IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004446

First-tier Tribunal No: PA/54239/2021
IA/12525/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 7th June 2024

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

SDH
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z Malik KC, instructed by Chancery Solicitors
For the Respondent: Ms A Ahmed, Senior Home Office Presenting Officer

Heard at Field House on 9 May 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the Appellant, likely to lead members of the public to identify the Appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Traynor promulgated on 3 July 2023, in which the Appellant's appeal against the decision to refuse his protection and human rights claim dated 2 August 2021 was dismissed.

2. The Appellant is a national of Bangladesh who first entered the United Kingdom with entry clearance as a Tier 4 (Student) on 2 October 2010, valid to 4 February 2021. He has remained unlawfully in the United Kingdom since. The Appellant was arrested on 22 November 2016 after being found working illegally and subsequently made an application for leave to remain on human rights grounds on 24 November 2016. That application was withdrawn and the Appellant then claimed asylum on 13 April 2017 on the basis that he would be at risk on return to Bangladesh due to his political opinion. The Respondent refused the asylum claim and the Appellant's appeal was dismissed by First-tier Tribunal Judge Manyarara on 13 December 2018 on the basis that the claim was not credible and the Appellant was not of any adverse risk from the authorities on return. The Appellant was appeal rights exhausted on 9 May 2019.

3. The Appellant made further submissions on 11 March 2020 again on the basis of a risk on return due to his political opinion for which he claimed that his brother and nephew had been mistaken for him and tortured; as well as a claim on mental health grounds. The Appellant claimed to be at risk from the Awami League due to his being an active member of the BNP. Further evidence was submitted in support on 27 July 2021 and 6 August 2021.

4. The Respondent refused the application the basis that little weight was given to the further documentary evidence submitted given that there was a lack of detail as to its authors, who had little knowledge and was not consistent, lacked sources and explanations. Overall, the Respondent did not accept that the Appellant was of any interests to the authorities, nor that his family was at risk on Bangladesh. For essentially the same reasons, the Appellant was not entitled to humanitarian protection and his removal would not breach Articles 2 or 3 of the European Convention on Human Rights. The Appellant did not meet the requirements of the Immigration Rules on private or family life grounds and there were no exceptional circumstances to warrant a grant of leave to remain outside of the rules. The Respondent did consider the Appellant's mental health, but considered that medical treatment was available on return to Bangladesh and the high threshold was not met for a breach of Article 3 on medical grounds.

5. Judge Traynor dismissed the appeal in a decision promulgated on 3 July 2023 on all grounds, following a hearing on 11 January 2023. In essence, it was found that the Appellant had continued to present a false profile of alleged political activities and little weight could be given to the new evidence relied upon. Overall, it was found that the Appellant was not at risk on return to Bangladesh and there was no reason to depart from the findings of the previous Tribunal. The Appellant was no more than an ordinary member of the BNP and did not have a profile which would likely be of any interest to the authorities on return. The Appellant could therefore return to his home area and in any event it would not be unduly harsh for him to internally relocate elsewhere. The appeal was dismissed on all protection grounds.

6. In relation to the Appellant's mental health, the First-tier Tribunal considered the report of Dr Costa who did not appear to be aware of the full history, including the reasons for refusal letter or the previous appeal decision. It was accepted that the Appellant had depression and was taking medication for this which was to be reviewed after his appeal hearing, but that the condition was treatable and there was available care in Bangladesh. It was not accepted that there was any immediate risk of suicide and overall the threshold for a breach of Article 3 was not met. Finally the appeal was dismissed on private and family life grounds,

including on the basis that the Appellant has family who could support him on return.

The appeal

7. The Appellant appeals on four grounds as follows. First, that the First-tier Tribunal erred in law as to the burden and standard of proof in directing itself as follows in paragraph 9:

> *"The burden is on the Appellant to show as at the date hereof there are substantial grounds for believing that the Appellant meets the requirements of the Qualification Regulations and further that the Appellant is entitled to be granted humanitarian protection in accordance with paragraph 339C of the Immigration Rules and that returning him to Bangladesh will cause the United Kingdom to be in breach thereof and/or insofar as applicable the decision appealed against is a breach of his protected human rights under the 1950 Convention."*

8. The emphasis in the quote is that of the Appellant to highlight three errors in the passage; (i) that in protection cases there should be an assessment of risk rather than a burden of proof on the Appellant as per paragraph 50 in MAH (Egypt) v Secretary of State for the Home Department [2023] EWCA Civ 216; (ii) that there only needs to be 'a reasonable degree of likelihood' rather than 'substantial grounds for believing' a person; and (iii) in respect of Article 3, a person need only adduce evidence 'capable of demonstrating that there are substantial grounds if removed, they would be exposed to a real risk of subjection to treatment contrary to article 3', much of which was omitted in the paragraph quoted above.

9. Secondly, that the First-tier Tribunal erred in law in failing to take into account the Appellant's vulnerabilities when assessing credibility after the hearing and failing to assess whether any deficiencies in his evidence were or could have been caused by his poor mental health.

10. Thirdly, that the First-tier Tribunal erred in law in paragraph 38 in its application of the principles in *Devaseelan,* by (i) failing to appreciate that there must have been material significantly different to that presented in the last appeal for the Respondent to have accepted a fresh claim under paragraph 353 of the Immigration Rules, and (ii) by implying a test of 'reasonableness' to consider new evidence where none exists.

11. Finally, that the First-tier Tribunal erred in law in the delay in promulgating the decision of almost six months, which of itself is said to have rendered the decision unsafe.

12. At the oral hearing, Mr Malik KC made submissions in line with his skeleton argument expanding on the above grounds of appeal. In relation to the first ground of appeal, examples were given of the wrong test being applied in paragraph 64 of the decision, referring to 'likely to place' the Appellant at risk in two places and in paragraph 66, the reference to whether the Appellant 'would face' a real risk rather than only evidence capable of demonstrating such a risk. It was however accepted that the error in the test for Article 3 of the European Convention on Human Rights on medical grounds was not material and that on the facts, the Appellant could not been the high threshold in medical claims.

13. In relation to the second ground of appeal, it was accepted on behalf of the Appellant that there was no issue with the application of the Joint Presidential Guidance Note No 2 or 2010 in respect of the hearing itself, just that there was no account taken of the Appellant's mental health when assessing the credibility of his evidence. The Appellant's claim was rejected on the basis that it was not believed, that it was not sufficiently detailed or consistent but there was no assessment of whether his poor mental health caused any of the deficiencies. It was further accepted that although there was a brief reference to depression in 2017 in the Appellant's medical records, the evidence post-dates his previous appeal and there was no suggestion that the previous findings were unsafe because of any poor mental health at that time. Again, a number of examples were given as to where there needed to be further consideration of the Appellant's mental health, in paragraphs 33, 37, 41, 42, 48, 49, 51 and 60.

14. In relation to the third ground of appeal, Mr Malik KC submitted that there was no dispute in this case that there was new and significantly different evidence being before the First-tier Tribunal and that the Judge then applied a question of whether it was reasonable to follow the previous findings, which was the wrong test.

15. In relation to the final ground of appeal, it was submitted that although there was no bright line rule that a delay of three months in promulgating the decision was not excessive, the context was guidance for a decision to be promulgated within 14 days and in this case the delay was almost six months. In this appeal, the key issues were the credibility of the Appellant and witnesses and it would therefore, in the context of the other grounds, be proper to set aside the decision for this additional reason of delay and for the appeal to be re-heard. Mr Malik KC submitted that in principle, a delay could itself be a sufficient ground to set aside a decision even in circumstances where there is no challenge to any of the findings of fact made and even if the decision is otherwise a rational one. There needs to be separate consideration of whether the decision is 'safe', albeit there is little guidance on what this means in practice.

16. On behalf of the Respondent, Ms Ahmed opposed the appeal on all grounds. In relation to the first ground of appeal, it was submitted that the remarks in paragraphs 48 to 51 of the decision in MAH (Egypt) did not state that the Appellant was not required to prove anything and were carefully worded obiter remarks, particularly the use of 'strictly speaking' and 'could be said' when referring to the assessment of risk. Overall, the First-tier Tribunal were correct to refer to the burden of proof being on the Appellant and there followed a correct reference to the lower standard of proof and what it means in protection claims.

17. The second two limbs of the first ground of appeal were accepted by Ms Ahmed as the relevant tests not being accurately referred to by the First-tier Tribunal in paragraph 9 of the decision; but that the slips/omissions were not material given that the correct tests were in substance applied later in the decision in particular in paragraph 63 and 73.

18. On the second ground of appeal, Ms Ahmed accepted that the decision did not expressly refer to any possible impact of the Appellant's mental health on the assessment of his credibility; but submitted that this was not material in the present appeal given the whole focus was on evidence other than the Appellant's testimony and in the context of previous adverse credibility findings from the earlier appeal with no suggestion that these were unsafe for reasons for poor mental health. The relevant guidance is expressly referred to and on behalf of

the Appellant, the relevance of his poor mental health has not been shown to have any relevance to the adverse findings made. The decision highlights, for example, inconsistencies in the Appellant's claim over a long period of time (long before any mental health problems) and refer back to previous findings, as well as adverse findings on the documentary and other witness evidence to which the Appellant's mental health could not have had any bearing. This was not one of the those cases where the adverse credibility findings were focused on, for example, the Appellant's performance in cross-examination.

19. On the third ground of appeal, Ms Ahmed submitted that there had been no conflation of the test for paragraph 353 of the Immigration Rules with the application of the *Devaseelan* principles by the First-tier Tribunal, these were separate and the previous findings were correctly identified as the starting point with clear findings as to why the new material did not provide a basis to depart from them. Ms Ahmed accepted the First-tier Tribunal's paraphrasing of the principles in *Devaseelan* included a misquoted reference to 'reasonableness' which could have been phrased better, however, there was no evidence that any additional test was imposed in substance in the decision.

20. On the final ground of appeal, Ms Ahmed submitted that there was no hard and fast rule as to any particular period of delay, the only consideration is whether the decision is 'unsafe' as a result which would require a nexus between the findings and the delay. In the present appeal, there is no challenge to any of the factual findings, for which the Judge has made a detailed analysis with sound reasons for each. In these circumstances, despite the delay, the decision is legally sustainable and is safe.

Findings and reasons

21. The first ground of appeal concerns the self-directions given as to the required burden and standard of proof set out in paragraph 9 of the First-tier Tribunal decision, in three material respects. The first is as to the burden and standard of proof in an asylum claim. Mr Malik KC submitted that following MAH (Egypt) it is no longer correct to refer to the burden being on the Appellant, but that there is a more neutral assessment of risk that must take place on all of the evidence. Paragraph 51 in particular is relied upon, which states:

> *"Strictly speaking it could be said that it is not entirely accurate to refer to this as a standard of "proof", because the applicant does not in fact have to prove anything. It could more accurately be described as being an "assessment of risk"."*

22. I do not accept that the comments in paragraph 51 of MAH (Egypt) represent a paradigm shift in the long accepted burden of proof being on the Appellant in protection claims, but more of a practical explanation of the task of the person or court assessing the claim. The comments were also made in the context of consideration of the standard of proof, not the burden of proof which was not directly in issue in this appeal. In any event, what followed in the decision of the First-tier Tribunal was, in practical terms, an assessment of risk and nothing in this appeal would turn on whether there was, or was not, strictly a burden of proof on the Appellant.

23. On the second and third limbs of the first ground of appeal, the Respondent accepts and I so find as well, that the self-direction in paragraph 9 is not well-drafted or entirely accurate. The very brief summary in one short paragraph

attempting to deal with all relevant burdens and standards of proof in different parts of the appeal is clumsy and has led to a self-direction which does not properly set out the relevant standard of proof in protection and human rights claims and appears to set everything out as a cumulative set of requirements. The First-tier Tribunal Judge should have separated these out, setting out the proper requirements in full for each relevant ground of appeal being considered in this case.

24. The issue however remains as to whether the wrong standard of proof was applied in substance in the decision. As to the Article 3 medical claim requirements, Mr Malik KC accepted on behalf of the Appellant that this was immaterial as on the facts he could not meet the relevant threshold in any event. No more therefore needs to be considered or said on this point as it could not have affected the outcome of the appeal. On no rational view, applying the correct test, could the Appellant's poor mental health come close to his return being in breach of Article 3 of the European Convention on Human Rights.

25. The focus is therefore on the standard of proof for the protection claims. The correct standard is the 'lower standard of proof' which has been expressed in many different ways in various authorities as a 'reasonable possibility', a 'real chance', a 'real risk', a 'reasonable chance', a 'serious possibility' and 'substantial grounds for thinking'. A number of these expressions date back to a quote from Lord Diplock in R v Governor of Pentonville Prison ex p Fernandez [1971] 2 All ER 691 included in Sivakumaran [1988] 1 All ER 198; in which he said that *"the expressions 'a reasonable chance', 'substantial grounds for thinking' and 'a serious possibility' all conveyed the same meaning."* It is notable that much more recently, the Supreme Court in AAA (Syria) v Secretary of State for the Home Department [2023] UKSC 42 repeatedly refers to whether there are 'substantial grounds for believing' when considering the risk of refoulement in the context of removals to Rwanda. The phrase used by the First-tier Tribunal in the current appeal is not one uncommonly used as one of the many expressions of the lower standard of proof.

26. In these circumstances, the self-direction in paragraph 9 of the First-tier Tribunal decision to 'substantial grounds for believing' is not in fact a different test to that set out or expressed in a variety of different ways in the authorities and does not indicate any higher standard of proof than is properly required in protection claims.

27. In any event, I do not find that there was in substance, anything other than the correct standard of proof applied by the First-Tier Tribunal when assessing the Appellant's protection appeal. The two particular paragraphs relied upon by the Appellant to support the claim that the wrong standard was applied were as follows:

> *"64. I have reached my conclusions in relation to the evidence and find there is nothing within the Appellant's case which would inform me he is at risk from the Bangladesh authorities based upon his political profile. I find the Appellant has provided no evidence which would lead me to conclude that the findings of Judge Manyarara, which was promulgated on 13 December 2018, should in any way be disturbed. I find the Appellant has not identified anyone in particular in Bangladesh, including members of the Awami League or any other person who is likely to place him at risk simply on account of his ongoing political activities in the United Kingdom. I find*

that his current political activities have not raised his profile over and above an ordinary member. I wish to make it clear I find the Appellant has not demonstrated that he is a leader or organiser of demonstrations against the Bangladesh authorities in the United Kingdom and that his mere presence at demonstrations, and the fact that he might have assisted to some degree in helping those who are organising demonstrations, is not sufficient to establish a profile such that he will be perceived as likely to be at risk on return to Bangladesh. For the reasons which I have given above I give no weight to the documents submitted in support of his further submissions or those lodged on the eve of his appeal haring, as sufficient to satisfy me that they are genuine and reliable and therefore inform me that he would be at risk on return to Bangladesh for the reasons he has given. …

65. …

66. In addition to the above conclusions, I have also assessed the evidence as to whether it would inform me the Appellant would face a real risk of serious harm upon his return to Bangladesh for the reasons given by him. …"

28. These paragraphs have to be read in the context of the decision as a whole and are preceded by very detailed factual analysis and findings in paragraphs 39 to 63, to which there has been no challenge in substance by the Appellant. The final sentence in paragraph 63 is also important to note, which concludes:

> *"63. … I find the Appellant's evidence is not substantiated by any credible or reliable evidence which, following my anxious scrutiny of everything he has said, and the documents supplied by him, would lead me to the conclusion that there is any reasonable likelihood he would face persecutory ill-treatment upon return to Bangladesh for the reasons he has given."*

29. There is no doubt the reference to the standard of proof in paragraph 63 is correct and there is nothing in the context of the findings and decision as a whole to suggest that any higher or incorrect standard of proof was then subsequently applied in the summary conclusion on asylum in paragraph 64; nor in the similar summary in relation to humanitarian protection (which would on the facts in this appeal, stand or fall with the primary asylum claim) in paragraph 66, which in any event refers to a 'real risk'.

30. The second ground of appeal concerns the application of the Joint Presidential Guidance Note No. 2 of 2010 and whether the First-tier Tribunal properly took into account the Appellant's poor mental health when assessing the credibility of his evidence. There is no dispute that the Appellant was recognised as a vulnerable witness, so much is expressly stated in paragraph 6 of the decision and the hearing was conducted with that guidance in mind.

31. On behalf of the Appellant, Mr Malik KC relied on a number of paragraphs to show examples of where the First-tier Tribunal were assessing the Appellant's credibility and should have, but did not, consider his poor mental health as to whether this had an impact on the assessment. Without unnecessarily long quotations from the First-tier Tribunal decision, I find the paragraphs cited were not examples which supported the second ground of appeal at all. The first two, paragraphs 33 and 37 refer to standard factors which are relevant to the assessment of credibility (including, for example, whether the claim was

consistent with country information, a matter which is relevant in the vulnerable witness guidance) and the latter was a point on which there were findings in the previous Tribunal as to the lateness of the claim which significantly pre-dated any mental health problems.

32. Paragraphs 41, 42, 49, 51 and 60 of the decision deal primarily with the documentary evidence and witness evidence of the other witnesses (not the Appellant), the assessment of which could not on any rational view have been affected by the Appellant's mental health as it was not his evidence that was directly under consideration.

33. The final reference was to paragraph 48 of the decision which states, so far as relevant:

> *"48. … In fact, I have noted that on the day of the hearing a psychologist's report was also uploaded to the Appellant's file. Whilst I have noted that the documents referring to charges for offences under the Bangladesh Explosive Substances Act 2002 relate to events in 2020, including the Charge Sheet and Arrest Warrant, I am satisfied that they had not been seen by the Respondent prior to the hearing and therefore there is a fundamental procedural irregularity in the late service of such documents. Nevertheless, I have considered these documents and the extent to which they could inform me the Appellant's initial claim for asylum could be revisited and if they inform me the Appellant should now be found to be someone who is a credible claimant who has consistently told the truth about his circumstances."*

34. Contrary to the second ground of appeal, this paragraph gives express consideration to the medical evidence and whether it affects the assessment of the Appellant's credibility now.

35. The current appeal is not the sort of claim that turns on the Appellant's own oral evidence, or performance in cross-examination. It was not, for example, refused primarily on the basis of gaps in his evidence, or internal inconsistencies or any such matters that poor mental health may have an impact upon. The starting point for this appeal was the previous findings in the earlier appeal, at which time there was no suggestion that the Appellant was a vulnerable witness nor that he had any mental health problems which could have impacted upon his evidence or credibility. Mr Malik KC expressly confirmed that there was no submission that the previous findings had been tainted in this way or were unsafe. The present appeal then proceeded primarily on further documentary and witness evidence from third parties; the credibility of which was nothing to do with any vulnerability of the Appellant. There are no examples in the findings of any matters in the assessment of the Appellant's own credibility which could possibly have been affected by his poor mental health in the period since the last appeal. In substance, I find that there has been no failure by the First-tier Tribunal to apply the Presidential Guidance to the Appellant as a vulnerable witness. The medical evidence was expressly taken into account for this purpose and there are no other matters upon which adverse findings which were made which could have been impacted by the Appellant's mental health or could have been material to the outcome. Comprehensive and detailed reasons were given as to why the documentary and third party evidence was given little or no weight and these were the points that this appeal turned on.

36. The third ground of appeal concerns the application of the principles in *Devaseelan.* These are dealt with in paragraph 38 of the decision as follows:

> *"38. As the Respondent has correctly identified in the Decision Letter, my starting point in assessing the evidence is governed by the guidance given in the decision of* ***Devaseelan****. In this regard, the Respondent correctly identifies that if the Appellant is relying upon facts not materially different to those put to the first Tribunal, and proposes to support the claim by what is in essence the same evidence as that available to him at the time of the first decision, then the second Tribunal should regard the issue as settled by the first Tribunal's determination and make findings in line with that. The decision in* ***Devaseelan*** *would permit the Second Tribunal to divert from the previous Tribunal's findings if it is satisfied that there is new evidence which was not before the previous Tribunal or that circumstances have changed such that it would be unreasonable not to take into account the new evidence."*

37. The final sentence and reference to whether it would be 'unreasonable' is a clumsy and arguably inaccurate summary of what is much more detailed guidance in *Devaseelan* as to the circumstances in which new evidence should be taken into account and how; which does not include any specific test of 'reasonableness'. However, in substance, no such additional hurdle or test is applied by the First-tier Tribunal when considering whether there was sufficient evidence to depart from the previous findings (some of which was the same evidence as was before the previous Tribunal and some was new, in the sense that it related to claimed activities which post-dated the previous appeal decision). There were no examples given at all on behalf of the Appellant of where the principles were not properly applied and again, it is notable that there were no challenges at all to the factual findings made on the new evidence. When reading the decision as a whole, there is reference to the previous findings, but overall, the decision gives express consideration to all of the new evidence and detailed findings as to why little or no weight was given to it; such that taken in the round, there was no credible or reliable evidence to establish that there was a reasonable likelihood the Appellant would be at risk on return. Thereafter there is simply a summary in paragraph 64 of the decision that that evidence did not disturb the earlier findings of Judge Manyarara (which did not include any reference to reasonableness).

38. Further, the test in paragraph 353 of the Immigration Rules is for a different purpose and does not directly overlap with the applicable principles in *Devaseelan.* It is perfectly possible and not contradictory for the Respondent to find that the requirements of paragraph 353 of the Immigration Rules was met but for a Tribunal to consider the same evidence and conclude that there is no basis upon which to depart from previous findings. A Tribunal is not bound by the Respondent's assessment of whether a fresh claim has been made.

39. The final ground of appeal concerns the delay in promulgating the decision of nearly six months from the hearing. The Appellant relies solely on the passage of time itself to claim that it would be proper to set aside the decision, without identifying any nexus between the delay and any errors in the decision (beyond a reference back to the earlier grounds of appeal, which, for the reasons set out above, do not identify any error of law) and in fact makes no challenge at all to any of the factual findings made in the appeal. It can not be that in these circumstances, delay of itself would be sufficient to establish a material error of

law such that the decision should be set aside and the appeal re-heard. Where there are no other errors of law identified or found and where there is no separate challenge to any of the factual findings, the delay, whilst contrary to the guidelines and deplorable from the perspective of the parties awaiting a decision on the appeal, does not amount to an error of law in this case.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

G Jackson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

30th May 2024