Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA123122016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 May 2017	**On 22 May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

M.A.R.
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Odair (counsel for Schneider Goldstein Immigration Law)
For the Respondent: Mr S Staunton (Home Office Presenting Officer)

DECISION AND REASONS

1. The Appellant, a citizen of Bangladesh, appeals against the decision of the First-tier Tribunal of 2 December 2016 dismissing his appeal, itself brought against the refusal of his asylum claim on 21 October 2016.

2. The Appellant was previously refused entry clearance as a working holidaymaker; the appeal he brought from abroad succeeded, Judge Blandy finding on 28 April 2009 that he had provided cogent evidence as to maintenance and accommodation, and had sufficient ties in Bangladesh including family and work that his intention to remain in the UK temporarily was a credible one.

3. The Appellant took advantage of the visa subsequently issued to him and entered the UK on 23 August 2009. However, he did not claim asylum until 25 April 2016. His asylum claim is outlined in the Home Office refusal letter and the First-tier Tribunal decision. Essentially his evidence is that he joined Jamaat-e-Islami in 2007, and attended a demonstration on 15 July 2008, during which a disturbance ensued: he and several others were arrested and detained. He spent some 15 days in detention and thereafter was required to report to the authorities regularly. He did not openly support Jamaat-e-Islami after his release; he left the country on 23 August 2009, after the Awami League had come to power leading him, like many others, to flee the country to avoid the possibility of arrest and mistreatment.

4. In his interview he stated (questions 91ff) that he had attended a demonstration protesting against the arrests of Jamaat-e-Islami leaders who had been publicly blamed for the country's troubles, and against police corruption; the leader of the Sylhet branch of Jamaat was in the course of giving a speech about these issues and the importance of taking a stand against them when the Awami League attacked them. There were some 30-35 people present at the demonstration. He was attacked and "involved in the fighting". He was arrested and taken away to the Central Police station of Dorga Gate, Sylhet. He was detained for 15 days, the first two of which he was remanded in custody and thereafter kept in prison. He was beaten and since then had feared the police. Whilst detained he was asked why he supported Jamaat and why he had been involved in the fighting.

5. The Home Office refused the asylum application because his knowledge of Jamaat was vague and he had been unable to describe the group's flag or locate its headquarters; additionally, in his screening interview he had recounted arrest and detention for 15 days notwithstanding that he had previously asserted himself to have been of good character generally when he had applied for further leave. He had left Bangladesh using his own documents and his family appeared not to have suffered problems since his departure. His asylum claim was made unjustifiably late. He did not qualify for leave under the Rules giving effect to private and family life connections with this country and had no compelling case for leave outside them.

6. In his witness statement for the appeal, the Appellant stated that when he sought legal advice from a named advisor he was told that he was liable to detention in the Detained Fast Track process in which he understood that 99% of claims were refused. He did not want to take such a risk regarding his own asylum claim, and so sought to bring his concerns as to his safety in Bangladesh to the attention of the Home Office via an application for further leave to remain outside the Rules.

In the application of 25 July 2011, the Appellant's representatives state that "as a result of the political situation in Bangladesh [our client] is wanted by the police in Bangladesh for his political affiliation with the Jamaat-e-Islami party. Our client maintains he is innocent and has done nothing wrong"; the letter went on to state that their client feared arrest and torture in violation of Article 3 of the ECHR.

7. His witness statement also sets out his evidence that in November 2014 his brother informed him that his case had now gone to trial and on 11 November 2014 he had been sentenced in absentia to four years imprisonment. He retained fears about the DFT but claimed asylum having heard that the system had been identified as unlawful.

8. The First-tier Tribunal heard the Appellant's appeal and dismissed it. As to the Appellant's credibility, it stated that he had pursued a working holidaymaker appeal on the basis of maintaining that he had close relatives and friends in the UK that he wished to visit whilst casually working here, and had represented to the Tribunal that he had economic and social ties in Sylhet where he had worked for a long time. There was no indication therein of any problems that might motivate an asylum claim. His asylum claim was made very late and his fears about the fast track procedure did not amount to a satisfactory explanation for not seeking asylum on an earlier occasion. It viewed the documents from Bangladesh with a "high degree of scepticism" as they had been provided in the context of "Knowing that his claim to have been involved with Jamaat-e-Islami was in issue."

9. He was not detained for a lengthy period and his claim to have been badly treated by the authorities was inconsistent with the reporting regime to which he was subsequently subject. The sentence he had subsequently received for the offence and failing to comply with his bail conditions was not persecutory behaviour so much as an appropriate punishment for participation in a violent outburst in 2008. Had he been of significant adverse interest to the authorities they had ample opportunity to visit harm upon him thereafter: but no adverse actions were thereafter taken against him.

10. At one point, the First-tier Tribunal stated that the Appellant was meant to have said that he did not want Jamaat-e-Islami to establish Islamic law in the country but then added "I liked the way they want to establish Islamic law in the country."

11. The grounds for permission to appeal to the Upper Tribunal alleged

    a. The Appellant had given an explanation for claiming asylum late which was inadequately addressed given its centrality to the thinking of the First-tier Tribunal;
    b. The Appellant's supporting evidence included a volume of documents said to be original FIR, charge sheet, judgment and arrest warrant, which were

apparently treated as genuine: yet there was no clear reasoning as to why the Appellant was found to be fleeing prosecution rather than persecution;

c. The Judge below had erred in overlooking the challenge made in the grounds of appeal to the First-tier Tribunal, which had raised problems with interpretation at interview and asserted that it was procedurally improper to have made a decision on the asylum claim without having given the five days publicised in the Home Office interview policy for the making of submissions regarding errors and omissions in the interview record.

12. Judge Baker granted permission to appeal for the First-tier Tribunal on 30 March 2017 on the basis that the treatment of the late asylum claim was arguably erroneous particularly given the 2011 application had raised Article 3 issues.

13. Before me Mr Odair argued that there was material unfairness in failing to address the allegation of interpreter problems at interview given the confused evidence at one point recorded in the decision, and that the delay in claiming asylum had assumed excessive importance: the Appellant's proffered explanation had been rejected without adequate reasons. His account was plausible when read in the light of the country evidence generally and he should have been given positive credit for that feature of his case.

14. For the Respondent Mr Staunton argued that ample reasons were given for rejecting the Appellant's credibility and the appeal inevitably failed given those findings.

Findings and reasons

15. I reserved my decision. Having now considered the matter with care, I have concluded that the decision of the First-tier Tribunal represents an inadequate determination of the issues that were before it.

16. As cited in the grounds of appeal, Swinton-Thomas LJ stated in the unreported Court of Appeal decision of *Wakene* (IATRF 98/0113 CMS4; 1 May 1998):

> "... care should be taken before placing undue weight on an untruth told at the point of entry in order to get into this country. There may in certain cases be good reasons for telling that untruth. Cases will vary depending on their facts and the personality involved. Some people arriving in this country may be in fear or may have very little understanding of what is required of them."

17. That enjoinder is consistent with other material sources of guidance. For example, UNHCR state in *Beyond Proof - Credibility Assessment in EU Asylum Systems*, in the section addressing *Behaviour Considered Indicative of the Applicant's Lack of Fear of Persecution*, at 2.1 addressing *Delay in applying for asylum*:

> "The foremost concern of a person in need of protection may understandably be to enter the Member State safely and securely. Therefore, it should not be assumed that a failure to apply for protection at the port of entry or upon arrival is indicative of a lack of credibility. …
> The decision-maker should consider whether the applicant's failure to apply for international protection at the earliest opportunity was due to a desire to achieve security, albeit temporary and in an irregular manner. …
> UNHCR wishes to emphasize that an applicant should not be found lacking in credibility merely on the ground that he or she did not apply for international protection at the earliest possible time. Neither should a delay in application constitute a ground to increase the threshold of credibility for the applicant."

18. Delay in certain circumstances is expressly placed on a decision maker's agenda by section 8(5) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, which states that "This section also applies to failure by the claimant to make an asylum claim or human rights claim before being notified of an immigration decision, unless the claim relies wholly on matters arising after the notification." As recognised by the authorities interpreting section 8, the reasonableness of any explanation must always be considered before a matter specified therein is held against an asylum seeker.

19. It is accordingly clear that the relevance of delay is essentially a question of fact for the decision maker assessing credibility, and that the precise explanation for delay must be addressed as to whether it is itself plausible. Here the Appellant stated that the delay was down to legal advice as to the prospects of having his asylum claim processed in the Detained Fast Track process, in which he was told that he would have had a low prospect of vindicating his application. His advisor's lack of confidence in the status determination system may be depressing, but it is hardly inconsistent with the statement of the Master of the Rolls in *The Lord Chancellor v Detention Action* [2015] EWCA Civ 840 §38 that

> "in view of (i) the complex and difficult nature of the issues that are often raised; (ii) the problems faced by legal representatives of obtaining instructions from individuals who are in detention; and (iii) the considerable number of tasks that they have to perform … the timetable for the conduct of these appeals is so tight that it is inevitable that a significant number of appellants will be denied a fair opportunity to present their cases under the FTR regime."

20. Whilst that was said in the context of the 2014 Procedure Rules, subsequently the earlier system was found to exhibit similar failings by Ouseley J in *TN (Vietnam)* [2017] EWHC 59 (Admin). Given the consistency of the advice with these judicial findings it was incumbent on the First-tier Tribunal to carefully consider whether it was plausible that the advice and the Appellant's reliance upon it might have

justified a failure to claim asylum sooner. It was not open for the First-tier Tribunal simply to reject the explanation out of hand.

21. The documents from Bangladesh received very little consideration for the First-tier Tribunal. It appeared to discount them simply because the truthfulness of the facts asserted therein was in issue. However, that appears to represent just the line of thinking that was criticised in SS [2017] UKUT 164 (IAC) §30:

> "The expression 'self-serving' is, to a large extent, a protean one. The expression itself tells us little or nothing. What is needed is a reason, however brief, for that designation. For example, a letter from a third party may be "self-serving" because it bears the hallmarks of being written to order, in circumstances where the applicant's case is that the letter was a spontaneous warning."

22. Once again, rather more detailed reasoning was required in order for the claim to be determined with the anxious scrutiny that asylum appeals demand.

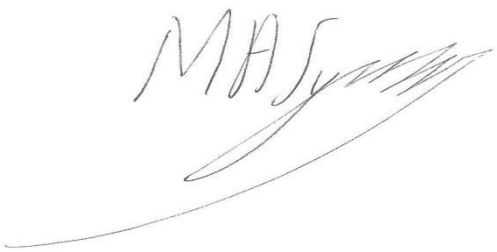
23. Furthermore, it does seem that there were problems with the interpretation at the original asylum interview, and that these were sought to be drawn to the attention of the First-tier Tribunal in the grounds of appeal that launched the appeal before it: however this was overlooked in the decision below. Given that at one point the First-tier Tribunal believed that Appellant had given inconsistent evidence at interview as to his view as to the desirability of Jamaat establishing Islamic law in Bangladesh where a somewhat garbled answer is recorded at interview, this required express treatment.

24. This is not an appeal where there are meaningful findings upon which the Upper Tribunal can build, and thus it is allowed to the extent that it is remitted to the First-tier Tribunal for hearing afresh.

Decision

Remitted to the First-tier Tribunal at Taylor House for hearing afresh: to any Judge except Judge Cockerill.

Signed Date: 18 May 2017

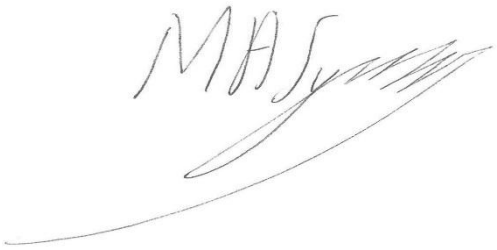


Judge Symes
Judge of the Upper Tribunal

ANONYMITY ORDER

I note that the Appellant's case has previously been subject to an anonymity order. I consider it appropriate to follow that approach. 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.

Signed: Date: 18 May 2017



Deputy Upper Tribunal Judge Symes