Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers:**
UI-2022-003593 (Formerly PA-50562-2022; IA/01775/2022)
UI-2022-003631 (Formerly HU/00240/2020)

THE IMMIGRATION ACTS

Heard at Field House
On the 30 September 2022

Decision & Reasons Promulgated
On the 28 November 2022

Before

UPPER TRIBUNAL JUDGE RINTOUL
DEPUTY UPPER TRIBUNAL JUDGE SHEPHERD

Between

MMS
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z Jafferji, counsel, instructed by E1 Solicitors
For the Respondent: Mr R Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Siddall promulgated on 11 May 2022 in which she dismissed the appellant's appeal against decisions of the Secretary of State made 10

December 2019 refusing his human rights claim and 7 February 2022 refusing his protection claim.

The Appellant's Case

2. The appellant is a national of Bangladesh. He arrived in the UK on 18 October 2009 with leave to enter as a student. His student visa was extended on two occasions and expired on 30 April 2016. On 28 April 2016 he applied for an EEA residence permit as an extended family member which was refused on 10 December 2016. He also applied for a tier 1 Entrepreneur migrant visa which was refused on 12 August 2016. He then submitted a claim for leave to remain on the grounds of private life on 17 October 2016 which was refused on 18 March 2017.

3. He claimed asylum on 7 June 2019 and then applied for leave on grounds of long residency. The latter application was refused on 10 December 2019. The appellant appealed that decision on human rights grounds. A decision refusing the asylum claim was made on 7 February 2022. The appellant's appeals against both decisions were heard by First-Tier Tribunal Judge Siddall ("the Judge") on 4 May 2022.

4. The appellant's human rights claim was initially made on the basis that he should be treated as having ten years' lawful residence in the UK. Prior to the hearing before Judge Siddall, he conceded that he could not make this out and instead argued that he had established a private life in the UK and would face very significant obstacles under paragraph 276ADE(1)(vi) of the Immigration Rules if he were returned to Bangladesh.

5. The appellant's protection claim (on which his son, ZH, is also dependant) was based on fear of harm from moneylenders in Bangladesh, from whom his family had borrowed money in order to support his studies in the UK; and later emphasised a fear of persecution due to his political opinion, and that he would be arrested if returned due to a court case/cases having been issued under the digital security act for comments had made to the press. He said the attention he had attracted for his political views had exacerbated the attention his family was already receiving due to the debts. As those he feared were both state and non-state actors, he said he could not relocate within Bangladesh to escape the risk and could not gain sufficiency of protection.

The respondent's case

6. Due to alleged inconsistencies, the respondent did not accept the appellant's account of being at risk on return, either due to events in Bangladesh or more recently. She did not accept that the documents he had produced were reliable.

The First-tier Tribunal's decision

7. The Judge heard evidence from the appellant via a Bengali interpreter, and submissions from his representative, Mr Jafferji. For unstated reasons, the respondent was not represented.

8. The Judge concluded that:-

(a) If a criminal charge had been laid against the appellant in relation to comments he made in a newspaper published online in Bangladesh, he would have a well-founded fear of persecution upon return. The central issue was his credibility and whether the documents he had produced concerning proceedings in Bangladesh were genuine. The Judge said she would decide the reliability of those documents using the principles set out in Tanveer Ahmed, taking all the evidence in the round.

(b) The appellant's immigration history was relevant. The Judge referred to the appellant having, since 2016, applied for leave to remain on at least four different bases, saying "*I accept that the decision of the legal ombudsman agreed that he had been badly advised in relation to two of these applications …. He accepts that there was no basis for the Tier 1 application, but asserts that he was advised to do so by his lawyer*". She also took into account that "*the fact that the basis of the appellant's claim for asylum has shifted substantially since it was lodged in June 2019"*, having "*wholly abandoned*" the claim to be at risk from creditors from whom his family had borrowed money.

(c) It was surprising that, having made a claim for asylum in June 2019, the appellant then submitted online comments which called for the Awami League to be brought to trial and for the prime minister to resign, including his personal details. She did not accept the appellant's explanation as to why he did this.

(d) Weight should be attributed to the fact that, in the preliminary information questionnaire dated September 2020, the appellant and/or his legal advisers indicated that they proposed to produce not only court documents but verification of court documents.

(e) The above matters cast doubt on the credibility of the appellant's evidence about the risks faced in Bangladesh.

(f) The respondent had checked that the press reports cited by the appellant were publicly available. The Judge did not consider little weight should be given to these reports due to inaccuracies such as incorrect dates, but she took account of background information which suggested that it was possible to publish fake news online in Bangladesh.

(g) As to whether the appellant was able to demonstrate to that criminal charges had been brought against him, he had not established that his advisor in Bangladesh, Mr Hossain was instructed on a legitimate,

commercial and 'arm's length' basis. Mr Hossain's reports were highly detailed such that the judge found it surprising that they contained errors. To some of those errors, the Judge attributed little weight. Others, such as incorrect references to the appellant's date of birth in the two first reports, she found concerning as "*This was not a slip of the fingers. The mistake suggests that the same report could have been used in relation to another person*".

(h) Taking everything in the round, "*I conclude that the appellant has not established to the required standard that the report can be relied upon in support of his assertion that he faces criminal charges in Bangladesh*".

(i) Having considered, MA (Bangladesh) v SSHD [2016] EWCA Civ 175, the respondent was not under a duty to take steps herself to verify the court documentation.

(j) The appellant had not discharged the burden of proving that he was a refugee or deserving of humanitarian protection. Having found there was no risk on return, the appellant could not satisfy the requirements of paragraph 276ADE.

(k) Article 8 was engaged. The Judge accepted that poor advice was likely to have contributed to the appellant's difficulties in establishing himself in the UK However she concluded that the private life established here and the difficulties that the family as a whole may face upon return did not outweigh the public interest in removal, which did not amount to a disproportionate interference with his family or private life.

9. The appellant sought permission to appeal to the Upper Tribunal on the grounds that the judge had erred:-

(i) in failing to follow the sequential approach set out by the Court of Appeal in MA (Bangladesh) v SSHD [2016] EWCA Civ 175 as to whether the respondent was under a duty to verify the appellant's documents.

(ii) In failing to make findings in relation to key evidence relied upon by the appellant, including the actual documents relied upon by the appellant in support of his claim (in particular the newspaper articles), as opposed to findings as to the reliability of the advocate's document verification report.

(iii) In taking irrelevant matters into account, such as the appellant's immigration history as being a matter relevant to assessing the documents he had produced, especially when the Judge had accepted he had been given poor advice by his previous legal representatives as confirmed by the Legal Ombudsman.

(iv) in making a flawed assessment of Mr Hossain's reports, including mischaracterising the nature of errors within them and focussing on minor discrepancies to dismiss "three detailed and comprehensive reports";

(v) failing to properly take into account all of the evidence in the round;

(vi) in conducting a flawed assessment of the article 8 claim because of the failures relating to the assessment of the protection claim, which factors were relevant to the appellant's claim under 276ADE(1)(vi).

10. On 22 July 2022, First-tier Tribunal Judge Burnett granted permission to appeal to the Upper Tribunal stating:

"[2]. The grounds are lengthy and make various assertions. A number of the grounds are mere disagreements with the analysis the judge gave to the evidence. An example is the judge referring to the change in the appellant's asylum claim from initial inception to the case advanced at the hearing. It should be noted in this regard that the appellant did not make his comments in the Daily Nobojug until 2021. The appellant claimed asylum in June 2019 and his preliminary information questionnaire was completed in September 2020.

[3]. Although the judge did not explicitly state that she accepted that the news articles had been written, after a careful reading of the entire decision, in particular paragraphs 61,62 and 63, in my view it is clear the judge made the finding that the news articles had been written but this did not mean that the articles were factually accurate.

[4]. I do not find merit in the criticism of the judge's findings regarding the expert report. The judge gave clear reasons as to the assessment of the report which lead to the conclusion that the appellant had not discharged the burden of proof.

[5]. Counsel asserts that the judge failed to take into account a specific paragraph of the CPIN which was referred to in closing submissions (Paragraph 11 of the grounds) . I can find no reference to this in the judge's decision. The judge's note of submissions will be of assistance in this respect. I note that although counsel has not provided a witness statement to support the claim , counsel is the author of the grounds of appeal. This ground should be formally established by evidence .

[6]. I grant permission with paragraph 12 et seq, of the grounds in mind. The judge does not further refer to the court orders and translations which were submitted. There appears to be no separate analysis of the documents, other than a rejection of the expert report. It is just arguable that the judge should have made some reference and analysis of the

documents, directly. In respect of the new articles, I would repeat my observations at paragraph 3 above.

[7]. I grant permission to appeal. I should note here that my observations above do not preclude the appellant arguing all of the grounds."

The hearing

11. The appeal came before us on 30 September 2022.

12. It serves no purpose to recite the submissions here at length as they are set out in the records of proceedings. Essentially, Mr Jafferji expanded on the grounds of appeal, making the following submissions of particular note:

    (a) Having stated that the Judge would address the documents using the guidance set out in Tanveer Ahmed, the Judge did not go on to do this, failing to make any findings as to the authenticity and reliability of the court documents and news articles.

    (b) He disagreed that the nature of the appellant's asylum claim had changed; instead he submitted that the appellant had referred to his political views from the outset, not just a fear of moneylenders. The nature of his case had also progressed from when it was first made, due to the subsequent news articles being published.

    (c) The Judge said she took into account the appellant's immigration history as damaging to his credibility, without properly considering the evidence explaining that history, namely the poor legal advice he had received. This was despite her finding that the appellant had in fact received poor advice, as this had been confirmed by the Legal Ombudsman.

    (d) He took us through Mr Hossain's reports in some detail, to illustrate his argument that these reports should not have been dismissed due to minor errors which, he said, were genuine typographical errors i.e. only a mistake in the year on the date of birth, not an entirely different date of birth. He submitted the Judge simply had not addressed the evidence of the appellant's initial comments to an online publication then being published in other publications, despite finding that the respondent had accepted that those articles were publicly available.

    (e) He said the Judge also failed to take into account the fact that Mr Hossain had undertaken the exact same process to verify the court documents as the British High Commission states it follows in Annex B to the "Country Information Note Bangladesh: Documentation" published in March 2020" ("the CPIN").

13. Mr Whitwell said there was no rule 24 notice as the appeal was still being opposed for the reasons set out in the Refusal Letter, which he summarised. His additional submissions worthy of particular note were:

    (a) The Judge was entitled to take the appellant's immigration history into account as damaging credibility, even with the finding that he had received poor advice. The poor advice did not explain why he had not made a protection claim earlier, and does not say he was advised away from making one.

    (b) The Judge was also entitled to find the respondent was under no obligation to verify the court documents adduced, as even had they been verified, there would still have been live issues as to credibility such that the criteria in MA (Bangladesh) for the duty arising were not met.

    (c) It is clear that the Judge did consider all the evidence in the round. She made a self-direction in the decision confirming she had considered all the evidence even if each piece were not specifically mentioned, and there was a vast amount of evidence produced such that it was reasonable not to refer to all of it expressly. She then weighed the evidence and repeated in the conclusion that it had been considered in the round. Ultimately, the decision needed to state why the appellant lost and it did that clearly.

    (d) He submitted the Judge did make findings on the court documents as, having found the appellant not credible, she found the documents not reliable either given the background information that documents could be fraudulently obtained. He said there was therefore no need to make separate and individual findings as to the news articles; it was obvious from the decision as a whole that they were not accepted as reliable evidence.

    (e) As to the argument that the Judge had not addressed the appellant being mentioned in other publications further to the original online news outlet, Mr Whitwell accepted that there were no specific findings on this but submitted that the Judge did record that it was possible to publish fake news online in Bangladesh and did not go on to say that 'actual' media was any different.

14. Mr Jafferji replied to say that if the Judge's finding was that all of that evidence was unreliable, it would amount to a finding that the appellant had somehow managed to manufacture several articles in different publications about the cases brought against him, in which case he would expect this to be accompanied by proper reasoning rather than being a finding to be deduced from the overall reasoning. He also understood that not every piece of evidence could be expressly referred to, but the point was that the Judge said she was going to assess the reliability of the Bangladeshi documents and then did not do so; she should have made

findings as to whether the documents were reliable or not but what she did is making findings on reports that comment on those documents.

Discussion and Findings

15. We first address the ground that the Judge failed to make findings in relation to key evidence relied upon by the Appellant, including the court documents and news articles.

16. We find this is an error of law and is material (we shall refer to it as the "main error"). The court documents and news articles go to the core of the Appellant's claim such that whether they are authentic and can be relied upon is key to the question of the risk to the appellant on return to Bangladesh. This is confirmed by the Judge herself at [53] in saying that *"I accept that if a criminal charge had been laid against the appellant in relation to comments he made in a newspaper published online in Bangladesh, he would have a well-founded fear of persecution upon return."* The Judge should have made explicit findings as to whether she found the court documents and news articles to be reliable and what weight she attached to them.

17. We reject the assertion that by making findings as to whether Mr Hossein's reports could be relied upon, it was implicit that the documents themselves could not be relied upon; this is to conflate two different questions. The appellant's case is that not only did he make comments to the Daily Nobojug that were published and put him at risk in their own right, but that these comments were then picked up and published by several other news outlets, as well as several different sources reporting that charges had been brought. He says these matters created their own or further risk. We reject the submission that it was sufficient for the Judge not to have made a finding on the reliability of these other publications, having found that online publications could be fake news. The other publications were not all online. This also ignores the point that, fake or not, the respondent accepted that they were available and in the public domain such that the risk arising from their content about the appellant needed to be addressed, whether that content were true or not.

18. We find that the main error is material because it cannot be said that the Judge would have reached the same conclusion as to risk had she properly addressed the reliability of the court documents and news articles and done so in the round against the evidence as a whole, including the objective background evidence and taking into account that the existence of the charges was reported in several different news sources.

19. In the circumstances we can deal briefly with the remaining grounds of appeal.

20. The allegations that the Judge failed to properly address the country background evidence, and that the Judge should have assessed whether the respondent was under a duty to verify the court documents are

parasitic on the ground of main error. We note the relevant CPIN contains comment at 5.2.3 about it being difficult to manufacture court documents as they can be checked against a database. We agree that consideration of the CPIN should have been part of the assessment of the reliability and authenticity of the documents. However, it appears clear from para [49] that the CPIN was before the Judge and that she had read it. We note the passage cited by the Judge (5.3.6) seems to contradict 5.2.3 as to whether court documents may be fraudulently obtained. The passage cited by the Judge comes from DFAT (the Australian Government's Department of Foreign Affairs and Trade), whereas 5.2.3 comes from 'one anonymous source'. It may be that the Judge therefore did consider 5.2.3 but disregarded the one anonymous source in favour of DFAT's findings; we do not know. In any case, it cannot be said that the Judge would not have been able to make satisfactory findings as to reliability and authenticity without specific consideration of the comment in 5.2.3, as this was just one factor to be considered.

21. As to addressing any duty to verify falling on the respondent, even if there were such a duty, that in itself would not necessarily have taken the matter any further forward. Even if a direction had been made to adjourn the hearing to allow time for the respondent to carry out verification checks, there is no guarantee that this would have actually happened.

22. We do not find merit in the argument that the Judge's allegedly flawed assessment of Mr Hossein's reports amounted to an error of law. As stated in the grant of permission to appeal, the Judge gave clear reasons as to the assessment of the reports and it was open to her to make the findings she did, even if those findings may be disagreed with.

23. We find the Judge was entitled to take into account the appellant's immigration history as part of her assessment of his credibility. Whilst it is unfortunate that she does not appear to fully address the impact of any poor advice the appellant may have had, she was entitled to reach the conclusion that this did not explain all aspects of the immigration history and the lack of previous asylum claim in particular. We note para [27] of the decision states that *"It is the appellant's position that there were other routes he could have followed in 2016 prior to the expiry of his student visa which may have led to him being granted further leave to remain and would have prevented him from becoming an overstayer*", such that the focus was on explaining why he had become an overstayer rather than why he had not made a claim for asylum earlier. The poor legal advice was one element of the history, not an explanation of the whole history.

24. To conclude, we find the main error, which affects the Judge's findings in relation to the protection claim, also undermines the Judge's findings as regards paragraph 276ADE of the immigration rules and article 8, as she addressed these aspects of the appeal on the basis that there is no risk on, and the appellant is able to, return.

25. We therefore find the main error infects the decision as a whole such that it cannot stand.

Conclusion

26. We are satisfied the decision of the First-tier Tribunal did involve the making of an error of law and we set it aside.

27. Given that the error identified undermines the findings as a whole, none of the facts found can be sustained. In the light of the need for extensive judicial fact-finding, we are satisfied that the appropriate course of action is to remit the appeal to the First-tier Tribunal to be heard afresh by a judge other than Judge Siddall.

Notice of decision

1. The decision of the First-tier Tribunal involved the making of an error of law and we set it aside.

2. We remit the appeal to the First-tier Tribunal for a fresh decision on all issues.

3. An anonymity direction is made due to the appeal concerning a protection claim.

Signed: L. Shepherd Date 17 October 2022

Deputy Upper Tribunal Judge Shepherd