Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/00314/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 November 2017 and 25 January 2018	**On 9 February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

JI
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Pennington-Benton, counsel (2 November 2017)
Ms H Masood, counsel (25 January 2018)
For the Respondent: Mr S Walker, Home Office Presenting Officer (2 November 2017)
Mr E Tufan, Home Officer Presenting Officer (25 January 2018)

DECISION AND REASONS

1. This is an appeal by the appellant against a decision of the First-tier Tribunal dismissing his appeal against the respondent's decision of 11 February 2016 refusing his claim for asylum.

Background

2. The appellant claims to be a Rohingya Muslim and a citizen of Myanmar, born on [ ] 1984. He said that he was born in Myanmar and lived there with his parents and siblings until he was 8 years old. The family then had to flee following an attack on his religion in 1992 by Buddhists. His family went to Bangladesh where they were placed in a refugee camp not far from Chittagong. In 1995 when he was 11, he escaped from the camp with 2 elders and went to Sylhet where he lived until 2008 when he left Bangladesh with the help of an agent, travelling to an unknown country before making a clandestine entry into the UK in August 2008. He claimed asylum on 4 November 2013.

3. The respondent accepted that if the appellant was a Rohingya Muslim from Myanmar, he would be entitled to asylum. However, for the reasons given in Annex A of the decision letter of 11 February 2016, the respondent was not satisfied that the appellant was from Myanmar or that he had ever lived in or escaped from a refugee camp there. His application was accordingly refused.

The Hearing before the First-tier Tribunal

4. At the hearing before the First-tier Tribunal, the appellant gave evidence adopting his witness statement. He confirmed that he had left his home village when he was 8 years old and the family had fled to a refugee camp in Bangladesh. He repeated that when he was 11 he was able to escape from the camp. He said that when he was on the beach on Cox's Bazar they met a man, S, who had come on holiday with his family from Sylhet. The appellant, who did not speak Bengali, could not speak to S but he was able to communicate with him through one of the people he had escaped with. S offered to take the appellant to Sylhet to work in his shop. In his witness statement the appellant described being enslaved by the family and working as a shop assistant for S. While working at the shop he was able to learn to speak Bengali. In support of his claim he produced a Rohingya Refugee Family Book (“the Family Book”) but, as the judge commented at [20-24], the oral evidence he gave about the order in which his siblings were born contradicted the order set out in the Family Book.

5. The judge did not find the appellant to be a credible witness. He found that it was not credible that the appellant had been unable to speak Bengali at the age of 11 but had learnt it when working for S. The appellant had given evidence that S did not know that he was not Bengali but the judge found that to be implausible. The judge also found that the inconsistency of the oral evidence of the order in which the appellant's

siblings had been born with the order set out in the Family Book adversely affected his credibility. He considered the Linguistic Origin Identification Report ("the Linguistic Report") obtained by the respondent (see annex C1-18 of the respondent's bundle) and commented that, although the report of itself could not show that the appellant was not Rohingya, it was a factor to be taken into account that the analysis in the report showed that the appellant's language was inconsistent with being from the Rohingya community. He also found that the appellant's failure to regularise his stay for 5 years until claiming asylum in November 2013 detracted from his credibility as it was not what a genuine asylum seeker would do.

6. The judge summarised his findings as follows at [30]:

> "Taking all the evidence into account and applying that evidence to the lower standard I find that the appellant has been inconsistent in his evidence to such an extent that there is no part of his claim that can be accepted. I find that the appellant is not a Rohingya and was not born in Burma/Myanmar. I find that the appellant is a Bangladesh national who has made up this entire asylum claim in order to simply remain in the United Kingdom."

For these reasons, the judge dismissed the appellant's asylum claim at [32].

The Grounds of Appeal and Submissions

7. In the grounds of appeal, it is argued in ground 1 that the judge erred by failing to consider all the evidence with anxious scrutiny and, in particular, the documents submitted in support of the appeal, and failed to consider or engage fully with the explanations provided by the appellant and the arguments deployed on his behalf. In ground 2 it is argued that the judge failed to take proper account of the conclusions in the Linguistic Report and that it was perverse to find that the report at least gave some weight to the appellant not being Rohingya. Ground 3 argues that the judge failed to deal with or to consider the human rights claim and, more specifically, to consider the medical evidence submitted in support of that part of the appeal.

8. In his submissions, Mr Pennington-Benton adopted his grounds. He argued that the judge had not dealt with the issue of credibility properly. He had commented at [17] on the fact that the appellant had described himself as "enslaved" when he had meant that he was afraid to go out because he thought someone would take him. It had been irrational of the judge, so he argued, to find at [18] that it was implausible that S would not have known that the appellant was not Bengali when he had first met him. The judge had also been wrong to find that the Family Book was not genuine on the basis of the inconsistency about the order in which the siblings were named and to reject the appellant's explanation about the circumstances in which a new book had been issued. He further submitted that the judge was wrong to find that the Linguistic Report was even

potentially supportive of an argument that the appellant was not a Rohingya. Finally, he submitted that the judge had erred in failing to deal at all with the article 8 appeal based on the appellant's private life.

9. Mr Walker submitted that the judge had said that he had considered all avenues of appeal and there was no reason to believe that that was not the case. The lack of any further reference to article 8 in the submissions before the First-tier Tribunal tended to indicate that the appeal had not been pursued in any substantial way on article 8 grounds. The judge had given clear reasons for rejecting the appellant's credibility and the grounds simply amounted to an attempt to reargue issues of fact.

Assessment of whether the judge erred in law.

10. I shall deal first with the asylum appeal. Ground 1 arguing that the judge failed to consider the evidence with anxious scrutiny or apply anxious scrutiny raises a number of issues. It is argued that the judge failed to refer to a number of documents when assessing credibility. It is right that some of the documents relied on by the appellant were not referred to by the judge, in particular the appellant's application to the Bangladesh High Commission for a Bangladeshi passport, photographs of him at Rohingya rallies in the UK and Facebook posts evidencing him campaigning for the plight of Rohingya people.

11. However, I am not satisfied that is any substance in this ground. The judge was under no obligation to refer to each and every document. He said at [11] that he had taken into account all the documents and there is no reason to believe that he did not. There was no need for the judge to spell out why the evidence about the application for a Bangladeshi passport took the matter no further. The response from the High Commission simply indicates that the information supplied by the appellant did not support his application as his own documents revealed that he was a Myanmar national. It was for the judge to decide whether the appellant had shown to the lower standard of proof that he was a Myanmar national and that depended on the view the judge took about the evidence the appellant relied on. Similarly, the photographs at rallies and the appellant's Facebook posts depended on the credibility of his evidence about his nationality. I am satisfied that in his decision the judge focused on the core aspects of the evidence and there is no reason to believe that any relevant factor in the evidence relating to the asylum claim, which turned on the appellant's nationality, was not properly taken into account.

12. Ground 1 then identifies at paragraph 10 four issues which it is said the judge failed to engage with fully. The first is that at [17] the judge commented on the appellant's evidence in his witness statement that he was "enslaved" by the family whereas in his oral evidence he said that he was not enslaved but was fed well and was not overworked. The grounds

say that the appellant explained that by “enslaved” he meant that he was afraid to go out because he thought someone would take him. However, it was for the judge to decide what weight to give to and what inferences to draw from the evidence. He did not accept the appellant’s evidence on this issue and was entitled not to do so for the reasons he gave. This issue does not raise any point of law but is seeking to reopen and reargue an issue of fact.

13. The second issue refers to [26] where the appellant had explained in his witness statement that the family had been given a new Family Book because the original one was exhausted in the section for recording food rations. It is argued that this is obvious when the book is looked at. However, the judge explained at [20]-[26] why he was not satisfied that the Family Book was reliable. He was entitled to attach weight to the discrepancy in the evidence of the order in which the siblings were born and to the fact referred to at [26] dealing with the explanation given by the appellant that the book was issued because his younger sister was born and a new Family Book was then issued. The judge was also entitled to note and give weight to the fact that there was evidence that Family Books such as the one produced by the appellant were easily available and were sold on by Rohingya refugees [25]. Again, this ground deals with an issue of fact and does not disclose an error of law.

14. The third issue refers to the delay in claiming asylum and argues that the appellant had explained in his interview that when he came to the UK, he knew nothing about asylum and it was only when someone he lived with advised him at the end of 2013 about claiming asylum that he took steps to do so. There is no reason to believe that the judge did not consider that evidence. But, having considered the evidence as a whole, he was entitled to reject it and to draw an adverse evidence from such a long delay in the appellant claiming asylum, having properly reminded himself of the provisions of s.8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

15. The fourth issue refers to the Linguistic Report which also forms the substance of ground 2. It is argued that the judge’s assessment at [28] was simplistic and indicated a failure to apply anxious scrutiny. It is further argued that the judge's comment that the report lent weight to the fact that the appellant was not Rohingya was perverse or irrational. I am not satisfied that this ground discloses any error of law. It was for the judge to decide what inferences could be drawn from the report. It was the respondent’s view that the report did not assist in determining the appellant’s nationality (see para 23 of Annex A of the decision letter). The judge said that, although he found that the report of itself could not show that the appellant was not Rohingya, it lent weight and was another factor to be taken into account in that it showed that the appellant's language was inconsistent with being from the Rohingya community.

16. I am satisfied that this comment was open to the judge in the light of the contents of the Linguistic Report and in particular at 3.4 that the linguistic

analysis clearly suggested that the results obtained were most likely inconsistent with the hypothesis that the appellant was from the Rohingya linguistic community and at 4.4 that the language analysis somewhat suggested that the results obtained were more likely than not consistent with the hypothesis that the appellant was from the Bengali linguistic community. The report was in evidence before the judge and, although the respondent had taken the view that it did not assist, it was for the judge to decide whether it did and if so, to what extent. The judge's cautiously expressed comment cannot be said to be perverse or irrational and does not disclose any error of law on this issue.

17. In summary, the grounds and submissions relating to the asylum claim do not satisfy me that the judge erred in law in his assessment of the appellant's credibility and whether he was entitled to asylum. When the evidence is considered as a whole, his finding of fact that the appellant had failed to show that he was a Rohingya from Myanmar but was national of Bangladesh was properly open to him for the reasons he gave.

18. I now turn to ground 3 and the article 8 appeal. The judge referred to the human rights appeal in [2] and to considering all avenues of appeal in [3] but there is no mention of the human rights appeal in the Summary of Decision at [32] which only refers to the asylum appeal. There is nothing to indicate that the article 8 appeal was not pursued at the hearing even though it clearly played a minor part in contrast to the asylum appeal whereas there is evidence that the appeal was being pursued. I have seen counsel's skeleton argument before the First-tier Tribunal and this refers to article 8. I have also seen the judge’s record of proceedings (and given the representatives the opportunity of looking at it). The judge’s note of the submissions made by the presenting officer refer briefly to article 8 but no submission on this issue is recorded in the submissions by the appellant's counsel. The grounds of appeal refer to the fact that the appellant had and was receiving treatment for a rare immunologic disorder and had been treated for non-infectious tuberculosis and this was supported by medical reports which were in evidence. However, these issues were not referred to or dealt with in the judge’s decision and, on the evidence relied on, it is not possible to say that the article 8 appeal had no prospect of success.

19. For these reasons, I am satisfied that the judge erred in law by failing to make any findings on the human rights appeal under article 8. I am satisfied that this is a matter which can properly be dealt with in the Upper Tribunal and does not require remittal to the First-tier Tribunal. There is no error of law in the asylum decision and that decision stands.

20. The hearing was adjourned to enable the appellant to file further evidence in respect of the article 8 appeal and directions were given accordingly. At the resumed hearing on 25 January 2018, the appellant relied on the two bundles of documents before the First-Tier Tribunal, A1 indexed and paginated 1-102 and A2, the supplemental bundle, indexed and paginated 1-124. A further witness statement was filed by the appellant dated 1

November 2017, a medical report by Professor S Lingam dated 15 January 2018, a letter from Dr S Gregoriado, a consultant immunologist at the Immunopathology Department of Barts Health NHS Trust, dated 30 October 2017 and an extract from the Home Office Fact Finding Mission published September 2017. No application has made to call further oral evidence.

Further Submissions.

21. Ms Masood indicated that the appellant maintained his assertion that he was a Rohingya . He had not seen his family members since he left the refugee camp and he had no family in the UK as he had indicated in answer to Q9 of his asylum interview. She referred to the medical evidence before the First-tier Tribunal at A1, 23, a letter from Dr M Buckland, and at 25, a letter from a TB nurse at Barts Health NHS Trust and then to the further medical evidence and in particular the report prepared by Professor Lingam. She referred to GS v Secretary of State for the Home Department [2015] EWCA Civ 40 and in particular to [86] where Laws LJ said:

> "If the article 3 claim fails (as I would hold it does here), article 8 cannot prosper without some separate or additional factual element which brings the case within the article 8 paradigm-the capacity to form and enjoy relationships or a state of affairs having some affinity with the paradigm. …"

23. Ms Masood submitted that the relevant article 8 factors for the appellant were the length of time he had been in the UK and the fact that he had no family here and had lost contact with his family in Bangladesh. She referred to the factors set out in s.117 of the Nationality, Immigration and Asylum Act 2002. She accepted that the appellant was not fluent in English but did speak some. His presence in the UK had been unlawful since his entry but the weight to be given to that fact depended on all the circumstances. In summary, she argued that this was a case where article 8 was engaged and that his circumstances were sufficiently exceptional to make his removal disproportionate.

24. Mr Tufan referred to EA & Ors (Article 3 medical cases - Paposhvili not applicable) [2017] UKUT 00445 which held that the test set out in Paposhvili v Belgium, 13 December 2016, ECtHR 41738/10 was not one which it was open to the Tribunal to apply in the light of the binding precedents of the House of Lords in N v Secretary of State [2005] UKHL 31 and the Court of Appeal in GS v Secretary of State. When an appeal could not succeed under article 3, it would be very rare for it to succeed under article 8. The facts in the present case, so he submitted, did not disclose factors sufficient to bring it within the article 8 paradigm.

Assessment of the Article 8 Appeal.

25. I accept that the medical evidence confirms that the appellant has had TB in multiple sites and that during his treatment in this country he was

investigated for immune defects when it was discovered that he had a serious immunological condition - type I cytokine defect. In the light of this prognosis it was recommended that he had medication to prevent TB coming back which involved being given interferon gamma, an injection treatment three times week. He has had this treatment for two years from October 2015 to October 2017. Full details are set out in the recent report of Professor Lingam, making it clear that this is a complex medical problem which can only be treated in developed countries where there are both resources and the necessary clinical expertise. His condition is being reinvestigated and if the immunological defect is again confirmed, the doctors in charge of managing him will give him the same treatment which will be lifelong to prevent the reactivation of TB.

25. In para 10 of her opinion, Professor Lingard confirms that his medical problems are rare and complex and once the defect is reconfirmed, he will be under specialist treatment. It will be important for his sake and others that he should be treated. Without expert therapy, the appellant will die and, before then, he could spread the infection to others. Professor Lingard would say that in neither Myanmar nor Bangladesh can his treatment be managed to any acceptable standard and that so far, the appellant has had a very high standard of care.

26. However, it is clear that the appellant's medical condition does not bring him with the ambit of article 3 as set out in N v Secretary of State and GS (India) v Secretary of State and Ms Masood has not sought to argue that article 3 is engaged. It is her submission that there are factors which engage article 8: in particular the length of time the appellant has been in the UK and the fact that he has no family here. I am not satisfied that these factors lead to article 8 being engaged in the appellant's circumstances. The fact that he has no family here takes the matter no further. He cannot show that the decision lacks respect for his family life and the lack of family life in itself has no bearing on any lack of respect for his private life. The length of his residence on his own account runs from 2008 when he made a clandestine entry into the UK, only claiming asylum in 2013. He cannot meet the private life requirements in the para 276 ADE of the Rules and in the light of the findings of fact made by the First-tier Tribunal, he fails to show that there would be very significant obstacles to his integration into Bangladesh if required to leave.

27. I am not satisfied that the decision to remove him shows a lack of respect for his private life or that the interference would be sufficiently substantial to engage article 8 (1). Even if article 8 is engaged, I am not satisfied that removal would be disproportionate to a legitimate aim particularly in the light of the finding that his asylum application had no substance, he having failed to show even to the lower standard of proof that he was a Rohingya from Myanmar.

28. I have taken account of the provisions of s.117B of the 2002 Act as amended. The appellant has some knowledge of English but he is not fluent and his residence in the UK has been unlawful since his arrival. In

these circumstances little weight should be given to such private life as he has established by length of residence. In summary, if article 8 is engaged, I find that his removal would be proportionate to a legitimate aim and would not lead to a breach of article 8.

Decision.

28. The First-tier Tribunal did not err in law in its assessment of the asylum appeal but did err by failing to make a decision on the article 8 appeal. I re-make the article 8 decision and dismiss that appeal.

29. The anonymity order made by the First-tier Tribunal remains in force until further order.

Signed: H J E Latter Dated: 6 February 2018

Deputy Upper Tribunal Judge Latter