



**Upper Tribunal
(Immigration and Asylum Chamber)** Appeal Numbers: PA/06871/2019 (V)

THE IMMIGRATION ACTS

**Heard at by Skype for business
On the 5 May 2021**

**Decision & Reasons Promulgated
On the 19 May 2021**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

**MJI
(ANONYMITY DIRECTION MADE)**

Appellants

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M. West, Counsel instructed on behalf of the appellant.
For the Respondent: Mr Diwnycz, Senior Presenting Officer

DECISION AND REASONS

Introduction:

1. An anonymity direction has previously been made in this matter and neither party requested that it be set aside. This is a matter concerning an application for international protection and I am mindful of Guidance Note 2013 No1 which is concerned with anonymity directions and confirmed that the starting point for consideration of such directions in this chamber of the upper Tribunal, as in all Courts and Tribunal, is open justice. However, I observe

paragraph 13 of the Guidance Note where it is confirmed that it is the present practice of both the First-tier Tribunal and this tribunal that an anonymity direction is made in all appeals raising asylum or other international protection claims. I am therefore satisfied that it is appropriate for the anonymity direction to continue in this matter, to avoid the likelihood of serious harm arising to the appellant from the contents of his protection claim being known to the wider public.

2. The direction is detailed at the conclusion of this decision.
3. The appellant is a national of Bangladesh.
4. On 14 February 2010, the appellant was granted leave to remain in the United Kingdom as a Tier 4 general student valid until 13 April 2013.
5. His leave was curtailed on 12 March 2012. He lodged an appeal and on 20 June 2012 his appeal was allowed and later on 17 September 2012 his leave to remain was reinstated valid until 13 April 2013.
6. The appellant thereafter submitted an application as a Tier 4 general student which was granted until 4 January 2015. However on 5 July 2013 his leave to remain was curtailed to expire on 3 September 2013.
7. A further application was submitted as a Tier 4 general student and he was granted leave to remain until 27 June 2015. Again his leave was curtailed on 21 May 2014 to expire on 27 July 2014.
8. On 21 September 2016 the appellant was encountered on an enforcement visit and was cautioned, questioned, and served with a number of documents. He was also detained. The appellant claimed asylum.
9. On 5 October 2016 screening interview was completed.
10. On 16 October 2016 and asylum interview was completed.
11. On 31 October 2016 a supplementary interview was not completed. It was agreed that he would have five working days to submit any further representations.
12. The application was refused. The appellant instituted proceedings for judicial review.
13. On 28 December 2016 a judicial review application was lodged and on 15 February 2017 permission to proceed for judicial review was granted however it was closed following the failure to pay a fee to continue the proceedings on 28th of March 2017.

14. In October 2017 the judicial review claim was reinstated. On 16 February 2018 it was agreed that the Secretary of State would reconsider the asylum decision.
15. The basis of the appellant's claim made to the Secretary of State that he was involved with the Jamaat-e-Islami party in Bangladesh and that he would be at risk of harm as a result of his sexual orientation as a gay man.
16. In a decision taken on 4 July 2019 the application by the appellant was refused on all grounds.
17. As to his claim based on his sexual orientation, the Secretary of State consider that he had been inconsistent about this aspect of his claim. As to his claim that he was threatened in Bangladesh as a result of his sexuality, as it was not accepted that he was gay there would be no reason for him to be threatened in Bangladesh for that reason.
18. However it was further noted that he was inconsistent in his account of who he feared. When encountered by the officials he stated that he feared politicians make no fear of his family or society due to sexuality. In the first screening interview at paragraph 4.1, he said that he feared "someone from the opposite political party" but did not mention a fear of family or society due to his sexuality.
19. The respondent considered that the appellant had given conflicting accounts of his fear and return. Furthermore the claim that his family found out about his sexuality will be killed one return was also based upon speculation. The inconsistencies in his account were considered to damage the credibility of the claim.
20. The respondent considered the credibility of the account of the first appellant was damaged by the appellant's failure to claim asylum at the earliest opportunity and not waited until he was encountered before lodging the claim for asylum (Section 8 (2) of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004.
21. The respondent therefore refused his protection claim.
22. As to his claim made an Article 8 grounds, taking into account his length of residence since 2010 were not accepted that he lived continuously in the United Kingdom for at least 20 years and therefore failed to meet the requirements of paragraph 276 ADE (1) (iii).
23. It was not accepted that there would be very significant obstacles to his integration into band - if required to leave the United Kingdom because he had spent the majority of his life in Bernadette, including his formative years. He was familiar with the language and culture, he had family in Bangor - with whom it was considered he could establish a relationship and support on return.

24. As to whether there were any exceptional circumstances that would rent refusal a breach of article 8 because it would result in justifiably harsh consequences for him, the respondent considered that the appellant had not provided evidence to establish that there were any such exceptional circumstances in his case.
25. Consideration was given to a medical claim that on the basis of the evidence provided, it did not indicate the medical condition was such a critical stage that it would be unhuman to remove him from the United Kingdom. In any event, the respondent set out that there were medical facilities available in Bangladesh (applying the country information) and that he would be able to access such treatment on return to Bangladesh.
26. The respondent refused his claim on all grounds.
27. The appellant appealed the decision and it came before the FtT on 17 October 2019. In a decision promulgated on the 7 November 2019, Judge Chohan dismissed the appeal having heard evidence from the appellant and two witnesses. The FtTJ concluded that the claim was a fabrication and that the appellant could safely return to Bangladesh.
28. The appellant sought permission on four grounds:
 - (i) That the FtTJ erred in her credibility assessment and the reasons given for her credibility findings;
 - (ii) That the FtTJ failed to provide any or any adequate reasons for his adverse findings in respect of the oral evidence of his witnesses;
 - (iii) That the FtTJ failed to consider the UT's decision on the appellant's judicial review claim dated 9 February 2019; and
 - (iv) That the FtTJ made no findings on the psychologist's report.
29. In an error of law decision promulgated on 16 September 2020 under Rule 34 of the Procedure Rules, Upper Tribunal Judge Kekic was satisfied that the decision of Judge Chohan involve the making of an error on a point of law and set aside the decision. It was to be listed for a de novo hearing; no findings of fact were retained. There is a copy of the decision of UTJ Kekic in the court file dated 16 September 2020.
30. Following that decision, the appeal was listed to be remade before the Upper Tribunal.
31. The hearing took place on 5 May 2021, by means of *Skype for Business*. The advocates attended remotely via video. There were no issues regarding sound, or any technical issues and I am satisfied both advocates were able to make their respective cases by the chosen means. It was not possible for the Upper Tribunal to hear the appeal by way of a remote hearing in light of the witness evidence

that was required. It is also the case that in his skeleton argument Mr West had identified issues of vulnerability relevant to the conduct of the proceedings and the evidence of the appellant.

32. The Upper Tribunal proceeded to consider the future case management of the appeal. In doing so, the parties provided their submissions on whether the appeal should be retained in the Upper Tribunal or be remitted to the FtT. As Mr West pointed out, the original decision made was one under Rule 34 (a paper hearing) and that the Tribunal did not hear any submissions on this issue and before the decision was made. It is also the position that in his written submissions at paragraphs 63-64 he set out that in the event of the appeal being allowed (and the decision set aside) that the appeal should be remitted to the FtT and expressly at London, Taylor House in the light of the witnesses and that he is acting pro bono. This was further set out at paragraphs 22 -23 of his further reply. Mr West also highlighted that one of the grounds referred to a "fairness point" and that the FtT had not taken into account the evidence of the psychologist and that the appeal fell within the practice statement.
33. Mr Diwnycz did not disagree with those submissions noting that this was to be a de novo hearing in respect of his protection claim and would involve findings of facts to be made on the evidence.
34. Having had the opportunity to hear the advocates, I have therefore considered whether it should be remade in the Upper Tribunal or remitted to the FtT for a further hearing. In reaching that decision I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal.

"[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

35. In the light of the error of law and that the protection claim will be heard de novo with factual findings made with three witnesses giving evidence, it falls within subparagraph (b) above. Therefore in my judgement the best course and consistent with the overriding objective is for it to be remitted to the First-tier Tribunal for a hearing. Judge Kekic did not preserve any factual findings relevant to his

protection claim. Whilst reference is made to the Article 8 claim, it is advanced on the same basis as his protection claim. In any event, any Article 8 claim would be considered as at the date of the hearing of the appeal.

36. For those reasons, it has been demonstrated that the decision of the FtTJ did involve the making of an error on a point of law and that the decision should be set aside and remitted to the FtT in accordance with the following directions:
- (1) It is directed that the appeal shall be listed for a face to face hearing on a date to be fixed before the First-tier Tribunal (Taylor House, London).
 - (2) An anonymity direction is made as set out at paragraph 1 of this decision.
 - (3) Counsel's availability should be taken account of when listing the appeal.
 - (4) A Bengali/Sylheti interpreter will be required.
 - (5) Any issues arising from the case of AM (Afghanistan) v Secretary of State for the Home Department [2017] EWCA Civ 1123 and the Joint Presidential Guidance Note No. 2 of 2010: Child, Vulnerable Adult and Sensitive Appellant ("the guidance note") and also the Practice Direction, First-tier and Upper Tribunal Child, Vulnerable Adult and Sensitive Witnesses should be set out in advance of the hearing.

Notice of Decision.

The decision of the First-tier Tribunal involves the making of an error on a point of law and therefore the decision is set aside and is remitted to the First-tier Tribunal in accordance with the directions set out above.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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. 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 Upper Tribunal Judge Reeds

Dated 5 May 2021