Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/08170/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 February 2016	**On 23 February 2016**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

AS
[Anonymity direction made]

Claimant

Representation:
For the claimant: Mr J Butterworth, instructed by Bespoke Solicitors
For the respondent: Ms A Brocklesby Weller, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The claimant, AS, with claimed date of birth 1.1.83, claims to be a citizen of Burma/Myanmar. The Secretary of State disputes his nationality and believes him to be Bangladeshi.

2. This is the appeal of the Secretary of State against the decision of First-tier Tribunal Judge Hembrough promulgated 27.10.15, allowing on asylum grounds the claimant's appeal against the decision of the Secretary of State, dated 7.1.15, to refuse his

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asylum, humanitarian protection and human rights claims. The Judge heard the appeal on 20.10.15.

3. First-tier Tribunal Judge Lever granted permission to appeal on 30.11.15.

4. Thus the matter came before me on 2.2.16 as an appeal in the Upper Tribunal.

Error of Law

5. For the reasons set out below, I find that there was such error of law in the making of the decision of the First-tier Tribunal that the decision of Judge Hembrough should be set aside for the decision to be remade.

6. The relevant background can be summarised briefly as follows. The claimant asserts that he is a Rohingya Muslim from Latapandom in the Mongdau District of Aragon State in Burma. Following the death of his parents in 1992 at the hands of the Burmese military his uncle took he and other family members across the border into Bangladesh, where they resided in the Dechua Palong refugee camp. The claimant's case is that he left the camp in 1998 and travelled via Chittagong to Sylhet, where he found employment as a domestic worker for 5 years. On his employer discovering that he is Rohingya, he was sent with an agent to the UK, arriving in December 2005, and where he was required to pay off the cost of his journey by working in an Asian restaurant. He claimed asylum on 6.9.13.

7. Finding his claim not credible, The Secretary of State did not accept that the claimant was either Burmese or a Rohingya Muslim, but considers him to be Bangladeshi who would not be at risk on return to Bangladesh.

8. A crucial issue raised in the refusal decision and at the First-tier Tribunal appeal hearing was what is purported to be an original ration book issued to the claimant's uncle GK at the refugee camp. The Secretary of State pointed out at §39 of the refusal decision that although the claimant asserts that he brought this book with him when he left the camp in 1998, the medical section for MS (alleged to be the claimant) appears to show an entry from 1999, which reduced the weight able to be placed on this document. It was further noted that the relationships set out in the ration book differ to the family relationships asserted by the claimant. Reliance was also placed on external information that old family ration books have been purchased from refugees or family members of repatriated refugees and subsequently used to claim false identities, or names added, in order to claim refugee status abroad.

9. Other concerns were raised in the refusal decision as to the language spoken by the claimant, who was interviewed in a Sylheti dialect of Bengali and not Burmese or Rohingya, and his account of learning Bengali. There were also concerns as to the claimant's lack of geographical knowledge of Myanmar and cultural knowledge of Rohingya culture.

10. However, it is clear that the credibility of the ration book was a central part of both the asylum claim and the reasons for refusal.

11. Judge Hembrough addressed the issue of the ration book and the apparent inconsistency of the date of entries between §13 and §15, and between §20 and §24 of the First-tier Tribunal decision. At §14 the judge examined the ration book "and found its appearance to be consistent with its claimed age." It is not clear how the judge reached such a conclusion. Neither did the judge explain how he recognised it contained both writing in English and in Bengali.

12. More significantly, the judge accepted evidence from the claimant's representative and sought confirmation from interpreter at the appeal hearing that the digit 4 in English is written as the digit 8 in Bengali. I note from §13 that the representative of the Secretary of State also pointed that in addition to the entry which appeared to be dated 1999, another entry appears to bear the date 2008. This appears at A13 of the bundle.

13. At §15 of the decision the judge explains that the claimant's representative "submitted that given the dates of the entries were in issue it would be appropriate to adjourn the hearing in order that the book could be translated." However, the judge refused, considering it unnecessary to have a complete translation of the book when only one or two entries were in issue, as it would cause unnecessary delay and additional cost. The judge stated, "I was of the view that the date 1998 to which reference is made in the reasons for refusal letter could equally and reasonably be read at 1994. Whilst observing that it was not part of his duty to translate documents, having regard to the overriding objective in the Tribunal's procedure rules, I asked the interpreter if he could assist by at least confirming that the English 4 was written as 8 in Bengali which he did. Having considered the entry he said that the year was written in Bengali as 1994."

14. The grounds submit that the judge materially erred in law by taking evidence from the legal representative and asking the interpreter to translate the document and provide evidence to the Tribunal. The Secretary of State asserts that this was a procedural irregularity capable of making a material difference to the fairness and outcome of the appeal. Reliance is placed on BW (witness statements by advocates) Afghanistan [2014] UKUT 00568 (IAC), which held, "When an advocate makes a witness statement in the circumstances outlined above, a change of advocate may be necessary, since the roles of advocate and witness are distinct, separated by a bright luminous line. An advocate must never assume the role of witness."

15. When dealing with the dates in his Findings and Reason section of the decision, at §24 the judge noted the claimant's evidence as to how the book came to be in his possession, stating that it was an old book which was full. "This is consistent with the last entry being in 1994, four years before he claims to have left the camp. He said it was left in a bag given to him by his uncle… when he left the camp and he kept it as a souvenir of sorts."

16. In granting permission to appeal on this issue, Judge Lever stated, "Whilst I have sympathy for the judge seeking to deal with the case in a timely manner this book was a central feature of the case and dates appeared to be critical as to credibility and

had been set out in advance in the refusal letter. The reasons provided generally by the judge in the decision are succinct. It was also noted that the appellant had entered the UK using a false document and had failed to claim asylum for 8 years. In the circumstances it is arguable that the judge erred in his dealing with a central piece of evidence in the manner described above. There were arguable errors of law in this case."

17. Unfortunately, there was some confusion in the judge's decision and at the hearing before me as to which entries the judge was referring to and the judge contributed further to this confusion by referring at §15 to 1998, when the Secretary of State had alleged the entry was 1999, as the judge was aware from what is set out at §13. In the decision the judge has transposed 1999 for 1998. However, from the judge's copy of the respondent's bundle, I can see, as I informed the parties before me, that the judge has circled in pencil entries on pages A13 and A19. Ms Brocklesby Weller produced the original exhibit and thus we could all see that there was no such circling on the original document. The circled entry on A13 appears to be that relied on by the Secretary of State's representative at the First-tier Tribunal appeal hearing as being 2008. The entry on A19 is the one the Secretary of State suggested in the refusal decision to be 1999 and thus post-dating the claimant's alleged departure from the camp.

18. After I had pointed out that the judge appears to have transposed the date 1999 for 1998 when preparing the decision, Mr Butterworth observed that factual error was not part of the Secretary of State's grounds of appeal and he had not had time to consider it. The error seems very obvious and had the Secretary of State applied to amend its grounds I would have considered that application in that light. However, I granted Mr Butterworth time to take further instructions on the point and put the case back from 10:45 until it was called back on again at 12:37. I consider this to have been more than adequate time to address this issue.

19. On resumption of the hearing Mr Butterworth informed me that neither he nor Ms Brocklesby Weller had been able to work out why the judge had referred to 1998. He suggested that the only way forward was to grant an adjournment to allow the parties to better address this apparent mistake of fact, which was not part of the grounds of application for permission to appeal, nor relied on in the grant of permission to appeal.

20. I refused the adjournment application and proceeded to hear full argument on the grounds that were raised in the application for permission to appeal, namely the issue of taking evidence from the claimant's representative and from the interpreter. The burden of Mr Butterworth's submissions were that in neither case was this evidence and that in the case of the involvement of the interpreter, the interpreter did no more than interpret.

21. I find that there was absolutely nothing improper in the claimant's representative at the First-tier Tribunal appeal hearing saying what she did say, that it was to her knowledge that the number 4 in English being written in Bengali as 8. She was not

attempting to give evidence and said as much. What she was doing was justifying why she sought an adjournment, so the matter within her own knowledge could properly be put before the Tribunal. The judge refused the adjournment request and instead asked the interpreter to assist.

22. There remains some confusion as to why the difference between 8 and 4 was relevant, given that it is clear from the refusal decision that 1999 was the relevant date that suggested the book could not relate to this claimant. However, I find there was a material error of law in the judge taking evidence from the interpreter. The interpreter not only confirmed that an English 4 is written as an 8 in Bengali, but he went on to say that having considered the entry in the book, it was actually written as 1994. That is far more than mere interpretation but an opinion about what was actually written, i.e. the equivalent of expert handwriting opinion. This was crucial to the central document at the heart of the issue in the case as to whether the claimant left the camp when he claimed.

23. In AA (Language diagnosis: use of interpreters) Somalia [2008] UKAIT 00029, it was held that it was no part of an interpreter's function to report on the language or dialect used. The expertise needed to identify a language or dialect is not typically the expertise of an interpreter. "In any event, an interpreter should not be in the position of giving, or being asked to give, evidence on a contested issue." I find that what the interpreter was asked to do was to make him a witness on a highly contested issue that went to the heart of the case. This he should not have been asked to do and the judge should not have relied on it. I take into account Mr Butterworth's submission that the interpreter stayed within his official function to "comprehend and communicate, not to assess and analyse" but to assess and analyse is in effect precisely what he did so.

24. I find that to rely on this evidence from the interpreter was a procedural irregularity and an error of law that vitiated the entire decision such that it cannot stand and must be set aside to be remade.

25. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. Where the facts are unclear on a crucial issue at the heart of an appeal, as they are in this case, effectively there has not been a valid determination of those issues. The errors of the First-tier Tribunal Judge vitiates all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.

26. In all the circumstances, I relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the parties of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that,

having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

27. It is to be hoped that the confusion referred to above as to the entries in the medical book in issue can be clarified before the hearing takes place.

Conclusions:

28. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the appeal to the First-tier Tribunal to be reheard afresh with no findings of fact preserved.

Signed

Deputy Upper Tribunal Judge Pickup

Dated

Consequential Directions

29. The appeal is remitted to the First-tier Tribunal at Harmondsworth (or at such other hearing centre as the Tribunal may direct) for the decision in the appeal to be remade afresh, with no findings preserved;

30. The estimated length of hearing is 3 hours;

31. An interpreter in Bangla will be required;

32. Not later than 14 days before the new hearing of the appeal in the First-tier Tribunal and by letter to the claimant and copied to the Tribunal the Secretary of State must identify with particularity the two entries in the medical book which are relied on to demonstrate dates post the claimed departure of the claimant from the camp.

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal made an anonymity direction. Given the circumstances, I continue that anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award. I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: No fee is payable in this case and thus there can be no fee award.

Signed

Deputy Upper Tribunal Judge Pickup

Dated