Upper Tribunal (Immigration and Asylum Chamber) **Appeal Number: HU/04291/2020**

THE IMMIGRATION ACTS

Heard at Field House (via Teams) On the 04 January 2022	**Decision & Reasons Promulgated On the 28 February 2022**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

ARS (BANGLADESH)
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Bayati, instructed by Morgan Hall Solicitors
For the Respondent: Mr Whitwell, a Senior Presenting Officer

DECISION AND REASONS

1. The appellant appeals, with permission granted by First-tier Tribunal Judge Grant, against the decision of First-tier Tribunal Judge McKinney. By her decision dated 26 April 2021, Judge McKinney ("the judge") dismissed the appellant's appeal against the respondent's refusal of his human rights claim.

Background

2. The appellant is a Bangladeshi national who was born in 1972. It is seemingly accepted on all sides that the appellant arrived in the UK with leave to enter as a domestic worker on 30 September 2002. His leave expired in March 2003 and he overstayed. He sought leave to

remain in the same capacity in 2008 but the application was refused and an appeal against that refusal was dismissed by Judge White.

3. The appellant then made no fewer than five applications for leave to remain on human rights grounds. The most recent such application was made on 9 January 2020. In that application, the appellant stated that he was 'only applying on the basis of private life in the UK'. He stated that he had lived in the UK for more than eighteen years.

4. In support of his application, the appellant provided a number of letters from people who thought highly of him. Three of those letters also stated that the appellant 'has a political background which makes it difficult for him to return to Bangladesh'. That idea was also echoed in another letter from an organisation called the Bangladesh Nationalist Shecchashebok Dal, UK, which described itself as the Volunteer Wing of the Bangladesh Nationalist Party, UK Branch. Sahin Ahmed, the President of that organisation, stated in his letter of 24 January 2020 that the appellant was 'active online for our party' and that the appellant 'had been marked by the ruling party' as a result.

5. The respondent refused the application on 2 March 2020. She did not accept that there would be very significant obstacles to the appellant's reintegration to Bangladesh. Nor did she accept that there were exceptional circumstances in the appellant's case which warranted a grant of leave to remain outside the Immigration Rules. That conclusion was premised largely on the generalised nature of the appellant's private life claim and the general desirability of enforcing the removal of those who had overstayed and made repeated and unmeritorious applications. In reaching her conclusion, however, the respondent also noted as follows:

> You have told us that you have a fear of returning to your country of origin Bangladesh, however, you were contacted by asylum colleagues inviting you to an appointment to make an asylum claim in person and our asylum colleagues have confirmed that you have failed to attend interview.
>
> Although you have indicated that you and [sic] will face a risk of persecution and/or serious harm if refused, you have not made a protection claim and this decision relates to the application you have made on the basis of your family/private life in the UK.

The Appeal to the First-tier Tribunal

6. The appellant appealed to the FtT on 13 March 2020. The grounds of appeal invoked Articles 3 and 8 ECHR. It was submitted that there would be very significant obstacles to the appellant's re-integration to Bangladesh after such a long absence and that there was a real risk of the appellant's ill-treatment by the ruling Awami League in the event of his return to Bangladesh. It was also submitted that he had extensive ties to the UK, including with his young cousins and his grandmother, and that it would be disproportionate to remove the appellant from those ties.

7. The appeal came before the judge, sitting at Birmingham (via CVP) on 9 April 2021. The appellant was represented by Mr Aziz of Morgan Hall Solicitors. The respondent was unrepresented. A letter had been sent to the Tribunal by the Presenting Officer's Unit, seeking an adjournment because the Presenting Officer was self-isolating due to a close family member testing positive for Covid-19. The judge did not consider this to be a proper reason to adjourn a remote hearing and she refused the application. In reaching that conclusion, the judge noted that the appellant had been waiting for nearly a year for the hearing and that it 'did not appear from the decision that credibility was in issue'.

8. Having made that decision, the judge quite properly canvassed the scope of the hearing with Mr Aziz. She noted that the letter from the BNP contained points which were 'potentially more suited to a protection claim'. She indicated to Mr Aziz that it was her intention to consider Articles 3 and 8 ECHR but that she was unable to consider the Refugee Convention, since there had been no refusal of a claim for international protection. She suggested that if it was the appellant's intention to claim asylum then 'it might be better' if Articles 3 and 8 ECHR were considered at the same time. The judge then gave Mr Aziz an opportunity to take instructions, after which he confirmed that he sought the determination of the appeal on ECHR grounds because it was not the appellant's intention to claim asylum.

9. The judge then heard from the appellant, who adopted his statement and was asked some 20 questions by Mr Azizi. The judge then took a short break so that she could read the first determination, a copy of which had by that stage been sent to her. On resuming, the judge asked the appellant 65 questions of her own. There was brief re-examination by Mr Aziz, followed by his submissions. The judge reserved her decision.

10. In her reserved decision, the judge found that there would not be very significant obstacles to the appellant's re-integration to Bangladesh. In reaching that conclusion, she found as a fact that the appellant had not been truthful as regards his work history in Bangladesh and his claim not to have received Judge White's decision: [38] and [43]. She expressed doubt about his claim that his parents had passed away and about his claim to be dependent upon mental health medication: [44] and [48]. The judge then considered Article 3 ECHR and concluded, for reasons I need not set out at this stage, that she was 'not satisfied that the appellant had demonstrated that he is an active member of the BNP and would face a real risk upon his return to Bangladesh for that reason': [59]. She did not accept that the appellant had more than normal emotional ties with family in the United Kingdom and she concluded that it would be proportionate for the respondent to interfere with the limited private life which the appellant enjoyed in the United Kingdom: [62]-[73]

The Appeal to the Upper Tribunal

11. The grounds of appeal settled by Ms Bayati of counsel raise two points which may be summarised quite shortly. The first is that the hearing

was procedurally unfair, in that the judge had stated that credibility was not in issue before asking a large number of questions which resulted, ultimately, in her concluding that the appellant had fabricated significant aspects of his claim. This was said to be contrary to the approach required by the Surendran guidelines appended to MNM * [2000] UKIAT 00005. The second ground is that the judge failed, in considering Article 8 ECHR outside the Immigration Rules, to have regard to material aspects of that claim.

12. Judge Grant considered both grounds to be arguable.

13. Ms Bayati amplified the grounds of appeal before me, submitting that the judge had entered the arena after giving a clear indication that credibility was not in issue. She submitted that the judge had failed to follow the Surendran guidelines, which required that she should have alerted Mr Aziz to her concerns rather than asking a large number of questions of her own. The judge had also failed to engage with significant aspects of the appellant's Article 8 ECHR claim.

14. In response, Mr Whiwell acknowledged that the judge had asked a significant number of questions of the appellant. There was some tension between the complaint that the appellant had not had notice of the judge's concerns and the complaint that the judge had put her concerns to the appellant. He accepted that there was a question mark over the tone and content of the questions, which was best resolved by reference to the Record of Proceedings. The appellant's credibility had not been accepted in the letter of refusal and it was not clear what the judge was supposed to do in circumstances in which there had been no prior consideration of the appellant's claim that he would be at risk in Bangladesh. In relation to the second ground, Mr Whitwell submitted that the it represented nothing more than a disagreement with the detailed findings reached by the judge.

15. In response, Ms Bayati submitted that the proper course had been for the judge either to adjourn or to follow the Surendran guidelines. The course she took was procedurally unfair and the decision fell to be set aside on that basis.

16. I reserved my decision.

Analysis

17. As is apparent from the submissions of the representatives before me, the judge was clearly placed in an invidious position. The respondent had not given any, or any adequate, consideration to the appellant's claim that he would be at risk on return to Bangladesh as a result of his political activity. That was not the fault of the respondent; it was because the appellant had been invited to claim asylum and had decided not to do so. The judge was therefore correct to observe, at the start of the hearing, that this appeared to be a case in which credibility was not in issue; the credibility of the 'protection' claim had simply not been the subject of prior examination.

18. The respondent was unrepresented and the judge quite rightly refused to adjourn the remote hearing on the respondent's application. The judge was also quite right to raise with Mr Aziz the issues which she intended to consider, and to give him time within which to consider with his client whether he wished, after all, to make a protection claim. Having refused the respondent's application and having been told that the appellant wished to press on with the hearing on Articles 3 and 8 ECHR grounds, it was at perhaps understandable that the judge decided to proceed.

19. Had the judge continued to proceed on the basis that credibility was not in issue, as she had stated at the start of the hearing before her, there could have been no challenge to her decision. But that was not what she did. Having read Judge White's decision, she embarked on detailed questioning of the appellant. It is clear from the Record of Proceedings that some of those questions were leading and that others were repeated. Mr Whitwell acknowledged that much depended on the nature and tone of the judge's questions; it did not follow from the number of questions that the judge had entered the arena. Considering the long-established authorities which govern a judge's conduct in this respect, including XS (Serbia and Montenegro) [2005] UKIAT 93 and WN (DRC) [2004] UKIAT 213, I consider that submission to be well made. In my judgment, the nature and the number of the questions would cause the fair-minded and informed observer to conclude that the judge had entered the arena in this case.

20. Mr Whitwell asked rhetorically what else the judge could possibly have done in the difficult situation which had developed. Ms Bayati provided what I considered to be the correct answer to that question in her response.

21. There were, in my judgment, two procedurally fair ways of resolving the difficulty which arose at this hearing. The first was to follow the Surendran guidelines, by alerting Mr Aziz to the concerns which the judge had about the appellant's account. It seems that the judge did not consider whether to adopt that course; there is no reference to it in either the decision or the Record of Proceedings.

22. The second option was for the judge to adjourn the hearing of her own volition so that the respondent could be represented and any challenges to the appellant's evidence could be put to him by a Presenting Officer. What was not procedurally fair, in my judgment, was for the hearing to begin with an indication that credibility was not in issue, to continue with the judge asking numerous questions of the appellant, some of which had the character of cross-examination, and then to conclude with the judge finding that the appellant had lied in various material respects. Whether that course of events is described as having an appearance of bias or the judge entering the arena is unimportant; what matters is that it was clearly procedurally unfair to the appellant. It is for that reason that I will set aside the decision of the FtT, albeit that I acknowledge that the events which preceded the hearing before the judge placed her in a difficult position indeed.

23. In the circumstances, I shall say nothing more about the second ground. Given that the hearing before the judge was tainted with procedural unfairness, the necessary outcome is that the appeal is remitted to the FtT for hearing *de novo* in accordance with paragraph 7.2(a) of the Senior President's Practice Statement.

24. I should note that the jurisprudence has moved on since the hearing before the FtT. The appellant and his advisers would now be well advised to consider what if any steps should be taken in light of JA (human rights claim: serious harm) Nigeria [2021] UKUT 97 (IAC). They will wish to consider, in particular, the Upper Tribunal's conclusion that the FtT might approach a claim to be at risk with some scepticism when the claimant has chosen not to subject themselves to the procedures that are inherent in the consideration of a claim to refugee status.

Notice of Decision

The appellant's appeal to the Upper Tribunal is allowed. The decision of the FtT is set aside and the appeal is remitted to the FtT for consideration de novo by a judge other than Judge McKinney.

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 his 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.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

1 February 2022