bangladesh on account of his activities as a journalist in the United Kingdom. An earlier hearing was adjourned to enable the respondent to consider whether the appellant should be interviewed in respect of what appeared to be a claim for international protection. The respondent did not consent to what amounted to an asylum claim being considered by the Tribunal as this constituted a "new matter" under section 85 of the Nationality, Immigration and Asylum Act 2002. At the appeal before judge Cary the appellant therefore only relied on private life grounds under Article 8 ECHR and under paragraph 276ADE(1) of the Immigration Rules.

4. In the decision promulgated on 24 July 2019 Judge Cary found that there was nothing in the appellant's case to suggest that he would have any significant difficulties in re-establishing a private life within the meaning of Article 8 if returned to Bangladesh. Judge Cary noted that the appellant had been born and brought up and educated in Bangladesh and would have no difficulty in understanding and adapting to the cultural norms. He only entered the UK when he was 27 years old and had spent the bulk of his life in Bangladesh. He worked in that country as both a journalist and a graphic designer and there was nothing to indicate that he would find it impossible to resume such employment, particularly in view of the qualifications he had obtained in the United Kingdom. The appellant had a wife, daughter, mother and various brothers and sisters in Bangladesh who would be able to help him re-integrate.

Judge Cary noted that the appellant had been back to Bangladesh on several occasions, and that there would be no language difficulties as the appellant gave evidence in Bengali. Judge Cary found the appellant was a resourceful individual who had continued to be heavily involved with the Bangladeshi community in the United Kingdom, including the 'Bangladeshi Students Union UK' and the 'Voice of Bangladesh' which he described as an international human rights organisation. Whilst Judge Cary found that the appellant had established a private life in the United Kingdom, including his relationship with his cousin, with whom he lived, and that his cousin's sister (Mrs Rina Begum – also the appellant's cousin) gave him money, taking account of the factors in section 117B of the Nationality, Immigration and Asylum Act 2002, Judge Cary concluded that the refusal of the appellant's human rights claim would not result in a disproportionate interference with Article 8.

5. The appellant made a further out of time application on 9 December 2019. This was an application for ILR based on the long residence rules, particularly paragraph 276B. In refusing the application the respondent noted that the appellant had been without lawful leave since 24 September 2016 and that he did not meet the requirements for a grant of leave under paragraph 276B(i)(a). The respondent rejected the appellant's claim that there were 'very significant obstacles' to his integration in Bangladesh, as required by paragraph 276ADE(1)(vi), and found that there were no exceptional circumstances such as to constitute a breach of Article 8 if his application was refused. The respondent was not satisfied that any mental health issues afflicting the appellant could not be adequately treated in Bangladesh. The respondent referred to the appellant's claim that threats had been made against him by a gang in the UK which was also active in Bangladesh, but there was said to be no evidence of any specific threat against the appellant and no evidence that the Bangladeshi authorities would not be able to deal with any threats made against him. The respondent noted that the appellant had not made a protection claim. The appellant was advised that if he felt unable to live in any part of Bangladesh because he feared persecution, he could apply for leave on protection grounds.

6. The appellant did not make any protection claim. The appellant appealed the respondent's decision to the First-tier Tribunal pursuant to s.82 of the Nationality, Immigration and Asylum Act 2002. The grounds of appeal relied on, inter-alia, the extent of the appellant's contribution to organisations in the United Kingdom, the threats he claimed had been made against him by the Bangladeshi intelligence agencies, and his fear from a criminal gang that arose from him acting as a prosecution witness in a serious criminal trial. The appellant claimed that the criminal gang had a significant influence on Bangladesh's ruling elite and that he had been a under witness protection for a long time in the UK. I pause at this juncture to express my surprise that no protection claim was made by the appellant.

The Decision of the First-tier Tribunal

7. The judge rejected the appellant's claim that he had at least 10 years continuous lawful residence in the United Kingdom. Although the judge's decision relies on **Ahmed, R (on the application of) v SSHD** [2019] EWCA Civ 1070 ("**Masum Ahmed**"), which has been overturned, the Court of Appeal authority of **Hoque & Ors v SSHD** [2020] EWCA Civ 1357 ("**Hoque**") makes plain that the appellant was not entitled to ILR because his overstaying was "open-ended" and the first disregard in sub-para (v) of paragraph 276B could not be construed as qualifying the definition of continuous lawful residence in sub-para (i) (see Underhill LJ's judgement at [43] to [45]).

8. The judge set out in the appellant's evidence in section "D" of the decision. The judge noted that, despite assertions in letters from Voice For Bangladesh that he and his family members face several threats from Bangladesh, it was the appellant's evidence that none of his family in Bangladesh had been directly threatened. The judge was not satisfied that the appellant had provided credible evidence of threats to him or his family as a result of his activities.

9. At [20] the judge referred to a letter from the Bangladesh High Commission dated 16 November 2017, authored by T M Jobaer, asking him to explain his position in respect of reports he wrote on 4 August 2017, 13 October 2017 and 27 October 2017. The judge noted that the letter did not refer to a meeting being required and there was nothing in writing arranging a date or time for a meeting. The judge then recounted, at [21], the appellant's claim that he had been required to attend a meeting at the High Commission and that he was told by T M Jobaer "not to write like this and that it could be dangerous to him later." There had been no written follow-up from this meeting and the appellant confirmed that nothing further had happened to him since 2017. At [22] the judge recorded the appellant's claim that he had continued to write articles after the conversation with T M Jobaer but that there was only one article in the bundle dated 8 June 2018 and nothing after that. The appellant claimed that TM Jobaer was a Brigadier General when he was with the High Commission and that he had now returned to Bangladesh and was Director-General of the National Security Intelligence. The judge mentioned that he had been provided with a Wikipedia article concerning this individual.

10. At [23] the judge referred to an article from a UK newspaper indicating that four people had been found guilty of money laundering in respect of the trial that took place in January 2019. At [24] the judge recorded evidence from the appellant that he had been threatened by a criminal gang and that he had been under witness protection for a long time. It was the appellant's evidence that the criminal gang had significant influence on Bangladesh's ruling elite and threatened to take action against him both in Bangladesh and in the UK if he continued to be a prosecution witness. The judge noted that the appellant had

provided no evidence that the gang had continued to threaten him after the trial. The judge stated:

> "on his own account they had told him they could do so in the UK but had not done so. I find that they are therefore unlikely to do so in Bangladesh."

11. The judge then summarised the evidence from the appellant's cousin, Mrs Rina Begum, and the submissions made by both representatives.

12. In the section of his decision headed "Findings and Decision" the judge noted, with respect to paragraph 276ADE(1)(vi), that the appellant had family in Bangladesh including his wife and child and had previously worked there and now had more qualifications. There was nothing in the evidence now presented by the appellant that was said to be any different from the position at the earlier appeal. The earlier appeal had considered the appellant's relationship with his cousin and, although Mrs Begum now added that she would suffer mental distress if the appellant returned, was no evidence in support of this.

13. At [42] the judge stated:

> "The appellant was a prosecution witness and threatened by the perpetrators of the fraud. I have found that the threat from the criminal gang was one said to be capable of being carried out in the UK or Bangladesh. Nothing has happened, but the threat by its nature encompassing both countries is not a significant obstacle to reintegration in Bangladesh."

14. At [43] the judge stated:

> "The appellant has said he has been threatened by the man who now runs the security services that he would face threats to his safety if returned to Bangladesh. While the appellant was sent a letter, in the absence of any communication setting up a meeting, any written follow-up or evidence of any action taken against the appellant. [sic] I conclude that on the balance of probabilities there is no risk on return. This does not create a significant obstacle."

15. At [45] the judge stated:

> "Turning to Article 8 outside the rules, I have considered the 5 steps set out in Razgar. The evidence given by Mrs Begum as to the closeness of their relationship had previously been considered and I have addressed it above. The prior determination had also addressed the appellant's contribution to the UK through his voluntary work. He has continued to do this, but this fact does not provide any reason to reach a different conclusion from the prior determination."

16. At [46] the judge stated:

> "The assistance as a prosecution witness is laudable and I was asked to give the appellant credit for this in considering the public interest. I find that this does not constitute a factor that diminishes the importance of immigration controls. I conclude that any interference with the appellant's private life is in accordance with the law and in pursuit of a legitimate aim, namely the maintenance of effective immigration controls."

17. The judge concluded, at [47], having stated that he had undertaken the balancing exercise to determine proportionality, that there were no exceptional circumstances in the case and that the interference was proportionate. The human rights appeal was dismissed.

The challenge to the judge's decision

18. The 1st ground contends that the judge failed to take into account relevant evidence relating to the nature of the threat the appellant claimed he faced if removed to Bangladesh. The appellant maintained that he had been under witness protection in the UK and that the gang he feared had significant influence on Bangladesh's ruling elite. If accepted, this evidence demonstrated that the gang could more easily harm the appellant in Bangladesh than in the UK. The appellant would be well protected in the UK but more exposed in Bangladesh, where the gang had influential friends. It is asserted that this evidence contradicted the judge's reasoning and conclusion on this point. It was an error of law for the judge to fail to take this evidence into account.

19. The 2nd ground of appeal contends that the judge incorrectly characterised the 'very significant obstacles' test. To the extent that the judge's assertion at [42] that "the threat by its nature encompassing both countries is not a significant obstacle to re-integration in Bangladesh" was a distinct reason, i.e. a threat which applies in both the UK and the state to which the applicant will be returned if required to leave the UK cannot be a significant obstacle to reintegration, this will was a material misdirection of law. Nothing in paragraph 276ADE(1)(vi) invited comparison between the appellant's situation in the UK and the situation he would be in in Bangladesh. The question is simply whether there were very significant obstacles to his integration in Bangladesh and conditions in the UK were irrelevant to this question.

20. The 3rd ground contends that the judge failed to give any or adequate reasons for concluding that there were no exceptional circumstances in the case and that the interference with the appellant's private life rights was proportionate. At [47] the judge merely stated his conclusion but failed to explain why he reached this conclusion. It was therefore unclear whether and to what extent key factors were assessed as part of the proportionality exercise. For example, the appellant's role as a prosecution witness was considered by the judge with

respect to s.117B(1) of the 200-2 Act, but there was no assessment that this action contributed to UK society and values and willingness to risk threats of violence to uphold those values. Is was impossible to know whether this was factored into the proportionality assessment.

21. The 4th ground contends that the judge failed to take into account relevant considerations in respect of the threat the appellant claimed he would face from the Bangladeshi authorities due to his political writing, as confirmed by Voice for Bangladesh. The Bangladeshi government is a relatively repressive regime that does not tolerate dissent and there was nothing in the evidence to support a finding that there would be any more of a prelude to action being taken against the appellant then writing a warning letter. Any consequent restrictions that the appellant may face on his liberty or ability to express his political views in Bangladesh might amount to very significant obstacles.

22. The 5th ground challenges the judge's decision on long lawful residence, but acknowledged that the decision in **Hoque** compromise the viability of this ground. The appellant nevertheless reserved his position as to whether to pursue this argument further noting that the judgement in **Hoque** may be the subject of an application for permission to appeal to the Supreme Court.

23. In granting permission Upper Tribunal Judge Jackson noted that the appellant accepted that the final ground of appeal was currently unarguable for the reasons given in **Hoque**. Although Judge Jackson considered that not all the grounds had strong arguable merit, she did not restrict the grant of permission. She noted however that the appellant would need to be prepared to deal with the issue of materiality of the grounds of appeal, if an error of law was found, as to whether this could have possibly had a bearing on the outcome of the appeal in all circumstances.

24. At the outset of the 'error of law' hearing I indicated my concerns with two aspects of the judge's decision so as to assist the parties in their submissions. The judge did not appear to have made any specific findings in respect of the appellant's claim to have had a meeting with Mr TM Jobaer in which threats were allegedly made against the appellant. Nor did the judge appear to take into account the appellant's claim that the criminal gang he feared was influential with the Bangladeshi elite, or the appellant's claim (which is otherwise unsupported by independent evidence) that he was under witness protection in the UK.

25. Ms Everett observed that the judge's decision was "concise" and indicated that she may be in difficulties in trying to defend the decision on the basis of the two concerns I raised. She stated that, as the appellant had not made a protection claim the judge may not have dealt with the matters raised by him in as comprehensive manner as was required, that it was unfortunate that the appellant did not make a protection claim and that he should be encouraged to

do so. I indicated my agreement with her sentiments. I thereafter informed the parties that I was satisfied the decision contained errors on points of law and that those errors were sufficiently material such s to require the decision to be set aside.

Discussion

26. I'm satisfied there is merit in the 1st ground. The appellant gave evidence that he was (i) under witness protection in the UK, and (ii) that the gang against whose members he testified had significant influence on Bangladesh's ruling elite. Although I could find no independent evidence to support the appellant's assertion to have been under witness protection in the UK, the judge made no clear findings in respect of either assertion and did not appear to take them into account when determining any risk faced by the appellant in Bangladesh. If the judge accepted the appellant's assertions (and he did not expressly reject them), then that evidence suggested that the gang could more easily harm the appellant in Bangladesh than in the UK. The fact that nothing had happened to him in the UK did not obviate the possibility, on the balance of probabilities standard (given that this is a human rights claim), that any threats would not be carried out in Bangladesh sufficient to interfere with his physical and moral integrity (as an aspect of the appellant's Article 8 private life rights) or sufficient to constitute a very significant obstacles to his integration. The judge's failure to make material findings in respect of the appellant's two assertions, or to take them into account in his assessment under paragraph 276ADE(1)(vi) and his Article 8 proportionality assessment, in the context of the appellant's Article 8 private life claim, constituted an error of law.

27. I am additionally satisfied that the judge fell into legal error in his assessment of the appellant's claim to have received threats from Brigadier-General TM Jobaer. Although the judge found there was no risk to the appellant based on his political writing and, in so doing, noted the absence of any communication setting up a meeting between the appellant and TM Jobaer, there was no actual finding as to whether the meeting occurred and whether the alleged threats were made. Given the relevance of this threat to the appellant's claim that he would encounter 'very significant obstacles' to his reintegration in Bangladesh and to his Article 8 private life claim based on his moral and physical integrity, it was incumbent on the judge to make these findings.

28. I am also persuaded, although by a narrow margin, that the 2nd ground is made out. It is not clear from the decision at [42] whether the judge has actually fallen into the error described at paragraph 19 above. It may simply be that the judge did not consider that any threat would be carried out in Bangladesh if none occurred in the UK. If this is so, then the judge fell into the legal error described at paragraph 26 above. If, however the judge considered that there were no very significant obstacles to the appellant's integration because the threat faced in Bangladesh was equalled by the threat faced in the UK, then he fell into legal

error. Paragraph 276ADE(1)(vi) does not require a comparison between the country of proposed return and the UK when determining whether there are very significant obstacles to return; the focus is entirely on the country of return.

29. I am further persuaded, also however by a narrow margin, that the 3rd ground is made out. The judge's proportionality assessment under Article 8 outside of the immigration rules is devoid of adequate reasoning. The judge asserts that there are no exceptional circumstances in the case, but he does not explain why he reached this conclusion.

30. I am satisfied that the errors of law identified above are material. Whilst there is a paucity of independent evidence supporting the appellant's claim to have been under witness protection in the UK, or his claim that the 'gang' had influence on the Bangladeshi elite, or his claim that he met TM Jobaer, in the absence of any clear assessment of this evidence it cannot be said that, had the judge not erred in the manner described above, that he would inevitably have reached the same conclusion. Taking that evidence at its highest, a judge, properly directing him or herself on the law, may be entitled to allow an Article 8 appeal on the basis advanced by the appellant.

31. I make one final point. Given the basis of the claim advanced by the appellant it was open to him to have made a protection claim. He did not do so. His account of fearing ill-treatment based on threats made to him by an influential criminal gang and the intelligences services, which would normally, by their very nature, be the subject of a protection claim, has therefore not been the subject of detailed examination under the asylum determination procedures deployed in this country. The assessment of all aspects of his Article 8 human rights claim at the moment is to be conducted by reference to the higher standard of proof ("balance of probabilities"), and there has been no possibility for his evidence to be verified or further investigated by the respondent. A person should not use an Article 8 human rights claim as a backdoor to making a protection claim, and the appellant may wish to consider whether it would be in his best interests to formally lodge a protection claim.

Remittal to First-Tier Tribunal

32. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 18 June 2018 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

    (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

33. The judge failed to make material findings of fact and failed to take relevant considerations into account. In these circumstances it is appropriate to remit the matter back to the First-tier Tribunal for a full fresh (de novo) hearing, all issues open.

Notice of Decision

The making of the First-tier Tribunal's decision involved the making of an error on a point of law requiring it to be set aside.

The case will be remitted back to the First-tier Tribunal for a de novo hearing before a judge other than Judge of the First-tier Tribunal McLaren

D.Blum

Signed Date 25 March 2021
Upper Tribunal Judge Blum