Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/03889/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 February 2016	**On 7 June 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL

Between

[A R]
~~(ANONYMITY DIRECTION NOT MADE)~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss K Anifowoshe, Counsel
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS ON ERROR OF LAW

1. The appellant's appeal against a decision to refuse his protection claim was dismissed by First-tier Tribunal Judge A J Parker ("the Judge") in a decision promulgated on 27 August 2015. The appellant claimed to be a national of Burma and a member of the Rohingya ethnic group. The Secretary of State disbelieved his core claims and found that the appellant is a citizen of Bangladesh and not at any risk on return there.

2. Having weighed the evidence before him, the judge found inconsistencies in the appellant's account and concluded, as had the Secretary of State, that the appellant is a citizen of Bangladesh. He dismissed the appeal on

asylum grounds, found that the appellant is not entitled to humanitarian protection, and also dismissed the appeal on human rights grounds.

3. In grounds in support of an application for permission to appeal, it was contended that the judge failed to apply the correct standard of proof and gave inadequate reasons for finding the appellant to be a citizen of Bangladesh. It was also contended that he erred in relation to some of the evidence before him, including a "refugee book" issued to members of the Burmese Rohingyan community in some circumstances and country evidence in the form of a report from the Danish authorities. Permission to appeal was refused by a First-tier Tribunal Judge but granted on renewal to the Upper Tribunal.

4. In a Rule 24 response from the Secretary of State, the appeal was opposed on the basis that the judge directed himself appropriately and reached conclusions which were open to him on the evidence. In particular, the judge was entitled to find as he did in relation to nationality, in the light of the appellant's apparent inability to speak the Rohingya language.

Submissions on Error of Law

5. The hearing was adjourned for a short while so that copies of the judgment of the Court of Appeal in RM (Sierra Leone) [2015] EWCA Civ 541 could be made available. The judgment contains part of the starred decision of the Immigration Appeal Tribunal in Hamza [2002] UKIAT 05185.

6. Miss Anifowshe relied upon her skeleton argument. The judge applied the wrong standard of proof, perhaps too high a standard, in concluding that the appellant was not a refugee. The appellant left Burma at the age of 4 and this provided an explanation for his inability to speak the Rohingya language. He lived in a refugee camp for some eight years and might very well have lost what he had learned in his first few years.

7. So far as nationality was concerned, RM (Sierra Leone) and Hamza assisted the appellant in relation to the submission that the wrong standard of proof had been applied. At paragraph 17 of the decision, the judge directed himself in relation to burden and standard of proof, setting out there the "lower standard". Paragraph 25 of the decision contained a clear finding by the judge that the appellant was a national of Bangladesh. At paragraph 32 of the judgment in RM the Court of Appeal drew attention to the higher standard of proof required, in this context. The judge had not shown in his decision that the correct standard of proof, the balance of probabilities, was applied.

8. The other grounds also had merit. An adjournment was required because the "refugee book" was not before the Tribunal and the appellant could not give relevant, direct evidence about the document. Sight of the document was required in the interests of fairness. The judge also erred in relation to his adverse finding on the appellant's inability to speak Rohingya. The appellant's explanation, that he left Burma for the camp at

a very young age, was reasonable and deserved to be given weight. Finally, the judge did not take into account the appellant's arrival in the United Kingdom as a minor, at the age of 15. This aspect was relevant to Section 8 of the 2004 Act, the appellant having been trafficked to the United Kingdom. He was unable to reasonably claim asylum sooner than he did, four years after entry.

9. Mr Tarlow said that any error in the determination was not material in the light of the judge's findings overall. At paragraph 19 of the decision, for example, the judge assessed the position with regard to the language spoken by the appellant and the overall credibility assessment was one the judge was entitled to make. He did not err in describing the appellant's inability to speak Rohingya as very strange, precisely because the appellant left Burma when he was 4 years old.

10. The judge dealt with the discrepancies properly and fairly, for example at paragraph 22 of the decision. Taken as a whole, the decision was sustainable.

11. Miss Anifowoshe had nothing to add to her earlier submissions.

Conclusion on Error of Law

12. The decision has been prepared by a very experienced judge and it is readily apparent that he took considerable care in assessing the appellant's case.

13. At paragraph 17 of the decision, the judge succinctly summarised the relevant burden and standard of proof applicable to his assessment of risk on return. He made mention of the 2006 Qualifying Regulations and the Immigration Rules. He correctly directed himself, in relation to the protection claim, that the burden fell on the appellant to show substantial grounds for believing that he would be at risk on return to Burma.

14. At paragraphs 26, 27 and 28 of the decision, the judge set out his conclusion that the appellant had not shown a well-founded fear of persecution or a real risk of suffering serious harm. He found that there were no substantial grounds for believing that the appellant would be at risk of ill-treatment on return, in breach of Article 3 of the Human Rights Convention.

15. The decision contains no other self-direction on the applicable burden or standard of proof.

16. Paragraph 25 of the decision contains the judge's finding that the appellant is a citizen of Bangladesh and not at risk on return there.

17. As is clear from the starred decision in Hamza and the judgment of the Court of Appeal in RM (Sierra Leone) (the full citations appear above) what is usually described as "the lower standard of proof" applies in an assessment of the risk of persecution or ill-treatment claimed by a person.

However, where the Tribunal is minded to make a positive finding against an appellant in relation to his nationality, and so long as this part of the analysis does not concern risk on return, the correct standard of proof is the balance of probabilities, a higher standard than "real risk".

18. At paragraph 25, the judge made a finding against the appellant in relation to nationality. Bangladesh is not a country in relation to which the appellant claims to be at risk of persecution or ill-treatment. Rather, he claims to be a Burmese national at real risk of persecution there. In these circumstances, the correct standard of proof to be applied is the balance of probabilities. With some regret, I find that the absence of a self-direction to this effect amounts to a material error of law. The decision does not show that the judge had the higher standard of proof in mind and the application of the "lower standard" summarised at paragraph 17 to the finding that the appellant is a national of Bangladesh is not sustainable.

19. So far as the other grounds are concerned, I conclude that they have less merit in the light of the care the judge took in his assessment. Nonetheless, as I believe Mr Tarlow accepted, if an error of law is found in relation to something as fundamental as the standard of proof, it would be unsafe to seek to preserve findings of fact that may have been made in the light of the wrong standard.

20. For this reason, I conclude that the decision of the First-tier Tribunal contains a material error of law and must be set aside. In a brief discussion regarding the appropriate venue for the remaking of the decision, both representatives agreed that this should be the First-tier Tribunal, at Taylor House, before a judge other than Judge A J Parker. I find that this is the proper course in the light of the extent of the fact-finding that will be required.

DECISION

21. The decision of the First-tier Tribunal is set aside. It shall be remade, *de novo*, with no findings of fact made by the First-tier Tribunal preserved, at Taylor House by a judge other than First-tier Tribunal Judge Parker.

Anonymity

The judge made no anonymity direction and there has been no application for anonymity since then. I make no direction on this occasion.

Signed Date 7 June 2016

Deputy Upper Tribunal Judge R C Campbell