Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/05348/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 February 2021	**On 19 March 2021**
Extempore decision	

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

AH
(ANONYMITY DIRECTION IN FORCE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Spurling, Counsel instructed by Hunter Stone Law
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This an appeal against a decision of Judge S J Clarke of the First-tier Tribunal promulgated on 6 December 2019. The judge allowed an appeal by the appellant against the decision of the Secretary of State dated 24 May 2019 to refuse his asylum and humanitarian protection claim. This appeal is brought by the Secretary of State. For convenience I will refer to the parties as they were before the First-tier Tribunal where appropriate.

2. The essential issue in these proceedings is the extent to which the Upper Tribunal may review a finding of fact reached by a Judge of the First-tier Tribunal.

Factual Background

3. The appellant is a citizen of Bangladesh. He arrived on a visitor's visa issued on 31 August 2016. He claimed asylum on 1 August 2017 on the basis that he faced being persecuted on account of his political opinion due to his activities with the Bangladesh Nationalist Party ("the BNP"), having come from a politically-active family, and having engaged in *sur place* activities here. At the core of his claim for asylum lies the appellant's account of having been arrested and beaten by the Bangladeshi Rapid Action Battalion ("the RAB") on 10 July 2016.

4. The Secretary of State did not accept the appellant's asylum claim to be credible. A significant plank of the Secretary of State's credibility concerns arose from stamps in the appellant's passport which appeared to suggest that he left Bangladesh for India on 8 July 2016 returning on 11 July 2016. Crucially, if accurate, those stamps would have placed the appellant in India at the very time he claimed to have been attacked in Bangladesh.

5. The appellant had sought to respond to those concerns of the Secretary of State in his case before the First-tier Tribunal. He did not dispute having travelled to India, but contended that the return stamp in his passport was inaccurate. He returned to Bangladesh a day earlier than his passport stamp indicated, and was attacked that evening. The border crossing point between India and Bangladesh was in disarray, he claimed. It was notorious locally for having poor staffing and haphazard security arrangements. It was Eid at the time of his return border crossing, on 10 July. The usual border staff were not present. It was even worse than normal. There was a local man wearing a *lunghi*, a form of traditional Bangladeshi dress stamping passports. The judge recorded the *lunghi*, which was the term used by the appellant in his witness statement and the appellants witnesses to whom I shall return in a moment, as a "*loin cloth*". It may be that the judge's use of the term *loin cloth* has given rise to some concern on the part of the Secretary of State and the judge granting permission in these proceedings.

6. The decision of the First-tier Tribunal engages with the passport stamps issue at the outset of its analysis. The judge noted at [9] that the stamps in the passport were "on the face of it" capable of undermining the claim that he was taken by the RAB and beaten.

7. The judge noted that the appellant had provided a bus ticket which purported to show his travel from India to Bangladesh on 10 July. She was clear that the bus ticket featured some spelling mistakes in its English version. She added that she had considered that in the round. The appellant also relied on a number of photographs of the border crossing point and a news article which criticised the poor security arrangements

and the difficulties encountered at the border crossing point during the Eid festival.

8. At [11] the judge noted that she had considered the appellant's own statement and those from his two friends in Bangladesh who had claimed to have travelled with him on 10 July. The statements say that the stamp that had been applied to the appellant's passport by the unofficial individual at the border crossing point was for the wrong date. This, they said, was common in Bangladesh.

9. The judge accepted the overall account of the appellant and found that he had given a consistent and reliable account, when assessed to the lower standard, of being attacked by the RAB in July 2016. At [24] she found that the core of the appellant's account was credible, she accepted that he had been detained by the RAB, and released, as claimed. She accepted that a friend of the appellants had been killed as claimed by the appellant. She accepted the appellant's claim to have come from a political family, and that he had engaged in political activities himself. The judge noted at [25] that the assessment of risk upon return to Bangladesh is case-specific and fact-sensitive. She made reference to the *Country Policy and Information Note* published by the respondent concerning Bangladesh in January 2018 and, having applied the policy set out in that document, concluded that the appellant faced a real risk of being persecuted on his return on account of his political activities. The judge allowed the appeal on asylum grounds.

Grounds of Appeal and Submissions

10. There are four grounds of appeal. The Secretary of State contends, first that inadequate reasons were given by the judge relating to the conflicts of fact in the appellant's evidence. Secondly, the judge made a mistake of fact in relation to accepting some of the witness evidence over that of others when there were consistencies between some of the dates that the witnesses had relied upon. Thirdly, the judge misdirected herself in law by failing to consider the evidence in the round from a holistic perspective. This ground contends that the judge focused only upon those factors which were in favour of the appellant and neglected to consider matters which had been advanced on behalf of the respondent. As a result, the grounds contend the judge produced a one-sided decision which failed adequately to consider all relevant issues. The fourth ground of appeal again contends that the judge provided inadequate reasons for her findings.

11. Permission to appeal was granted by Upper Tribunal Judge Sheridan in these terms:

> "1. It is arguable that the appellant's explanation as to why his passport was stamped 11 July 2016 and not 10 July 2016 was so implausible that it was irrational for the judge to accept it.

2. The judge also arguably erred by not addressing whether it is plausible that a genuine ticket would contain multiple spelling mistakes".

Permission was granted on all grounds.

Discussion

12. At the outset of my analysis it is necessary to recall that an appeal to the Upper Tribunal lies only upon an error of law not following a disagreement of fact. Of course, certain findings of fact are capable of being infected by an error of law as notably summarised in R (Iran) v Secretary of State for the Home Department [2005] EWCA Civ 982 at [9]. There are many judgments of the higher courts which underline the distinction between errors of fact and errors of law. Perhaps one of the most well-known judgments addressing this distinction as it applies across all jurisdictions may be found in the oft quoted judgment of Lord Justice Lewison in Fage UK Ltd v Chobani UK Limited [2014] EWCA Civ 5 at [114]. There, his lordship stated as follows:

> "Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them".

His lordship proceeded to outline some of the leading authorities concerning that approach and summarised the reasons for the deference owed by Appellate courts and Tribunals to trial judges as including the following:

> "(i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
>
> (ii) The trial is not a dress rehearsal. It is the first and last night of the show".

Then again:

> "(iv) In making his decisions the trial judge will have regard to the whole sea of evidence presented to him, whereas an Appellate court will only be island hopping".

The judgment in Fage UK v Chobani Ltd is now seven years old but it continues to represent a useful summary of the law on the approach to findings of fact and the deference owed by appellate tribunals and courts to first instance judges. See also Perry v Raleys Solicitors [2019] UKSC 5

at [52] which summarised the principles on the "constraints" on appellate courts and tribunals as follows. Lady Hale said that the principles:

> "may be summarised as requiring a conclusion either that there was no evidence to support a challenged finding of fact, or that the trial judge's finding was one that no reasonable judge could have reached".

The most recent example of these principles being applied in this context may be found in the Court of Appeal's judgment in Lowe v Secretary of State for the Home Department [2021] EWCA Civ 62 at, for example, [29].

13. Against that background I turn to the grounds of appeal in the present matter. Mr Walker, who appeared for the Secretary of State, noted that the lengthy grounds of appeal conclude with these words:

> "The SSHD is not merely rearguing the case, as the Tribunal often finds, but contends that for the reasons above, the determination is vitiated by material errors in law, rendering this an unsatisfactory, unclear, unreasoned and unsubstantiated decision which should be set aside".

14. Mr Walker very fairly accepted in oral argument that it would seem that, despite the above attempted assurance in the application for permission to appeal, what features throughout the lengthy grounds are, in fact, attempts to reargue the case. For that reason, he focused his submissions on ground 3 of the grounds of appeal, namely that the judge misdirected herself in law by considering only one side of the appellant's case.

15. I find that an examination of the judge's decision reveals that she did anything but consider only one side of the case.

16. At [6] the judge outlined the basis upon which the respondent refused the application. She noted expressly that the concerns of the respondent related to the timings of the entry and exit stamps in the passport, and she also noted that at Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 had been raised by the respondent on account of the appellant's delay in claiming asylum. It will be recalled that the appellant arrived in the United Kingdom on 27 September 2016 on a visitor's visa, and it was not until 1 August 2017 that he claimed asylum. The judge was clearly aware of the respondent's case. Of course, mere awareness of a case is insufficient if the operative reasoning adopted by a judge fails properly to engage with that case.

17. An examination of the judge's reasoning reveals that she was fully aware and took full account of the respondent's case at each part of her analysis. At [9] she noted that, "on the face of it", the passport's entry and exit stamps undermined the appellant's claim to have been beaten on 10 July 2016. She noted concerns about the language of the bus ticket relied upon by the appellant. What follows in her decision is a consideration of the evidence relied upon by the appellant, and the Secretary of State's

position in relation to it. It cannot be said that she failed to consider both sides of the case.

18. The appellant had written to the port authority in Bangladesh on 18 August 2016, apparently having realised that a mistake had been made in the stamp entered in his passport. The judge noted that the appellant had provided two witnesses supporting this aspect of his account. Of course, the two witnesses were in Bangladesh, and were only able to give written evidence, but they nevertheless corroborated the appellant's account.

19. The judge then set out some of the other operative features in her reasoning which led her to accept the appellant's account, noting at [17] that an inconsistency concerning dates (as identified by the grounds of appeal) suggested poor memory rather than anything more but noted that she had considered the evidence in the round. At [19] the judge noted that various newspaper articles had been provided in support of the appellant's claimed sur place meetings which featured the appellant at various BNP meetings and other BNP figures. The judge said that she was aware of the caution that one had to deploy when assessing documents emanating from Bangladesh. At [20] she considered the letters that had been provided in support of the appellant in the round together with the appellant's application form to join the BNP in London. This led to her overall conclusion at [22] that the appellant had presented a consistent and credible account. It was at this stage in her decision that she said that she had considered "very carefully" the appellant's delay in claiming asylum. She accepted the explanation that she had been provided with by the appellant, namely the arrest of his friends Z and M, which had been said by the appellant to catalyse his claim for asylum and lay behind his reasons for not claiming asylum previously.

20. This was a decision which looked at each strand of the appellant's case and considered the evidence advanced on behalf of the appellant, and the objections of the Secretary of State, in the round. It is a decision which is generous to this appellant; another judge may not have accepted the appellant's evidence relating to what took place, for example, at the border crossing point. I note that Judge Sheridan granted permission to appeal on the basis that it was arguably implausible, and therefore irrational, for the judge to have accepted the appellant's case in relation to the *lunghi*. However, when one addresses the evidence that the appellant had provided, namely his own detailed account, the bus ticket which although featuring spelling mistakes had been considered in the round by the judge, and the other weaknesses that had been identified and specifically set out by the judge, it cannot be said that the judge adopted a one-sided approach. The judge had the benefit of hearing the appellant's uncle give evidence, in which he said that he had spoken to the appellant while the appellant was in the shop from which he claimed to have been abducted on the evening of 10 July 2016. The appellant's case was not based on assertions that were without foundation; there was evidence.

21. It may be that what lay behind Judge Sheridan's characterisation of the evidence as being arguably so implausible as to be irrational was the judge's use of the term "*loin cloth*" at [10]. That is not the phrase that was used by either of the two witnesses or the appellant in their statements. A *lunghi* is a far more plausible form of dress than a *loin cloth*. Whilst significant credibility concerns could understandably arise in the event that it was said that the border crossing point was manned by someone in their underwear, that is in fact not what the evidence was in the present matter.

22. Drawing the above analysis together, this decision took into account all relevant factors. It assessed the points advanced on behalf of the respondent. It noted caution in relation to certain aspects of the evidence relied upon by the appellant, by reference to both case-specific features relating to the material the appellant adduced, and also broader concerns relating to documents from Bangladesh in general. Having conducted that analysis, the judge reached a conclusion that was open to her on the evidence.

23. It is, as Mr Spurling accepts, not a conclusion that all judges would have reached. Mr Spurling accepted that, had a different judge reached a different conclusion, he may have well been in difficulties seeking to challenge it by way of an appeal to this Tribunal.

24. I find that this judge reached a decision that was open to her, on the whole sea of evidence she heard. It was supported by adequate reasons and was not irrational.

25. Accordingly, it cannot be said that this was a decision which no reasonable judge could have reached. The first and last night of the show in relation to this appeal took place in the judge's decision promulgated on 6 December 2019. It was not a dress rehearsal and I decline to order a further performance.

26. This appeal is dismissed.

Notice of Decision

The appeal is dismissed. The decision of Judge Clarke did not involve the making of an error of law.

An anonymity direction is in force.

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.

Signed *Stephen H Smith* Date 11 March 2021

Upper Tribunal Judge Stephen Smith