



**Upper Tribunal  
(Immigration and Asylum Chamber)  
PA/08153/2017**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 15 March 2018**

**Decision &  
Promulgated  
On 11 May 2018**

**Reasons**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS**

**Between**

**M A A**  
(ANONYMITY DIRECTION MADE)

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr A Basith, Sponsor

For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against the decision of First-tier Tribunal Judge James who dismissed the Appellant's appeal on protection grounds against a decision of the Respondent dated 9 August 2017.
2. I am grateful to the helpful submissions from both sides and in particular the helpful and realistic approach taken by Mr Wilding which has resulted in broad agreement that the decision of the First-tier Tribunal Judge should be set aside for error of law, and that in consequence the decision in the appeal should be remade following a new hearing with all issues at large before the First-tier Tribunal by any Judge other than First-tier Tribunal

Judge James or First-tier Tribunal Judge Robinson (who heard an earlier appeal by the Appellant against a different refusal decision). In such circumstances I do not propose to go into the level of detail as to the background to this case as I might otherwise have done so. Nonetheless it is appropriate to set out broadly something of the background to the appeal.

3. The Appellant is a citizen of Bangladesh whose date of birth is given as 1 January 1986. He initially made an immigration application in November 2008 when he applied for entry clearance as a working holidaymaker. This was refused in the first instance on 6 November 2008; the refusal was maintained and/or upheld notwithstanding a number of challenges by way of appeal and application for judicial review. The Appellant next made a visit visa application in February 2012, which was also refused. Again, he pursued a challenge to that decision and in due course he was granted entry clearance on 9 January 2013. He entered the United Kingdom pursuant to the visitor entry clearance on 9 February 2013. On 27 March 2013 he applied for asylum.
4. The Appellant's application for asylum was refused on 10 April 2013, and a subsequent appeal dismissed by way of decision of First-tier Tribunal Judge Robinson promulgated on 24 April 2013 (ref. AA/03479/2013). Attempts to challenge the decision of Judge Robinson were unsuccessful and the Appellant became 'appeal rights exhausted' on 10 May 2013.
5. Thereafter the Appellant made further submissions in respect of his asylum claim to the Secretary of State on 13 February 2014. Those submissions were rejected on 5 October 2016. The Appellant commenced judicial review proceedings, and on 5 April 2017 - pursuant to a Consent Order of that date - the Respondent agreed to reconsider the Appellant's representations. The Appellant's representations were again refused on 9 August 2017, but it was acknowledged that his representations amounted to a fresh claim for asylum and accordingly he was accorded a further right of appeal to the IAC.
6. The Appellant's appeal was dismissed for reasons set out in the decision of First-tier Tribunal Judge James.
7. The Appellant applied for permission to appeal to the Upper Tribunal. The grounds of challenge set out a number of matters both in respect of what were said to be procedural unfairness or irregularities in the conduct of the hearing, and by way of challenging the evaluation of the evidence and the findings of the First-tier Tribunal Judge.

8. Permission to appeal was granted by First-tier Tribunal Judge Andrew on 15 January 2018. The particular basis on which it was considered permission to appeal was warranted is set out in the following terms in the decision of Judge Andrew.

*“It is arguable that there was procedural unfairness in this hearing in that the Judge may have excluded evidence being given by persons present at the hearing, particularly as it is indicated at paragraph 33 of the decision that they were not present when the application for permission claims that they were.”*

It is upon this point - which as I have indicated above is not the only point pleaded in the grounds - that the parties have focused before me, and in respect of which they are in broad agreement.

9. By way of context I should observe that the Appellant’s asylum claim is based on political opinion and specifically his support and involvement with the Jamaat-i-Islami Party in Bangladesh. He has claimed that he has been falsely accused by the Awami League and false cases have been brought against him including by a step-uncle who is a supporter of that organisation. He fears that he would be at risk on return. As part of his case he has produced various supporting documents with regard to cases being brought against him; he has also relied upon materials and evidence in respect of the circumstances of his family. Of particular recent note, it is said that his father was the victim of a shooting sustaining an injury to his foot, which the Appellant suggests is related to his own political activities.
10. It is proper to note that the Appellant’s first appeal found little favour with Judge Robinson. Judge Robinson accepted that some evidence supported the Appellant’s claim to have been a supporter of the Jamaat-i-Islami and to have attended demonstrations. It was not accepted however that reliance could be placed upon the supporting documentary evidence as to the difficulties that the Appellant claimed had befallen him in consequence of those activities. In terms Judge Robinson found that he did not accept *“that the court documents are documents upon which reliance can be placed”* (see paragraph 60). The Judge also found *“I do not accept that false cases have been brought against him in the court by the government members of other political groups or his step-uncle”* (paragraph 62), and the Judge did not accept *“that the Appellant was arrested and detained by the police or that he was in hiding before he left Bangladesh”* (also paragraph 62).
11. Necessarily, pursuant to the principles in **Devaseelan**, the findings of Judge Robinson were the starting point for the consideration of Judge James - although bearing in mind that the Appellant had produced further documentary material which had persuaded the Secretary of State that

there was a 'fresh claim'. It is also to be noted that the claimed shooting of his father was an event that postdated the earlier proceedings.

12. In support of his second appeal the Appellant had filed a substantial bundle of documents which included a number of witness statements. Those witness statements - and the ones that are the subject of particular consideration by the Upper Tribunal - are identified at paragraph 32 of the decision of Judge James:

*"In further support of his claims the Appellant submitted witness statements from [MA, AM, NG and UG]. All of these statements were unsigned and undated".*

The first three such individuals are the husbands of the Appellant's three sisters; the fourth, UG, is the brother of NG.

13. It is said that all such witnesses attended the hearing listed at Hatton Cross on 21 September 2017 before Judge James. However, it is said that Judge James, after preliminary discussions, ruled that she would only hear evidence from one of the witnesses, that is to say the witness UG. Indeed, the Judge sets out her consideration of the evidence of UG in the body of her decision. The Judge deals with the matter in this way:

*"However not all of these persons were present at the hearing to give evidence as confirmed by the legal representative at the beginning of the hearing, three were absent." (paragraph 33).*

14. It is accepted by the Respondent that the Judge's observation that three witnesses were absent is factually incorrect. All four witnesses had attended the hearing - as, Mr Wilding acknowledged, is confirmed in the record of proceedings taken by the Presenting Officer.
15. Moreover the fact that all had attended is reinforced by a written submission sent to the Tribunal by the Appellant's representative after the completion of the hearing.
16. In this latter context it is to be noted that this case had originally been listed in front of a different Judge on 21 September 2017 who had been taken ill and had not attended the hearing centre. The appeal was effectively taken as a 'float' case, commencing in the afternoon at something approaching 2.45pm. At or about 5pm the hearing was ended on the understanding that Judge James would accept further written submissions. The Appellant's further written submissions were made by way of letter dated 25 September 2017. The written submissions, amongst other things, refer to the substance of the matters set out above with regard to the approach taken to the evidence of the Appellant's

brothers-in-law. Reference is made to a discussion between the Judge and the representative as to why the brothers-in-law had attended the hearing as witnesses rather than the Appellant's sisters. The thrust of the matter - as set out in the written submission - appears to be that the Judge determined that in circumstances where some of the evidence of the propose witnesses was in reality the evidence of their wives (the Appellant's sisters), it should have been the case that the wives provided witness statements and/or attended the appeal hearing, rather than that their husbands attend to 'report' upon their evidence. It was in this context that the Judge purportedly identified that of the four witnesses it was only UG who had something particular to say that was unique to him and of which he was a direct witness - so might properly be a matter upon which he should give oral evidence. The Judge, it is said, declined to hear the evidence of the other three witnesses.

17. Support for the circumstance being as described in the written submission is provided by way of Mr Wilding's acknowledgment based on the record of proceedings of the Presenting Officer.
18. In the circumstances Mr Wilding accepts that it is plainly wrong for the Judge to state that *"not all of these persons were present at the hearing to give evidence"* (paragraph 33).
19. This error also means that the Judge in effect had marginalised, or would appear to have marginalised, the evidence of three witnesses on the basis that their statements were unsigned and undated - even though they had attended court willing to support those statements in person. Moreover, no doubt - as is quite common in this jurisdiction - they would have signed and dated the witness statements upon adopting them in oral evidence before the Tribunal.
20. Having had an opportunity to peruse the Judge's record of proceedings it seems that it is possible to infer the basis upon which Judge James came to make this particular error. In the record of proceedings, the Judge clearly indicates that there was a discussion with the legal representatives at the outset in respect of the witnesses and what they might have to say. In this regard she has noted that three of them were not present and had spoken to their wives about the Appellant's - and their - father being shot in the foot. It seems to me absolutely clear that what the Judge meant at the time that she made the note in the record of proceedings was that the witnesses were not present at the event to which they were bearing witness. As is observed in the grounds of challenge, the decision of Judge James appears to have been written up approximately ten weeks after the hearing. The reasonable inference is that when the Judge came to review the record of proceedings she interpreted the reference to being 'not present' as meaning not present at the hearing, rather than not present at the event to which they bore witness.

21. Be that as it may, it is common ground that there was a factual misunderstanding on the part of the Judge in her Decision. Moreover, it means that the Judge has not adequately reasoned in the Decision why she elected not to hear evidence from these witnesses. It is essentially on these bases that it is accepted by the Respondent that it is difficult to resist the argument that there was error on the part of the First-tier Tribunal of a nature that was material, and that the decision should be set aside.
22. I did initially think that perhaps this case ought to be retained in the Upper Tribunal on the basis that this was a second hearing of the Appellant's appeal - but in fact it is the first hearing of the current appeal.
23. I have also given some thought to whether or not this matter should be retained in the Upper Tribunal to explore further the issue identified by the Judge with regard to the giving of evidence by husbands on behalf of wives. The Judge described this as a "*Russian doll approach to evidence i.e. he spoke to his brother who is married to the sister of the Appellant to obtain this information*" (paragraph 35). However, having given the matter some further consideration, and upon scrutiny of the relevant witness statements in this case, I do not think the circumstances here are such as to make this a suitable case for the exploration of such an issue. For example, whilst in the witness statements of the Appellant's brothers-in-law reference is made to the Appellant's sisters having spoken to family in Bangladesh on the telephone concerning the shooting, it is also said by one or more of the witnesses that he himself then also spoke on the telephone to the family: to that extent the male witnesses are not merely reporting upon what their wives have told them, but are also giving evidence as to their own communications - albeit with the same people to whom their wives had spoken, and about the same events.
24. It may be that the individual witness statements may require some more careful and considered analysis. In this regard it may also be that now that the issue has been raised in this way by reason of the discussion before Judge James, the observations of Judge James in her decision and the further discussion briefly before the Upper Tribunal, that the Appellant and his representatives may determine it appropriate to also file evidence from the Appellant's sisters, and also to have them attend the hearing. That is a matter for the Appellant and his advisers to consider in deciding how best to present his case.
25. Notwithstanding the foregoing, as a general observation it seems to me that Judge James has touched upon a matter that may be of legitimate concern when evaluating evidence in appeals: the appropriateness of having a partner (a wife or a husband) give evidence on behalf of the

other partner as to what that other partner has witnessed, in circumstances where there is no particular or obvious reason why the more direct witness cannot give that evidence herself/himself. Some detailed guidance from the Upper Tribunal may yet be necessary in due course: but as I say, I do not consider the circumstances here warrant retaining the case in the Upper Tribunal for such a purpose. I merely offer the following observation: whilst the First-tier Tribunal has wide powers of case management (Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, rule 4), and powers in respect of the receipt of evidence and the admission and exclusion of evidence (rule 14) such that it could decline to hear evidence from an offered witness, or decline to admit part or all of a witness statement, it is likely that in most cases where a witness purports to give testimony on behalf of another that this should be evaluated as a matter of weight rather than admissibility.

### **Notice of Decision**

26. The decision of the First-tier Tribunal is set aside for error of law.
27. The decision in the appeal is to be remade before the First-tier Tribunal before any Judge other than Judge James or Judge Robinson with all issues at large.

### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

*The above represent a corrected transcript of ex tempore reasons given at the conclusion of the hearing.*

Signed:

Date: **8 May 2018**

**Deputy Upper Tribunal Judge I A Lewis**