



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/10433/2019

**THE IMMIGRATION ACTS**

Heard at Bradford (via Skype)  
On 3 March 2021

Decision & Reasons Promulgated  
On 15 March 2021

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SBS

(Anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr Greer instructed by Bankfield Heath Solicitors.

For the Respondent: Mrs Pettersen Senior Home Office Presenting Officer.

**DECISION AND REASONS**

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Kelly ('the Judge') promulgated on 11 September 2020 in which the Judge dismissed the appellant's appeal.
2. Permission to appeal was refused by another judge of the First-tier Tribunal but granted on a renewed application by Upper Tribunal Judge Grubb on 10 November 2020, the operative part of the grant being in the following terms:

2. The judge accepted that the appellant had previously been persecuted in Bangladesh because of his pro-Hindu writings (para 30) but found that he would not do so again if returned to Bangladesh (para 31).
3. It is arguable that the judge's reasons were inadequate. It is arguable that, having found the appellant to be a truthful witness and accepted the past persecution, the judge gave inadequate reasons for finding that the appellant had not established that he would continue to publish in Bangladesh or that, if he did not do so, it would be out of a fear of persecution. It would appear to be no answer to his claim that, as the judge found at para 32, he could avoid harm by taking up his earlier merchant seamen career.
4. For these reasons, permission to appeal is granted.

### **Background**

3. The Judge sets out findings of fact from [22] of the decision under challenge in which it is noted it was not understood the respondent was suggesting that it was implausible for members of the Muslim majority in Bangladesh to attack a member of a religious minority for publishing a supposed religious insult.
4. At [30] the Judge writes:
  30. Having reviewed the various strands of the evidence in detail, I have stood back and considered it in the round, weighing those features that tell both for and against the appellant's credibility. I have therefore concluded that there is at least a reasonable degree of likelihood that his account of the events leading to his departure from Bangladesh and his subsequent conversion to Christianity is a truthful one (the latter claim not in any event being disputed by Mr Hunt-Jackson at the hearing). I shall therefore conduct my assessment of the risk to the appellant on return to Bangladesh on this basis.
5. The Judges risk assessment is set out between [31 - 34] in the following terms:
  31. I should perhaps make clear from the outset that, whilst I have accepted the appellant's account of the primary facts, I do not accept his claim (made during his re-examination by Mr Greer) that he, (a) would continue to publish materials in defence of the Hindu community on return to Bangladesh but for the risk of harm he would thereby face from Islamic Fundamentalists, and/or (b) would have published such material whilst in the United Kingdom but for fear that he would thereby jeopardise the safety of his family in Bangladesh. I do not accept that claim for the following combination of reasons. Firstly, and most obviously, he does not suggest that the reach of those he fears on return to Bangladesh extends to the United Kingdom. There was thus nothing to prevent him from publishing such material in the UK had he genuinely wished to do so. Secondly, his family in Bangladesh have disowned him for the very reason that they wish to disassociate themselves from his views. Thirdly, he has now converted from Hinduism to Christianity. Fourthly, the appellant only made this claim at a very late stage in his evidence. It is, in my judgement, a claim that it is reasonable to expect he would have made at a much earlier stage of the proceedings had there been any substance to it. I am so satisfied that the reason why the appellant has not published such material whilst in the UK - and why he would not do so on return to Bangladesh - is because he has simply lost interest in the subject matter of the book that caused him to be attacked by Islamic fundamentalists whilst in Bangladesh. I am thus satisfied that fear of any consequential increase in the risk of him being subjected to religious persecution is not (and would not

be) a contributory factor in him choosing to refrain from such activity upon return to Bangladesh.

32. In the opinion of Dr Daryn, the appellant should have little difficulty in securing a suitable position were he to resume his career as a merchant seaman in Bangladesh. Moreover, as Dr Daryn also points out, this would solve any difficulty that he may otherwise face in seeking to relocate on the mainland (see paragraph 46 of his report). When Mr Hunt-Jackson the appellant why he could not take this step to avoid this claimed fear of those who had ill treated him in the past, he responded by saying that it could take up to six months to secure a position on a ship and that his fear was of being located and harmed during that period. I have therefore assessed the objective risk of persecution on return to Bangladesh on this basis.
33. In his careful and balanced report, Dr Daryn says this at paragraph 53 of his report –  

I have little doubt that the ABT, JI and Hefazat-e-Islam, despite the first two being banned/persecuted by the authorities in Bangladesh, have sufficient financial and other means that will allow them to find out about the return of any of their enemies and execute a suitable punishment. However, it is rather questionable whether the ABT and JI are still looking for the Appellant at present, now that he has stopped publishing pro-Hindu (“un-Islamic”) books.
34. Given the above, I am not satisfied that there is a real risk that the appellant would be traced and harmed by those in respect of whom, I accept, he has a subjective fear. For the avoidance of doubt, I am not satisfied that there is a real risk of this happening in either the limited period of up to 6 months he would be residing on mainland Bangladesh or at all. I accordingly find that the appellant has failed to substantiate (to the standard of a reasonable degree of likelihood) that his subjective fear is well-founded.

## Discussion

6. HJ (Iran) v Secretary of State for the Home Department [2010] UKSC 31 found that a person cannot be expected to deny a fundamental aspect of their personal make up, such as religion, political opinion, sexual orientation, if the reason for doing so was to avoid the risk of persecution.
7. Mr Greer relied upon decision in MSM [2015] UKUT 413 which was considered further by the Court of Appeal in MSM (Somalia) [2016] EWCA Civ 715. Despite commenting upon the “Tribunal's unsatisfactory elision of the concepts of actual and imputed opinion” the judgment of the Upper Tribunal was upheld on the basis it had in fact made a finding that MSM's pursuit of a career in journalism involving the expression of political opinion is "at least partially driven by political conviction relating to conditions prevailing in Somalia" and it was not a case of imputed political opinion.
8. There is no finding by the Judge in this appeal that the reason the appellant published the book that led to his difficulties in Bangladesh was as a result of a career activity involving the expression of a genuinely held adverse religious opinion. The appellant's own evidence before the Judge was that his writing was a form of “release” without any indication that he was expressing a religious or political conviction in relation to views contrary to the teachings of Islam. The fact the appellant in MSM succeeded before the Upper Tribunal is therefore not determinative of the issues in this appeal. There is a clear material difference between the circumstances of MSM and this appellant.

9. It is also the case that there was insufficient evidence led before the Judge in relation to the appellant's motives for publishing the material over and above the statement recorded above. Whilst Mr Greer in his submissions claim this may be because the reason was obvious, in adversarial proceedings such as those before the First-tier Tribunal the Judge was entitled to assess the merits of the appellant's claim on the basis of the evidence before him. In this appeal the appellant was represented by experienced solicitors in terms of the preparation of the appeal and Mr Greer on the day. No arguable legal error is established in the Judge's understanding of the evidence relating to the appellant's motives.
10. It is therefore necessary to consider what the Court of Appeal said when looking at MSM in a case such as this where, as there is no evidence of actual adverse religious opinion, the underlying ground of persecution claimed must be imputed as opposed to actual, and whether it was open to the appellant to take avoiding action by not publishing any further works; which was clearly the finding of the Judge on the basis the appellant would not do so in any event.
11. The Court of Appeal stated that the starting point was the language of the Convention and the Directive. The Directive expressly protected those persecuted because of the characteristics listed in Articles 2(c) and 10(1) whether or not they actually had the characteristic, provided it was "attributed to the applicant [for refugee status] by the actor of persecution". In the case of political opinion, Article 10(1)(e) expressly protected those persecuted because they had a political opinion, whether or not they had acted upon that opinion. The text of the Directive and Convention contemplated two questions. The first was whether the applicant for refugee status faced a well-founded fear of persecution. The second was the reason for that persecution. If the answer to the first question was "yes" and the reason for persecution was within Articles 2(c) and 10, the language of the Directive left little room for examination of the steps the applicant might take to avoid persecution. There was a single test for refugee status and, save for Article 8 of the Directive in respect of internal protection and internal relocation, there was no separate test for those who did not in fact have the protected characteristic but to whom that characteristic was imputed by the actor of persecution. The absence of any provision in the Convention or the Directive dealing with the possibility of avoiding action, together with the express exemption in Article 8(1) from the basic approach in cases where there was no real risk of persecution in part of the applicant's country of origin, pointed against the implication for which the Secretary of State contended. Nothing in the Directive authorised a refusal of refugee status on the basis that the applicant could but would not in fact take reasonable steps to avoid persecution.
12. Article 2(c) of Qualification directive reads:

(c) «refugee» means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as

mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply;

13. Article 10 reads:

**Article 10**

Reasons for persecution

1. Member States shall take the following elements into account when assessing the reasons for persecution:

(a) the concept of race shall in particular include considerations of colour, descent, or membership of a particular ethnic group;

(b) the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief;

(c) the concept of nationality shall not be confined to citizenship or lack thereof but shall in particular include membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State;

(d) a group shall be considered to form a particular social group where in particular:

members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and

that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;

depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States: Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article;

(e) the concept of political opinion shall in particular include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution mentioned in Article 6 and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the applicant.

2. When assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social

or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution.

14. Mr Greer accepts Ground 1 is a reasons challenge, asserting the appellant's evidence in cross-examination that the reason he had not published anything further was because his second post reached all his community and family and that he could not afford to put his family at risk by publishing anything further, and that the reason those who had previously attacked him were still interested in him was because they thought he had some more items written that he was trying to publish, is a credible reason why he would not wish to publish; which the Judge failed to adequately deal with.
15. It asserted by Mr Greer that the Judge's findings in [31] are flawed for four reasons namely:
  - i. Firstly, that the appellant's enemies cannot reach him in the United Kingdom is an irrelevant consideration; it is his case that he has not published books in the United Kingdom because his family remain in Bangladesh and have been targeted by his enemies. Therefore, the Appellant's explanation for his decision not to seek to publish books whilst in the United Kingdom is linked to a fear of persecution of his family in Bangladesh.
  - ii. Secondly, that the Appellant's family have disowned the appellant to disassociate themselves from his view is suggestive of the truthfulness of his explanation, not the contrary view taken by the First-tier Tribunal.
  - iii. Thirdly, the Appellant's conversion from Hinduism to Christianity is irrelevant to whether he would seek to write and publish books upon return to Bangladesh.
  - iv. Fourthly, the timing of the Appellant's evidence in respect of this matter is irrelevant. The reason why the Appellant did not give this evidence earlier in the hearing is that he simply was not asked. The suggestion that evidence given during re-examination is of less value than evidence given at an earlier stage of the hearing is not adequately reasoned.
16. It is not disputed that the appellant with his qualifications is likely to be able to obtain employment in the Merchant Navy on return to Bangladesh, but as submitted by Mr Greer they will be periods where the appellant will be 'shore based' either whilst he is seeking employment on a ship or on leave.
17. It is not disputed the appellant said in re-examination before the Judge that he would continue to publish materials in defence of the Hindu community on return to Bangladesh but for the risk of harm he would face from Islamic fundamentalists and that the reason he had not published material since he has been in the UK was as a result of fears for the safety of his family in Bangladesh.
18. It is a lawful finding of the Judge to state that the individuals the appellant fears have not been shown to have any reach or influence within the United Kingdom and that if the appellant genuinely held anti-Islamic views he could have

- continued to publish in the UK. This is not, however, an appeal based upon a genuinely held view but upon such a view being imputed to the appellant.
19. The Judge claimed that the appellant's explanation for not publishing was not accepted as being credible as a result of family disowning him in Bangladesh is not adequately explained as it, arguably, takes no account of the fact the appellant may still have feelings for and a wish to protect his family from the consequences of any further publication.
  20. It is not clear how the appellant's conversion from Hinduism to Christianity undermines his claim with the exception that it can be inferred from the Judge's finding that as the appellant had converted to Christianity, he may not wish to make further comment upon the extent to which Hindus are marginalised and discriminated against by the Muslim majority population or state authorities. Mr Greer's assertion that the appellant may still wish to publish comment about the treatment of Christians in Bangladesh was not an issue before the Judge.
  21. The Judge does not give less weight to the statement made by the appellant in relation to the reasons why he would not further publish a reply to re-examination as a result of such a statement being made late in the day, but because the Judge found it reasonable to expect that he would have made such a statement at a much earlier stage in the proceedings had there been any substance to it. That is a finding within the range of those reasonably open to the Judge on the evidence especially in light of the fact the appellant was represented throughout, when such matters would have no doubt been discussed with his representative when preparing his witness statement, but of which there is no reference. Such an approach is supported by authorities such as *ND (Afghanistan) v Secretary of State for the Home Department* [2006] EWCA Civ 1363 in which the Court of Appeal said the adjudicator was entitled to take the view that injuries were not inflicted in the circumstances described by the appellant, particularly in light of the fact that he only revealed the incidents of torture during a consultation his doctor rather than at an initial interview. At interview the appellant had failed to mention being hung up by the wrists for a long time and hung up by the heels for four or five hours.
  22. In *AM (Iran) v Secretary of State for the Home Department* [2006] EWCA 1813 the Iranian Appellant did not mention problems arising from his possession of the satanic verses until after the asylum interview. The Court of Appeal upheld the Immigration Judges decision to reject the Appellant's account on that basis and observed that the Appellant had given a detailed and comprehensive account of why he had left Iran at interview, an account which differed entirely from the explanation he proffered five weeks later: this was not a case in which the Appellant had been silent and the reasons for his asylum claim only became clear later.
  23. In *HN v Sweden* (Application no. 30720/09) ECtHR (Fifth Section) the Swedish Migration Board had found the appellant was not credible for various reasons. That was upheld by the ECtHR who noted that many of his statements were vague and lacking in detail and had he been subjected to the events alleged, it would be reasonable to assume that he could provide more specific information.

In particular, it was thought remarkable that, although he had escaped from prison, where he had allegedly been tortured, just about two weeks before his arrival in Sweden, he apparently made no attempt to draw the migration authorities' attention to possible injuries, for instance by undergoing an initial health examination.

24. It was a combination of that comment being made later than expected, if genuine, and the appellant's move away from Hinduism that appear to be the cornerstones of the Judge's conclusion that the reason the appellant would not publish further is not as a result of a fear of further acts by the Islamic fundamentalists or negative impact on his family, but because he had lost interest in the subject matter of the books that led to the difficulties for him in the first instance.
25. The Judge went on thereafter to consider whether the appellant would face a real risk on return as a result of his past activities and the views imputed to him as a result of the original publication. The Judge's conclusion on the basis of the evidence that there was no real risk the appellant will be traced or harmed by those in respect of whom he has an understandable subjective fear, is a conclusion that such subjective fear is not objectively well-founded. The evidence before the Judge did not support an argument that those the appellant expressed a fear of were likely to be aware of his return to Bangladesh or will have sufficient resources or inclination to seek him out. There was no evidence before the Judge that during any time the appellant would be living within Bangladesh, he would do anything that will raise his profile or that will create a real risk for him on return. The material the appellant claims led to his difficulties was published some years ago.
26. The Judge was aware of the appellant's earlier experiences and accepted the credibility of the same. There was insufficient evidence to show that the appellant possessed religious views that would, per se, expose him to a real risk on return to Bangladesh, making this an imputed opinion case. It is not made out the Judge adopted an impermissible approach contrary to the guidance provided by the Court of Appeal in MSM. The Judge clearly considered the core issue in the case which is whether the appellant would act in a way that will create a credible real risk of further persecution based upon an adverse imputed view. The Judges finding, notwithstanding other aspects of the claim being credible, that the appellant's claim that he would not continue to publish materials as a result of the risk to himself and his family a further persecution was not credible, giving rise to no real risk on return to Bangladesh, and the claim being dismissed by the Judge for the reasons set out at [31 - 34], has not been shown to be a finding outside the range of those reasonably available to the Judge on the evidence.
27. The Court of Appeal have made it abundantly clear that an appeal judge should not overturn a decision on appeal just because he or she might make a different decision on the evidence. Whilst Mr Greer takes the view that the Judge's reasons are insufficient to support the findings made, it is not made out the reasons given do not allow a reader to understand why the Judge concluded as he did, or that those findings are irrational.



28. The grant of permission to appeal, stating that it would appear to be no answer to the claim that as the judge found at paragraph 32 he could avoid harm by taking up his earlier merchant seamen career, arguably misrepresents the findings of the Judge which was that the appellant would avoid harm by not publishing further material as he had lost interest in the relevant subject and because his claim that he would avoid doing so solely to avoid persecution was not found to be credible. This was a cumulative assessment by the Judge. The point about merchant seamen employment, which the appellant had stated he wished to follow, was noted by the Judge as was the fact the appellant would only spend a relatively short period of time in Bangladesh in any event. That is not the core reason relied upon by the Judge.
29. For the above reasons the appeal is dismissed. It is not made out it is appropriate for the Upper Tribunal to interfere any further in relation to this appeal.

**Decision**

30. **There is no material error of law in the Immigration Judge’s decision. The determination shall stand.**

Anonymity.

31. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....  
Upper Tribunal Judge Hanson

Dated 4 March 2021